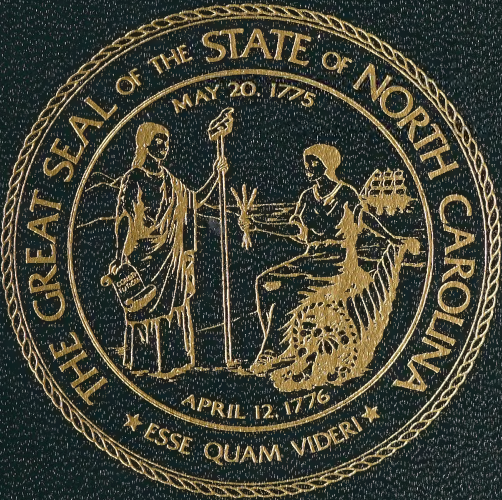
GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED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GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

Volume 10

Chapters 58A Through 86A

Prepared Under the Supervision of
The Department of Justice
of the State of North Carolina
by
The Editorial Staff of the Publisher

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Preface

This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2009 Regular Session that are within Chapters 58A through 86A, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

Roy Cooper
Attorney General

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 2009 Regular Session affecting Chapters 58A through 86A of the General Statutes.

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted through September 18, 2009. These cases will be printed in the following reporters:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R.	Potter's Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

December 2009

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2009 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

Roy Cooper

Attorney General of North Carolina

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Chapter 58A.

North Carolina Health Insurance Trust Commission.

§§ 58A-1 through 58A-5: Recodified as Article 68 of Chapter 58.

Editor's Note. — This Chapter has been recodified as Article 68 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

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ARTICLE 1.

Uniform Limited Partnership Act.

§§ 59-1 through 59-30.1: Repealed by Session Laws 1985 (Regular Session, 1986), c. 989, s. 2.

Cross References. — For the Revised Uniform Limited Partnership Act, see G.S. 59-101 et seq.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 989, s. 2 enacted a new Revised Uniform Limited Partnership Act, as Article 5 of Chapter 59, and repealed this Article, effective October 1, 1986. Limited partnerships created after October 1, 1986, are governed by Article 5 of Chapter 59. As to the effective date and applicability of various provisions of the new Article and of this Article to transactions entered into and partnerships formed before October 1, 1986, see G.S. 59-1104.

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 989 added a new G.S. 59-30.1 to repealed Article 1, reading as follows: "G.S. 59-30.1. No limited partnership shall be formed under this Article after September 30, 1986."

Section 31 of the act from which the repealed Article was codified repealed G.S. 3258-3276 of the Consolidated Statutes, as amended, except insofar as said sections affected limited partnerships existing on March 15, 1941, when the Article became effective.

ARTICLE 2.

Uniform Partnership Act.

Part 1. Preliminary Provisions.

§ 59-31. North Carolina Uniform Partnership Act.

Articles 2 through 4A, inclusive, of this Chapter shall be known and may be cited as the North Carolina Uniform Partnership Act. (1941, c. 374, s. 1; 2000-140, s. 101(j); 2001-487, s. 20.)

Legal Periodicals. — For comment, see 19 N.C.L. Rev. 499 (1941).

For note on partnerships in bankruptcy, see 31 N.C.L. Rev. 457 (1953).

For discussion of partnerships as legal vehicles for historic preservation, see 12 Wake Forest L. Rev. 9 (1976).

For note on the presumption of a wife's gratuitous services, see 16 Wake Forest L. Rev. 235 (1980).

For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. G.S. 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

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Applied in Hewes v. Wolfe, 74 N.C. App. 610, 330 S.E.2d 16 (1985).

Cited in Klein v. Greenberg, 461 F. Supp. 653 (M.D.N.C. 1978); Branch v. High Rock Realty, Inc., 151 N.C. App. 244, 565 S.E.2d 248, 2002 N.C. App. LEXIS 727 (2002).

§ 59-32. Definition of terms.

As used in this Chapter, except as otherwise defined in Article 5 of this Chapter for purposes of that Article, unless the context otherwise requires:

(01) "Act" means the North Carolina Uniform Partnership Act and refers to all provisions therein.

(1) "Bankrupt" means bankrupt under the Federal Bankruptcy Act or insolvent under any State insolvent act.

(2) "Business" means every trade, occupation, or profession.

(3) "Conveyance" means every assignment, lease, mortgage, or encumbrance.

(4) "Court" means every court and judge having jurisdiction in the case.

(4a) "Domestic corporation" has the same meaning as in G.S. 55-1-40.

(4b) "Domestic limited liability company" has the same meaning as in G.S. 57C-1-03.

(4c) "Domestic limited partnership" has the same meaning as in G.S. 59-102.

(4d) "Domestic nonprofit corporation" means a corporation as defined in G.S. 55A-1-40.

(4e) "Foreign corporation" has the same meaning as in G.S. 55-1-40.

(4f) "Foreign limited liability company" has the same meaning as in G.S. 57C-1-03.

(4g) "Foreign limited liability partnership" means a partnership that (i) is formed under laws other than the laws of this State, and has the status of a limited liability partnership or registered limited liability partnership under those laws.

(4h) "Foreign limited partnership" has the same meaning as in G.S. 59-102.

(4i) "Foreign nonprofit corporation" means a foreign corporation as defined in G.S. 55A-1- 40.

(5) "Person" means individuals, partnerships, corporations, limited liability companies, and other associations.

(5a) "Principal office" means the office (in or out of this State) where the principal executive offices of a registered limited liability partnership or a foreign limited liability partnership are located, as designated in its most recent annual report filed with the Secretary of State or, if no annual report has yet been filed, in its application for registration as a registered limited liability partnership or foreign limited liability partnership.

(6) "Real property" means land and any interest or estate in land.

(7) "Registered limited liability partnership" means a partnership that is registered under G.S. 59-84.2 and complies with G.S. 59-84.3. (1941, c. 374, s. 2; 1993, c. 354, s. 3; 1999-362, s. 4; 2000-140, s. 101(k); 2001-387, s. 103.)

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Legal Periodicals. — For "Legislative Survey: Business & Banking," see 22 Campbell L. Rev. 253 (2000).

§ 59-33. Interpretation of knowledge and notice.

(a) A person has "knowledge" of a fact within the meaning of this Act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances show bad faith.

(b) A person has "notice" of a fact within the meaning of this Act when the person who claims the benefit of the notice:

(1) States the fact to such person, or

(2) Delivers through the mail, or by other means of communication a written statement of the fact to such person or to a proper person at his place of business or residence. (1941, c. 374, s. 3; 2000-140, s. 101(n).)

§ 59-34. Rules of construction.

(a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this Act.

(b) The law of estoppel shall apply under this Act.

(c) The law of agency shall apply under this Act.

(d) This Article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(e) This Article and the other provisions of this Act shall not be construed so as to impair the obligations of any contract existing when the Article or any other provision of this Act, as applicable, goes into effect, nor to affect any action or proceedings begun or right accrued before this Article or any other provision of this Act, as applicable, takes effect. (1941, c. 374, s. 4; 2000-140, s. 101(l).)

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Applied in Volkman v. DP Assocs., 48 N.C. App. 155, 268 S.E.2d 265 (1980); Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982); Wiggs v. Peedin, — N.C. App. —, 669 S.E.2d 844, 2008 N.C. App. LEXIS 2243 (2008).

§ 59-35. Rules for cases not provided for in this Act.

In any case not provided for in this Act, the rules of law and equity, including the law merchant, shall govern. (1941, c. 374, s. 5; 2000-140, s. 101(m).)

§ 59-35.1. Filing of documents.

(a) A document required or permitted by this Act to be filed by the Secretary of State must be filed under Chapter 55D of the General Statutes.

(b) A document submitted for filing by the Secretary of State on behalf of a general partnership must be executed by a general partner of the partnership.

(c) The Secretary of State may adopt and furnish on request forms for:

(1) An application for registration as a registered limited liability partnership;

(2) Cancellation of registration as a registered limited liability partnership;

(3) Application for registration as a foreign limited liability partnership; and

(4) Cancellation of registration as a foreign limited liability partnership.

If the Secretary of State so requires, use of these forms is mandatory.

(d) The Secretary of State may adopt and furnish on request forms for other documents required or permitted to be filed by this Act, but their use is not mandatory. (1999-369, s. 4.1; 2001-358, ss. 9, 38, 51(c); 2001-387, ss. 104, 105(c), 155, 170(a), 173, 175(a); 2001-413, s. 6; 2002-58, s. 4.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, ss. 104 and 105(c) had added this section and repealed former G.S. 59-73.7. However, s. 155 of c. 387 repealed ss. 104 and 105(c), contingent upon the enactment of Session Laws 2001-358. Session Laws 2001-358, which renumbered former G.S. 59-73.7 as present G.S. 59-35.1, was enacted on August 10, 2001.

Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 59-35.2. Filing, service, and copying fees.

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are submitted by a partnership to the Secretary of State for filing:

Document	Fee
(1) Application for reserved name	$10.00
(2) Notice of transfer of reserved name	10.00
(3) Application for registered name	10.00
(4) Application for renewal of registered name	10.00
(5) Registered limited liability partnership's or foreign limited liability partnership's statement of change of registered agent or registered office or both	5.00
(6) Agent's statement of change of registered office for each affected registered limited liability partnership or foreign limited liability partnership	5.00
(7) Agent's statement of resignation	No Fee
(8) Designation of registered agent or registered office or both	5.00
(9) Articles of conversion (other than articles of conversion included as part of another document)	50.00
(10) Articles of merger	50.00
(11) Application for registration as a registered limited liability partnership	125.00
(12) Certificate of amendment of registration as a registered limited liability partnership	25.00
(13) Cancellation of registration as a registered limited liability partnership	25.00
(14) Application for registration as a foreign limited liability partnership	125.00
(15) Certificate of amendment of registration as a foreign limited liability partnership	25.00
(16) Cancellation of registration as a foreign limited liability partnership	25.00
(17) Application for certificate of withdrawal by reason of merger, consolidation, or conversion	10.00
(18) Annual report	200.00
(19) Articles of correction	10.00
(20) Any other document required or permitted to be filed pursuant to this Act	10.00

(b) Whenever the Secretary of State is deemed appointed as a registered agent under this Act or under Chapter 55D of the General Statutes, the Secretary of State shall collect a fee of ten dollars ($10.00) each time process is served on the Secretary of State under this Act. The party to the proceeding causing service of process is entitled to recover this fee as costs if the party prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying, comparing, and certifying a copy of a filed partnership document:

(1) One dollar ($1.00) a page for copying or comparing a copy to the original.
(2) Fifteen dollars ($15.00) for a paper certificate.
(3) Ten dollars ($10.00) for an electronic certificate. (2001-387, s. 170(b); 2001-487, s. 62(q); 2005-435, s. 46.)

Editor's Note. — Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Session Laws 2008-194, s. 2, provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, 'notice' shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section [August 8, 2008]."

Part 2. Nature of a Partnership.

§ 59-36. Partnership defined.

(a) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(b) But any association formed under any other statute of this State, or any statute adopted by authority, other than the authority of this State, is not a partnership under this Article, unless such association would have been a partnership in this State prior to the adoption of this Article; but this Article shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith. (1941, c. 374, s. 6.)

Cross References. — As to limited partnerships, see G.S. 59-101 et seq.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

For "Legislative Survey: Business & Banking," see 22 Campbell L. Rev. 253 (2000).

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"Profit" Relates to Purpose of Business. — There was no merit to defendant's contention that since he and his associates never achieved a "profit" in their business dealings, there could be no partnership, since the word "profit," as it is used in subsection (a) of this section, relates to the purpose of the business, not to whether the business actually produced a net gain. Reddington v. Thomas, 45 N.C. App. 236, 262 S.E.2d 841 (1980).

Partnership is a legal concept but the determination of the existence or not of a partnership, as in the case of a trust, involves inferences drawn from an analysis of "all the circumstances attendant on its creation and operation." Peed v. Peed, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (1985).

To make a partnership, two or more persons should combine their property, effects, labor, or skill in a common business or venture, under an agreement to share the profits and losses in equal or specified proportions, constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business. Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952); Zickgraf Hardwood Co. v. Seay, 60 N.C. App. 128, 298 S.E.2d 208 (1982).

A voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such. Peed v. Peed, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (1985).

Where a person merely makes repayable advances and loans of money to another, it cannot be inferred from that fact that they are partners. Peed v. Peed, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (1985).

A partnership is a combination of two or more persons, their property, labor, or skill in a common business or venture under an agreement to share profits or losses and where each party to the agreement stands as an agent to the other and the business. G.R. Little Agency, Inc. v. Jennings, 88 N.C. App. 107, 362 S.E.2d 807 (1987).

Co-ownership of the business is an indispensable requisite for a partnership, under this section, and where this element is lacking there can be no partnership. McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951).

Co-ownership and sharing of any actual profits are indispensable requisites for a partnership. Sturm v. Goss, 90 N.C. App. 326, 368 S.E.2d 399 (1988).

A partnership is a contractual relation and may be informally created, and its existence may be proved by acts and declarations of the parties. Whiteside v. Rooks, 197 F. Supp. 313 (W.D.N.C. 1961).

A partnership may be formed by an oral agreement. Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

A partnership may be formed orally or by the agreement or conduct of the parties, either express or implied. Peed v. Peed, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (1985).

There is no requirement for an express agreement, either written or oral, in order to form a partnership; rather, a partnership may be created by the conduct and declarations of the principals without an express agreement of any kind. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

A partnership agreement may be inferred without a written or oral contract if the conduct of the parties toward each other is such that such an inference is justified. Williams v. Biscuitville, Inc., 40 N.C. App. 405, 253 S.E.2d 18, cert. denied, 297 N.C. 457, 256 S.E.2d 810 (1979).

A partnership consisting of one person cannot continue to exist. Crosby v. Bowers, 87 N.C. App. 338, 361 S.E.2d 97 (1987).

A partnership is a partnership at will unless some agreement to the contrary can be proved. Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

Failure to Show Partnership. — Where plaintiffs, who filed an action to enjoin foreclosure on real property, contending that the option contract, contract to purchase and note entered into between plaintiffs and defendants created a partnership relationship rather than a mortgagee-mortgagor relationship, failed to show probable cause to believe that they would be able to establish the partnership rights they asserted, the trial court did not err in denying a preliminary injunction and allowing foreclosure to proceed. Carefree Carolina Communities, Inc. v. Cilley, 79 N.C. App. 742, 340 S.E.2d 529, cert. denied, 316 N.C. 374, 342 S.E.2d 891 (1986).

Finding of the trial court that defendant was not a partner with her ex-husband in his farming and agribusiness enterprises, but acted only as an assistant to him, upheld. G.R. Little Agency, Inc. v. Jennings, 88 N.C. App. 107, 362 S.E.2d 807 (1987).

When the North Carolina Department of Transportation (NCDOT) entered into an agreement with a developer to jointly fund a roadway to be built to state specifications by a contractor selected by the developer, which NCDOT approved, due to the involvement of public funds in the project, it did not enter into a partnership with the developer because: (1) no language in G.S. 136-28.6 referred to a partnership being created in any agreement contemplated by that statute; and (2) if a partnership could be created, none was created under these facts because nothing indicated NCDOT and the developer entered into an agreement as co-owners of any business for profit or that they were otherwise a partnership under G.S. 59-36(b). Rifenburg Constr., Inc. v. Brier Creek Assocs., L.P., 160 N.C. App. 626, 586 S.E.2d 812, 2003 N.C. App. LEXIS 1926 (2003), aff'd sub nom. Rifenburg Constr., Inc. v. Brier Creek Assocs.L.P., 358 N.C. 218, 593 S.E.2d 585 (2004).

Where a manufacturer stated that it considered all of its distributors to be its partners, the distributor's belief that it was a partner was insufficient to establish a partnership in the absence of a sharing of the profits or co-ownership between the parties or any other indicia of partnership. Dealers Supply Co. v. Cheil Indus., 348 F. Supp. 2d 579, 2004 U.S. Dist. LEXIS 25313 (M.D.N.C. 2004).

Where a plaintiff contended that a joint venture agreement established all the elements of a partnership with a Chapter 11 debtor, the agreement, standing alone, did not prove the existence of a partnership because it did not establish both co-ownership and the sharing of profits. Anderson v. Brokers Inc. (In re Brokers, Inc.), 363 B.R. 458, 2007 Bankr. LEXIS 792 (Bankr. M.D.N.C. 2007).

Partnership Shown. — A partnership existed between plaintiff and defendant, and plaintiff had a 50% interest in the partnership, where the evidence presented showed that plaintiff certainly contributed her property, effects, labor, and skill to the business. Wike v. Wike, 115 N.C. App. 139, 445 S.E.2d 406 (1994).

A partnership was created where an owner of a corporation that operated a real estate brokerage firm permitted the corporation to be dissolved, continued the business of the firm, and orally agreed with the two brokers that worked for the firm to make them partners in a partnership, even though the parties never actually signed a written partnership agreement, as the brokers made capital contributions to the partnership and the parties held themselves out to others as being partners. Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905, 2003 N.C. App. LEXIS 369 (2003).

Substantial evidence tended to show that a partnership existed between partners and a widow's deceased husband because the husband sent a handwritten and signed document to the partners proposing that they enter into a business relationship, the husband's document set forth in detail the proposed terms of the business relationship, and the parties subsequently complied with the proposed terms contained in the document. Wiggs v. Peedin, — N.C. App. —, 669 S.E.2d 844, 2008 N.C. App. LEXIS 2243 (2008).

Applied in Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268 (1982); Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

Cited in Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949); Peirson v. American Hdwe. Mut. Ins. Co., 248 N.C. 215, 102 S.E.2d 800 (1958); DuBose Steel, Inc. v. Faircloth, 59 N.C. App. 722, 298 S.E.2d 60 (1982); Sturm v. Goss, 90 N.C. App. 326, 368 S.E.2d 399 (1988); Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990); Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990); Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993); Dean v. Manus Homes, Inc., 143 N.C. App. 549, 546 S.E.2d 160, 2001 N.C. App. LEXIS 310 (2001).

§ 59-37. Rules for determining the existence of a partnership.

In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by G.S. 59-46 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

  a. As a debt by installments or otherwise,
  b. As wages of an employee or rent to a landlord,
  c. As an annuity to a widow or representative of a deceased partner,
  d. As interest on a loan, though the amount of payment vary with the profits of the business,
  e. As the consideration for the sale of a goodwill of a business or other property by installments or otherwise. (1941, c. 374, s. 7.)

Cross References. — For provision that a lessor and lessee are not partners, see G.S. 42-1.

CASE NOTES

Creation by Express or Implied Agreement or Conduct. — Not only may a partnership be formed orally, but it may be created by the agreement or conduct of the parties, either express or implied. Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

Express Agreement Not Required. — A

voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such. Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

Existence of a partnership does not require an express agreement and the parties' intent to formulate a partnership can be inferred by the conduct of the parties by examining all the circumstances. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

There is no requirement for an express agreement, either written or oral, in order to form a partnership; rather, a partnership may be created by the conduct and declarations of the principals without an express agreement of any kind. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

A partnership agreement may be inferred without a written or oral contract if the conduct of the parties toward each other is such that such an inference is justified. Williams v. Biscuitville, Inc., 40 N.C. App. 405, 253 S.E.2d 18, cert. denied, 297 N.C. 457, 256 S.E.2d 810 (1979).

The intent to realize a profit is an indicia of partnership without regard to whether the principals were successful in doing so. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

Co-ownership and sharing of any actual profits are indispensable requisites for a partnership. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Sharing Profits. — Although sharing profits does not of itself establish a partnership, the Uniform Partnership Act emphasizes the importance of sharing profits in the existence of a partnership by mandating that the receipt by a person of a share of the business profits is prima facie evidence that he is a partner. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Agreement to Share Profits Does Not Necessarily Create Partnership. — While an agreement to share profits, as such, is one of the tests of a partnership, an agreement to receive part of the profits for his services and attention, as a means only of ascertaining the compensation, does not create a partnership. Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

The determination of whether a partnership exists, and whether the parties are co-owners, involves examining all the circumstances. Peed v. Peed, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (1985).

Receipt of Share of Profits Is Prima Facie Evidence of Partnership. — Where defendant's corporation, and not defendant, received a direct share of plaintiff partnership's profits, that was prima facie evidence that defendant's corporation, not defendant, was a partner. Sturm v. Goss, 90 N.C. App. 326, 368 S.E.2d 399 (1988).

Inferences from Circumstances of Creation and Operation. — Partnership is a legal concept but the determination of the existence or not of a partnership, as in the case of a trust, involves inferences drawn from an analysis of all the circumstances attendant on its creation and operation. Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

Filing of a certificate to transact business under an assumed name, pursuant to G.S. 66-68, does not manifest intent to form a partnership. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Where one person is an employee of another, and receives wages, then the two are not partners. Peed v. Peed, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (1985).

The filing of a partnership tax return is significant evidence of a partnership. Sturm v. Goss, 90 N.C. App. 326, 368 S.E.2d 399 (1988); Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

The filing of partnership tax returns is "significant" evidence of the existence of a partnership and may constitute an admission against interest by a party who denies the existence of a partnership after having signed a partnership return. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

Failure to Show Partnership. — Where plaintiffs, who filed an action to enjoin foreclosure on real property, contending that the option contract, contract to purchase and note entered into between plaintiffs and defendants created a partnership relationship rather than a mortgagee-mortgagor relationship, failed to show probable cause to believe that they would be able to establish the partnership rights they asserted, the trial court did not err in denying a preliminary injunction and allowing foreclosure to proceed. Carefree Carolina Communities, Inc. v. Cilley, 79 N.C. App. 742, 340 S.E.2d 529, cert. denied, 316 N.C. 374, 342 S.E.2d 891 (1986).

Where a plaintiff contended that a joint venture agreement established all the elements of a partnership with a Chapter 11 debtor, the agreement, standing alone, did not prove the existence of a partnership because it did not establish both co-ownership and the sharing of profits. Anderson v. Brokers Inc. (In re Brokers, Inc.), 363 B.R. 458, 2007 Bankr. LEXIS 792 (Bankr. M.D.N.C. 2007).

Sale or Lease of Property to Partnership. — Where a tractor was either sold by an individual to a partnership for "ten hundred dollars," payable one hundred dollars per week, or was leased to the partnership on a rental basis of one hundred dollars per week, even though it appeared that the money paid for the tractor was money received from the partnership business, no inference arose therefrom that the individual was a partner in the business. Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Instruction as to Statutory Rules. — The trial court's instructions on the law applicable to the formation of partnerships were inadequate where the court did not give the jury the benefit of the applicable statutory rules for determining the existence of a partnership that are set out in this section. Hardesty v. Ferrell, 44 N.C. App. 354, 260 S.E.2d 925 (1979).

Partnership Shown. — Evidence was sufficient to show the existence of a partnership where letters detailed the duties of the plaintiff, the plaintiff testified that the parties agreed to share profits of their venture, and the defendants failed to show that the plaintiff's claim was legally deficient. Dean v. Manus Homes, Inc., 143 N.C. App. 549, 546 S.E.2d 160, 2001 N.C. App. LEXIS 310 (2001).

Defendants were partners as defined in G.S. 59-36 where defendants owned the building, the property, the inventory, and the equipment, opened the bank account for the business and at all times had authority to draw on this account, invested additional money on various occasions to pay for expenses incurred by the business, such as building payments and inventory, took out insurance, signed the closing statement for the sale of the business, and, after paying debts, deposited the profit in their private savings account. Harrell Oil Co. of Mount Airy v. Case, 142 N.C. App. 485, 543 S.E.2d 522, 2001 N.C. App. LEXIS 135 (2001).

Applied in Eggleston v. Eggleston, 228 N.C. 668, 47 S.E.2d 243 (1948); McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951); Zickgraf Hardwood Co. v. Seay, 60 N.C. App. 128, 298 S.E.2d 208 (1982); Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

Cited in Reddington v. Thomas, 45 N.C. App. 236, 262 S.E.2d 841 (1980); Harrell Oil Co. of Mount Airy v. Case, 142 N.C. App. 485, 543 S.E.2d 522, 2001 N.C. App. LEXIS 135 (2001); Trujillo v. N.C. Grange Mut. Ins. Co., 149 N.C. App. 811, 561 S.E.2d 590, 2002 N.C. App. LEXIS 301 (2002).

§ 59-38. Partnership property.

(a) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.

(b) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(c) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(d) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears. (1941, c. 374, s. 8.)

CASE NOTES

Determination of Partnership Property. — An important factor in determining whether property listed in the names of the partners is partnership property is whether the property is used by those partners for partnership purposes; if so, such use of the property is evidence of an intention that the property be partnership property. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

Where a partnership is formed and operated around a single asset for a period of years, courts should be reluctant to permit the partners to separate that asset from the partnership, particularly after the occurrence of a transaction or event giving rise to a legal controversy and particularly on the basis of after-the-fact testimony regarding their subjective intentions. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

Partnership Property Shown. — Where partners acquired 15.98 acre tract of land as the first step in carrying out business venture which they had associated together to own and operate and the only reason the property was deeded to them was so that they could pursue the business venture which they were pursuing as partners, the property thereby was brought into the partnership and was "partnership property" under the definition contained in subparagraph (a). Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

Joint Venture. — The principle in subsection (a) holds true for property bought on account of a joint venture. Jones v. Shoji, 336 N.C. 581, 444 S.E.2d 203 (1994).

Liability Insurance — Property of Joint Venture. — Where church purchased liability insurance pursuant to a joint venture agreement and on account of voluntary association between it and not-for-profit organization with which it ran a day care program, the insurance was purchased on account of the joint venture and was therefore an asset of the joint venture. Jones v. Shoji, 110 N.C. App. 48, 428 S.E.2d 865 (1993), petition allowed as to additional issues, 334 N.C. 163, 432 S.E.2d 361, aff'd in part, discretionary review improvidently granted in part, 336 N.C. 581, 444 S.E.2d 203 (1994).

Cited in Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-39. Partner agent of partnership as to partnership business.

(a) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(b) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(c) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(1) Assign the partnership property in trust for creditors, or on the assignee's promise to pay the debts of the partnership,

(2) Dispose of the goodwill of the business,

(3) Do any other act which would make it impossible to carry on the ordinary business of a partnership,

(4) Confess a judgment,

(5) Submit a partnership claim or liability to arbitration or reference.

(d) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction. (1941, c. 374, s. 9.)

Legal Periodicals. — For comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina," see 18 Campbell L. Rev. 121 (1996).

For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

In order for a written instrument to be binding on a partnership, the instrument must be executed in the partnership name. Oxford Plastics v. Goodson, 74 N.C. App. 256, 328 S.E.2d 7 (1985).

Privity to Contract. — It is fundamental that all partners are agents of each other, that a contract entered into by the agent is a contract entered into by the principal, and that all partners are liable on any contract executed by a single partner in the name of the partnership; and if a partner may be used for nonpayment or other breach of the contract, he certainly is privy to the contract. Barnes v. Campbell Chain Co., 47 N.C. App. 488, 267 S.E.2d 388 (1980).

Authority of Partner to Bind Firm. — In the absence of authority expressly conferred, a partner's authority to bind his firm is restricted to things done by him within the scope of partnership business. Investors Title Ins. Co. v.

Herzig, 83 N.C. App. 392, 350 S.E.2d 160 (1986), rev'd on other grounds, 320 N.C. 770, 360 S.E.2d 786 (1987).

A contract apparently made for the purpose of carrying on partnership business, executed in the partnership name by a partner, makes the partnership liable for a breach of that contract even though the partner was not authorized to so act, unless the other parties to the contract had knowledge of the lack of authority. Investors Title Ins. Co. v. Herzig, 320 N.C. 770, 360 S.E.2d 786 (1987).

Although partner did not sign documents in the partnership name, and the partnership did not ratify his actions, sufficient evidence was presented that he was acting on behalf of the partnership and had the authority to do so. Mountain Farm Credit Serv. v. Purina Mills, Inc., 119 N.C. App. 508, 459 S.E.2d 75 (1995).

In a case brought by the United States under the National Housing Act against the owners of an apartment project, the court concluded that it had personal jurisdiction over the individual owners pursuant to G.S. 59-39(a) the individual owners were partners in a partnership, and one of the individual owners had signed several agreements as a general partner and as an agent for all other general partners, including the loan documents with a North Carolina bank and a regulatory agreement with the United States. United States v. Coleman, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 23682 (E.D.N.C. July 26, 2001).

Liability on Contract Signed for Partnership by Unauthorized Partner. — Where a contract, apparently made for the purpose of carrying on partnership business, is executed in the partnership name by a partner, the partnership is liable for a breach thereof, even if the partner was not authorized to so contract, unless the other parties to the contract had notice of the lack of authority. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Burden of Proof Where Partner Did Not Sign in Name of Partnership. — Where one partner did not sign either a promissory note or mortgage in the name of the alleged partnership, the plaintiff had the burden of showing either that (1) that partner was acting on behalf of the partnership when he executed the note and mortgage and the other partner had authorized his acts, or (2) the other partner, with knowledge of the note and mortgage, ratified his acts. Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

Attempt by Partner to Relieve Himself of Liability by Notice to Third Person. — Where there is a general partnership of two persons, without restrictions on the authority of either partner to act within the scope of the partnership business, one of the partners cannot, by notice to a third person that he would not be personally liable for goods thereafter sold to the partnership in the ordinary course of the partnership business, relieve himself of liability for such goods thereafter ordered by the other partner while the partnership is a going concern under this section and G.S. 59-45 and 59-48 of the Uniform Partnership Act. National Biscuit Co. v. Stroud, 249 N.C. 467, 106 S.E.2d 692 (1959).

Service of Summons on One Partner. — Under the Uniform Partnership Act it is not necessary that all members of an alleged partnership should be served with summons. A partnership is represented by the partner who is served, and as to him a judgment in the action in which he is served would be binding on him individually, and as to the partnership property. But as to a partner not served with summons, the judgment would not be binding on him individually. Nevertheless, even after judgment such partner could be brought in and made a party. The court may, before or after judgment, direct the bringing in of new parties to the end that substantial justice may be done. See G.S. 1A-1, Rules 19 and 22. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949).

Conveyance with View to Dissolution. — Where a conveyance was not for apparently carrying on in the usual way the business of the partnership, but was with a view to the immediate dissolution of the partnership, neither G.S. 59-40(d) nor subsection (a) of this section applies. Instead, subsection (b) of this section applies. Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982).

Materialman's Lien Held Superior to Deed of Trust. — Since deed of trust which was recorded did not convey debtor's predecessor's interest in that property, but instead purported to convey the interest of which was an interest which debtor did not have, since the deed was indexed with debtor as grantor and thus was recorded outside of its chain of title and had the same effect on notice as no registration, and since the fact that such deed was signed general partner of actual owner had no effect, materialman's lien was superior to deed of trust. Southeastern Sav. & Loan Ass'n v. Rentenbach Constructors, Inc., 114 Bankr. 441 (E.D.N.C. 1989), aff'd per curiam, 907 F.2d 1139 (4th Cir. 1990).

Applied in Bynum v. Hobbs Realty, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 19499 (M.D.N.C. Apr. 4, 2002); Whitacre P'ship. v. BioSignia, Inc., 153 N.C. App. 608, 574 S.E.2d 475, 2002 N.C. App. LEXIS 1275 (2002).

Cited in Pappas v. Crist, 223 N.C. 265, 25 S.E.2d 850 (1943); Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952); Blow v. Shaughnessy, 68 N.C. App. 1, 313 S.E.2d 868 (1984).

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OPINIONS OF ATTORNEY GENERAL

Not Advisable for Attorney to Act as Notary and Verify Client's Divorce Complaint. — It is not advisable for a notary who is also a partner in a law firm acting of counsel to an attorney filing a divorce complaint to notarize the verification of the client. A divorce complaint which is not properly notarized is subject to dismissal. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, — N.C.A.G. — (May 18, 1988).

When one partner of Firm A appears as attorney for a plaintiff in a divorce proceeding, the other partners in the firm also "appear," and they could be prohibited under former G.S. 47-8 from notarizing the verification of the client. This would be true whether or not the firm appears as "of counsel" to the individual partner on the face of the complaint or answer. Therefore, such practice should be avoided, and as an attorney/notary who acts in this fashion proceeds at his own risk. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, — N.C.A.G. — (May 18, 1988).

Pleadings not requiring verification by one of the parties are not subject to dismissal if they are verified anyway and a partner of the firm representing that client acts as the notary. However, former G.S. 47-8 would still seem to say that partner is without power to act as a notary in that situation. The signature of the attorney signing the pleadings would be adequate under N.C.R.C.P., Rule 11(a). See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, — N.C.A.G. — (May 18, 1988).

Act of One Partner Binding on Partnership. — This section sets out a basic premise of agency law that the acts of one partner, including the execution of any instrument in the partnership name, for the purpose of carrying on the usual business of the partnership is binding on the partnership unless he has in fact no such authority and the person with whom he is dealing is aware of that fact. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, — N.C.A.G. — (May 18, 1988).

§ 59-39.1. Act, admission or acknowledgment by partner.

After a cause of action has accrued on any obligation of a partnership, any act, admission or acknowledgment by any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners which removes the bar of the statute of limitations or causes the statutes to begin running anew with respect to the partner doing such act or making such admission or acknowledgment has a like effect with respect to all of the partners and with respect to partnership liability, but when any partner is not so acting and does not have the authority of his copartners, any act, admission or acknowledgment by such partner which removes the bar of the statute of limitations or causes the statute to begin running anew has such effect only as to the partner doing such act or making such admission or acknowledgment, and shall not renew, extend or in any manner impose liability of any kind against any partner who has not authorized or ratified the same nor against the partnership. (1953, c. 1076, s. 2.)

Legal Periodicals. — For brief comment on this section, see 31 N.C.L. Rev. 397 (1953).

§ 59-40. Conveyance of real property of the partnership.

(a) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of subsection (a) of G.S. 59-39, or unless such property has been conveyed by the grantee or a person claiming through such grantee to holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(b) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of subsection (a) of G.S. 59-39.

(c) Where title to real property is in the name of one or more, but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of subsection (a) of G.S. 59-39, unless the purchaser or his assignee, is a holder for value, without knowledge.

(d) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of subsection (a) of G.S. 59-39.

(e) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property. (1941, c. 374, s. 10; 1959, c. 1161, s. 3.)

CASE NOTES

How Title to Real Property Held. — Under this Article, title to real property owned by a partnership may be held either in the partnership name or in the name of some or all of the partners. Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982); Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

Land owned individually by one who entered into a partnership could not become a partnership asset absent some written agreement sufficient to satisfy the statute of frauds, despite subsection (c) of this section, which recognizes that title to real property may be in the name of one or more, but not all the partners, and G.S. 59-56, which makes a partner's interest in partnership property, even real property, a personal property interest. Ludwig v. Walter, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

Determination of Partnership Property. — An important factor in determining whether property listed in the names of the partners is partnership property is whether the property is used by those partners for partnership purposes; if so, such use of the property is evidence of an intention that the property be partnership property. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

Conveyance with View to Dissolution. — Where a conveyance is not for apparently carrying on in the usual way the business of the partnership, but is with a view to the immediate dissolution of the partnership, neither subsection (d) of this section nor G.S. 59-39(a) applies. Instead, G.S. 59-39(b) applies. Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982).

Cited in Simmons v. Quick Stop Food Mart, Inc., 56 N.C. App. 105, 286 S.E.2d 807 (1982); Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

§ 59-41. Partnership bound by admission of partner.

An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this Act is evidence against the partnership. (1941, c. 374, s. 11; 2000-140, s. 101(n).)

Cross References. — As to admission after the statute of limitations has run, see G.S. 1-27 and G.S. 59-39.1.

§ 59-42. Partnership charged with knowledge of or notice to partner.

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner. (1941, c. 374, s. 12.)

Legal Periodicals. — For survey of 1980 commercial law, see 59 N.C.L. Rev. 1081 (1981).

For comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina," see 18 Campbell L. Rev. 121 (1996).

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Applied in Browning v. Maurice B. Levien & Co., 44 N.C. App. 701, 262 S.E.2d 355 (1980); Forrest Drive Assocs. v. Wal-Mart Stores, Inc., 72 F. Supp. 2d 576 (M.D.N.C. 1999).

§ 59-43. Partnership bound by partner's wrongful act.

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. (1941, c. 374, s. 13.)

Legal Periodicals. — For comment, "North Carolina's Limited Liability Company Act: A Legislative Mandate for Professional Limited Liability," see 29 Wake Forest L. Rev. 857 (1994).

For comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina," see 18 Campbell L. Rev. 121 (1996).

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Section Applicable to Law Partnerships. — The rules set out in this section regarding partnership tort liability are fully applicable to law partnerships. Shelton v. Fairley, 86 N.C. App. 147, 356 S.E.2d 917, cert. denied, 320 N.C. 634, 360 S.E.2d 94 (1987).

Authority of Partner to Bind Firm. — In the absence of authority expressly conferred, a partner's authority to bind his firm is restricted to things done by him within the scope of partnership business. Investors Title Ins. Co. v. Herzig, 83 N.C. App. 392, 350 S.E.2d 160 (1986), rev'd on other grounds, 320 N.C. 770, 360 S.E.2d 786 (1987).

Where one partner is sued individually for a tort committed by him in the course of the partnership business, a judgment would be binding upon him individually, and as to the partnership property, but not as against the other partner individually, though the court even after judgment may direct that such other partner be brought in and made a party. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949). See also § 59-45 and notes thereunder.

Malicious prosecution is not within the ordinary course of business of a law partnership. Jackson v. Jackson, 20 N.C. App. 406, 201 S.E.2d 722 (1974).

Advising the initiation of a criminal prosecution is clearly within the normal range of activities for a typical law partnership, but taking such action maliciously and without probable cause is quite a different matter. A partner who gave such advice was either conducting himself lawfully and ethically in his relationship with his client, in which event neither he nor any of his partners would have any liability, or he was conducting himself maliciously and unlawfully and would not be acting in the ordinary course of the partnership business. Whatever may be the eventual determination of the conduct, it is evident that his partners, who did not authorize, participate in, or even know about such conduct, would not be held responsible for any injury the conduct may have caused. Jackson v. Jackson, 20 N.C. App. 406, 201 S.E.2d 722 (1974).

Action Against Individual Partners for Violation of Federal False Claims Act. — In an action by the federal government to recover from individual partners for alleged violation of the False Claims Act, this section did not impose liability upon one of the partners for a false claim filed by the other, since the action was against the individual partners and not against the partnership. United States v. Toepleman, 141 F. Supp. 677 (E.D.N.C. 1956), aff'd in part and rev'd, 242 F.2d 359 (4th Cir. 1957), modified, United States v. McNinch, 356

U.S. 595, 78 S. Ct. 950, 2 L. Ed. 2d 1001 (1958).

Liability of Law Firm for Partner's Activities. — In order to determine whether members of a law firm should be held liable for the activities of one of its partners, the court should consider (1) the provisions of the instrument empowering the firm to practice law, such as partnership agreements and articles of incorporation, as well as statutory provisions; (2) the construction which our courts have historically given the questioned activity or related ones; (3) where the partner has acted, or seemed to act, with the firm's authority; this includes his position in the firm, the participation, if any, by the rest of the firm in the disputed activities, and any assurances given the client that this transaction would be handled through the firm; and finally, (4) whether the other members of the firm have assented to or ratified the acts. Shelton v. Fairley, 86 N.C. App. 147, 356 S.E.2d 917, cert. denied, 320 N.C. 634, 360 S.E.2d 94 (1987).

Trial court did not err in dismissing a client's professional malpractice claims against law firms because there was nothing in the complaint to suggest that the law firms authorized, participated in, or even knew about an attorney's fraudulent conduct; fraud associated with the attorney's representation, including the failure to keep the client informed about the status of his case and the active concealment of the true state of affairs in violation of N.C. R. Prof. Conduct 1.4, was not in the ordinary course of the law firms' business. Goodman v. Holmes & McLaurin, — N.C. App. —, 665 S.E.2d 526, 2008 N.C. App. LEXIS 1622 (2008).

Where law firm benefits indirectly from partner's position as executor undertaken in his individual capacity, that benefit alone is not sufficient to establish partnership liability for those activities. Shelton v. Fairley, 86 N.C. App. 147, 356 S.E.2d 917, cert. denied, 320 N.C. 634, 360 S.E.2d 94 (1987).

Act Done in Ordinary Course of Business. — An issue of material fact was held to exist as to whether the act of defendant, in executing the title certificate on property owned by him and for the purpose of obtaining a personal loan for himself was "in the ordinary course of the business of the partnership or with the authority of his copartners." Investors Title Ins. Co. v. Herzig, 320 N.C. 770, 360 S.E.2d 786 (1987).

Applied in Bynum v. Hobbs Realty, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 19499 (M.D.N.C. Apr. 4, 2002).

Cited in Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952); Keith v. Wilder, 241 N.C. 672, 86 S.E.2d 444 (1955); Heath v. Craighill, Rendleman, Ingle & Blythe, 97 N.C. App. 236, 388 S.E.2d 178 (1990).

§ 59-44. Partnership bound by partner's breach of trust.

The partnership is bound to make good the loss:

(1) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(2) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership. (1941, c. 374, s. 14.)

§ 59-45. Nature of partner's liability in ordinary partnerships and in registered limited liability partnerships.

(a) Except as provided by subsections (a1) and (b) of this section, all partners are jointly and severally liable for the acts and obligations of the partnership.

(a1) Except as provided in subsection (b) of this section, a partner in a registered limited liability partnership is not individually liable for debts and obligations of the partnership incurred while it is a registered limited liability partnership solely by reason of being a partner and does not become liable by participating, in whatever capacity, in the management or control of the business of the partnership.

(b) Nothing in this Chapter shall be interpreted to abolish, modify, restrict, limit, or alter the law in this State applicable to the professional relationship and liabilities between the individual furnishing the professional services and the person receiving the professional services, the standards of professional conduct applicable to the rendering of the services, or any responsibilities, obligations, or sanctions imposed under applicable licensing statutes. A partner in a registered limited liability partnership is not individually liable, directly or indirectly, including by indemnification, contribution, assessment, or otherwise, for the debts, obligations, and liabilities of, or chargeable to, the registered limited liability partnership that arise from errors, omissions, negligence, malpractice, incompetence, or malfeasance committed by another partner or by an employee, agent, or other representative of the partnership; provided, however, nothing in this Chapter shall affect the liability of a partner of a professional registered limited liability partnership for his or her own errors, omissions, negligence, malpractice, incompetence, or malfeasance committed in the rendering of professional services.

(c) Repealed by Session Laws 1999-362, s. 5, effective October 1, 1999.

(d) A partner in a registered limited liability partnership is not a proper party to proceedings by or against a limited liability partnership, except where the object of the proceeding is to enforce a partner's right against or liability to the limited liability partnership.

(e) The liability of partners of a registered limited liability partnership formed and existing under this Chapter shall at all times be determined solely and exclusively by this Chapter and the laws of this State.

(f) If a conflict arises between the laws of this State and the laws of any other jurisdiction with regard to the liability of a partner of a registered limited liability partnership formed and existing under this Chapter for the debts, obligations, and liabilities of the registered limited liability partnership, this Chapter and the laws of this State shall govern in determining the liability. (1941, c. 374, s. 15; 1953, c. 881; 1993, c. 354, s. 4; 1999-362, s. 5.)

Cross References. — As to procedure in action against partners, see G.S. 1-72 and G.S. 1-113. As to liability of limited partner to third parties, see G.S. 59-303.

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. G.S. 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

For comment, "North Carolina's Limited Liability Company Act: A Legislative Mandate for Professional Limited Liability," see 29 Wake Forest L. Rev. 857 (1994).

For comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina," see 18 Campbell L. Rev. 121 (1996).

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Section States Common Law. — The common-law rule of joint and several liability of partners for a tort committed by one of the members of the partnership is incorporated in the Uniform Partnership Act, embraced in this Article. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949); Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Each partner is jointly and severally liable for a tort committed by one partner in the course of the partnership business, and the injured person may sue all members of the partnership or any one of them at his election. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949); Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952). See note to § 59-43.

Privity to Contract. — It is fundamental that all partners are agents of each other, that a contract entered into by the agent is a contract entered into by the principal, and that all partners are liable on any contract executed by a single partner in the name of the partnership; and if a partner may be sued for nonpayment or other breach of the contract, he certainly is privy to the contract. Barnes v. Campbell Chain Co., 47 N.C. App. 488, 267 S.E.2d 388 (1980).

Each partner in a partnership is jointly and severally liable for a tort committed in the course of the partnership business, and the injured party may sue all members of the partnership or any one of them at his election. But a partner who is not served with summons is not bound beyond his partnership assets. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 318 N.C. 511, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

Actual Notice Is Not Sufficient. — Actual notice of a suit against the partnership will not cure the requirement that a partner must be served with a summons to be held individually liable. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 318 N.C. 511, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

Nor Is Participation in Suit Against Partnership. — A partner who participates in a malpractice suit by acquainting himself with the facts of the pending suit and notifying his insurance carrier of the suit does not subject himself to individual liability when the Rules of Civil Procedure require that he be served with process individually before being held individually liable. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 318 N.C. 511, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

Or Verification of Answer. — Defendant partner's verification of original answer where he was sued in his partnership capacity did not subject him to individual liability. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 318 N.C. 511, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

Notice Held Sufficient. — Where defendants, who were general partners, were sued individually, and the prayer for relief asked for enforcement of arbitration award against all defendants jointly and severally, the individual defendants were on notice that plaintiff's complaint sought to hold them individually liable for any award made in the arbitration; with that knowledge, defendants filed an answer requesting that the action be stayed pending determination of the claims in the arbitration proceeding; therefore, defendants were on notice that the arbitration proceeding would affect them individually, and not only as partners, even though the defendants were not named individually in the arbitration proceeding. George W. Kane, Inc. v. Bolin Creek West Assocs., 95 N.C. App. 135, 381 S.E.2d 832 (1989).

Burden of Proof Where Partner Did Not Sign in Name of Partnership. — Where one partner did not sign either a promissory note or mortgage in the name of the alleged partnership, the plaintiff had the burden of showing either that (1) that partner was acting on behalf of the partnership when he executed the note and mortgage and the other partner had authorized his acts, or (2) the other partner, with knowledge of the note and mortgage, ratified his acts. Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

Repayment of Note Out of Partnership Funds. — Regardless of whether a note was signed by the parties as individuals or as partners, its legal effect was the same. Nevertheless, in a dissolution action, where it appeared that the note was executed in furtherance of the partnership, and that there may have been partnership funds available to satisfy it, the court should have determined the nature of the note and ordered it repaid out of partnership funds if possible. Ludwig v. Walter, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

General Partner Not Held Personally Liable. — General partner who was not made a party to the defendant's counterclaim or served with a copy of a summons, could not be held personally liable for the judgment against the partnership. Post & Front Properties, Ltd. v. Roanoke Constr. Co., 117 N.C. App. 93, 449 S.E.2d 765 (1994).

Applied in NCNB Nat'l Bank v. O'Neill, 102 N.C. App. 313, 401 S.E.2d 858 (1991); Bynum v. Hobbs Realty, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 19499 (M.D.N.C. Apr. 4, 2002).

Cited in Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963); Econo-Travel Hotel Corp. v. Taylor, 45 N.C. App. 229, 262 S.E.2d 869 (1980); Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056 (4th Cir. 1986); Hinshaw v. Wright, 105 N.C. App. 158, 412 S.E.2d 138 (1992); Harrell Oil Co. of Mount Airy v. Case, 142 N.C. App. 485, 543 S.E.2d 522, 2001 N.C. App. LEXIS 135 (2001).

§ 59-46. Partner by estoppel.

(a) When a person, by words spoken or written, by conduct, or by contract, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(1) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(2) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(b) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation. (1941, c. 374, s. 16; 1975, c. 732.)

Legal Periodicals. — For comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina," see 18 Campbell L. Rev. 121 (1996).

CASE NOTES

The filing of partnership tax returns is "significant" evidence of the existence of a partnership and may constitute an admission against interest by a party who denies the existence of a partnership after having signed a partnership return. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

Nature of Liability. — This section provides for a form of liability more akin to that of apparent authority than to estoppel. Volkman v. DP Assocs., 48 N.C. App. 155, 268 S.E.2d 265 (1980).

The essentials of equitable estoppel or estoppel in pais are a representation, either by words or conduct, made to another, who reasonably believing the representation to be true, relies upon it, with the result that he changes his position to his detriment. Volkman v. DP Assocs., 48 N.C. App. 155, 268 S.E.2d 265 (1980).

It is essential that the party estopped shall have made a representation by words or acts and that someone shall have acted on the faith of this representation in such a way that he cannot without damage withdraw from the transaction. Volkman v. DP Assocs., 48 N.C. App. 155, 268 S.E.2d 265 (1980).

Evidence that son was authorized to write checks on father's corporate account did not constitute, in the absence of other fundamental requisites, a partnership in fact. In the absence of representations made by the defendant personally to third-party creditors and of any expression of consent on the part of the defendant to his son that the son could represent him to be a partner, there was no evidentiary support for plaintiff's contention that representations were made in a public manner, so that under these circumstances, the evidence was not sufficient to warrant submitting the case to the jury upon the theory of partnership by estoppel. H-K Corp. v. Chance, 25 N.C. App. 61, 212 S.E.2d 34 (1975).

Defendant's communications with insurance agents regarding the acquisition of insurance policies for her ex-husband's farm business did not amount to a representation of her partnership status so as to estop her from subsequently denying same. Plaintiff's agents dealt with defendant as an agent for the farm and could not later claim that defendant was anything other than a representative. G.R. Little Agency, Inc. v. Jennings, 88 N.C. App. 107, 362 S.E.2d 807 (1987).

Summary Judgment Improper. — Trial court erred in granting a widow summary judgment in partners' action alleging that a partnership with her deceased husband did not dissolve upon his death because there was a genuine issue of material fact as to whether a partnership was established between the partners and widow based upon the legal principles of partnership by estoppel or apparent authority; although the widow denied that she had knowledge of the terms of the partnership agreement, her deposition testimony indicated that she was fully aware there was some sort of arrangement for the partners to work for the hog farm operation, the partners continued to perform their obligations after the husband's death, and the widow reaped the benefits of the continued arrangement. Wiggs v. Peedin, — N.C. App. —, 669 S.E.2d 844, 2008 N.C. App. LEXIS 2243 (2008).

Cited in DuBose Steel, Inc. v. Faircloth, 59 N.C. App. 722, 298 S.E.2d 60 (1982).

§ 59-47. Liability of incoming partner.

A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property. (1941, c. 374, s. 17.)

Part 4. Relations of Partners to One Another.

§ 59-48. Rules determining rights and duties of partners.

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(1) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(2) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(3) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(4) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(5) All partners have equal rights in the management and conduct of the partnership business.

(6) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(7) No person can become a member of a partnership without the consent of all the partners.

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners. (1941, c. 374, s. 18.)

Cross References. — As to rights and liabilities of limited partners, see G.S. 59-301 et seq.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

"Milk base" owned by defendant and used by dairy partnership was a "contribution" to the partnership property as contemplated by subdivision (1) of this section. Halsey v. Choate, 27 N.C. App. 49, 217 S.E.2d 740, cert. denied, 288 N.C. 730, 220 S.E.2d 350 (1975).

Where insurance proceeds were joint venture property of church and day care and were sufficient to cover plaintiffs' claims arising from accident with church van, the church was not entitled to indemnity or contribution as the church incurred no "personal liabilities" and made no "personal payments"; rather, the joint venture incurred the liabilities and the insurance maintained for its protection covered the settlement payment. Jones v. Shoji, 336 N.C. 581, 444 S.E.2d 203 (1994).

Cited in Jones v. Shoji, 110 N.C. App. 48, 428 S.E.2d 865 (1993).

§ 59-49. Partnership books.

The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them. (1941, c. 374, s. 19.)

§ 59-50. Duty of partners to render information.

Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability. (1941, c. 374, s. 20.)

CASE NOTES

Fiduciary Duty Exists. — A fiduciary duty existed on the part of one of the partners in a partnership as to the other two partners in the partnership. This fiduciary duty imposed on the partner the obligation of the utmost good faith in the dealings with the other partners in respect to partnership affairs; such that the partner was required to make full disclosure of all material facts within the partner's knowledge to the other partners in any way relating to the partnership affairs. Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905, 2003 N.C. App. LEXIS 369 (2003).

§ 59-51. Partner accountable as a fiduciary.

(a) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

(b) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner. (1941, c. 374, s. 21.)

Cross References. — As to criminal liability for appropriation of partnership funds by partner, see G.S. 14-97 and G.S. 14-98.

CASE NOTES

Applicability. — Although this section does not extend a partner's fiduciary duty to actions connected with the formation of the partnership, it expressly applies to "every partner." There is no indication that it applies beyond this context to individuals who agree to but never actually form a partnership. Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

When one partner wrongfully takes partnership funds and uses them to buy or improve property, his copartners may charge the property with a constructive trust in favor of the partnership to the extent of the partnership funds used in its purchase or improvement. McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951).

Self-Dealing by a Partner Constitutes a Breach of Fiduciary Duty. — Partner in a partnership breached the fiduciary duty owed to the other partners in the partnership where the partner entered into a business merger and did not share the benefits of the merger with the other partners. The partner engaged in self-dealing, which constituted a breach of the partner's fiduciary duties. Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905, 2003 N.C. App. LEXIS 369 (2003).

Cited in Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

§ 59-52. Right to an account.

Any partner shall have the right to a formal account as to partnership affairs:

(1) If he is wrongfully excluded from the partnership business or possession of its property by his copartners,
(2) If the right exists under the terms of any agreement,
(3) As provided by G.S. 59-51,
(4) Whenever other circumstances render it just and reasonable. (1941, c. 374, s. 22.)

CASE NOTES

Equitable jurisdiction is practically exclusive in proceedings for an account and settlement of partnership affairs, including suits for an accounting and settlement of the firm's affairs between the copartners themselves. Casey v. Grantham, 239 N.C. 121, 79 S.E.2d 735 (1954).

Cause of Action for Accounting Stated. — Allegations of a partner that the other partner had usurped complete control and exclusive possession of the books, records and entire assets of the partnership and was squandering its earnings and assets, and had refused, after demand, to account to plaintiff for any share of the profits or earnings of the business, were held to state a cause of action for an accounting between the partners. Casey v. Grantham, 239 N.C. 121, 79 S.E.2d 735 (1954).

Accounting Properly Ordered. — Accounting properly ordered where (1) the evidence was sufficient to establish the existence of a partnership involving the parties, (2) by filing a claim against the defendants, the plaintiff expressed his intent to dissolve the partnership, and (3) the defendants admitted that they had not paid a partnership profit share to the plaintiff. Dean v. Manus Homes, Inc., 143 N.C. App. 549, 546 S.E.2d 160, 2001 N.C. App. LEXIS 310 (2001).

Applied in Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

Cited in Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968); Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989); Lewis v. Edwards, 159 N.C. App. 384, 583 S.E.2d 387, 2003 N.C. App. LEXIS 1519 (2003); Brown v. Flowers, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 23272 (M.D.N.C. Sept. 14, 2005).

§ 59-53. Continuation of partnership beyond fixed term.

(a) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(b) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership. (1941, c. 374, s. 23.)

Part 5. Property Rights of a Partner.

§ 59-54. Extent of property rights of a partner.

The property rights of a partner are:

(1) His right in specific partnership property,
(2) His interest in the partnership, and
(3) His right to participate in the management. (1941, c. 374, s. 24.)

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

Deed of trust executed by debtor did not create a security interest in the partnership interest of debtor in partnership property; the trustee, was entitled to avoid such deed of trust to the extent that the deed of trust was alleged to create a security interest in the partnership interest of debtor. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

Applied in Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-55. Nature of a partner's right in specific partnership property.

(a) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(b) The incidents of this tenancy are such that:

(1) A partner, subject to the provisions of this Act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(2) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(3) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(4) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner, or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(5) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin. (1941, c. 374, s. 25; 2000-140, s. 101(n).)

Cross References. — As to survivor in joint tenancy for partnership purposes, see G.S. 41-2.

Legal Periodicals. — For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

CASE NOTES

Partners Protected by G.S. 45-21.36. — Each partner, though certainly not enjoying the traditional rights of owners, holds a property interest sufficient to invoke the protection of G.S. 45-21.36. If it were otherwise, mortgagees could avoid the requirements of G.S. 45-21.36 when foreclosing on property owned by a partnership simply by suing the partners for a deficiency. NCNB Nat'l Bank v. O'Neill, 102 N.C. App. 313, 401 S.E.2d 858 (1991).

Assignment by one partner of all his rights in the partnership to a stranger does not affect the rights of the other partner who is not a party to such assignment, and such assignment cannot transfer title to partnership property. Smithfield Oil Co. v. Furlonge, 257 N.C. 388, 126 S.E.2d 167 (1962).

The extent to which a partner may transfer or assign his interest in specific partnership property is controlled and limited by subparagraph (2); the effect of this provision is to invalidate or render void an assignment by a partner of his interest in specific partnership property if such assignment is not joined in by the other partners. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

Personal Policy Did Not Cover Partnership Property. — Cargo van involved in accident was not general partner's property for purposes of coverage under his personal blanket excess policy; because the cargo van was owned, maintained, and used by partnership on behalf of partnership business, the exception to the business pursuits exclusion did not apply and no coverage was provided by the policy. Harleysville Mut. Ins. Co. v. Packer, 60 F.3d 1116 (4th Cir. 1995).

Property Not Deeded to Partner Still Owned by Partnership. — Where partners dissolved their partnership and did not wind up the partnership affairs, parcel of property which was inadvertently not deeded to one partner continued to be owned by the partnership. McGahren v. First Citizens Bank & Trust Co., 111 F.3d 1159 (4th Cir. 1997), cert. denied, 522 U.S. 950, 118 S. Ct. 369, 139 L. Ed. 2d 287 (1997), aff'd, 165 F.3d 19 (4th Cir. 1998), cert. denied, 526 U.S. 1066, 119 S. Ct. 1458, 143 L. Ed. 2d 544 (1999).

Applied in Prentzas v. Prentzas, 260 N.C. 101, 113 S.E.2d 678 (1963); Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955); DOT v. Nelson Co., 127 N.C. App. 365, 489 S.E.2d 449 (1997).

§ 59-56. Nature of partner's interest in the partnership.

A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property. (1941, c. 374, s. 26.)

CASE NOTES

The interest of partners in the partnership is personal property, even though part of the partnership assets is real estate. Hence, upon the death of the partners, their respective personal representatives were properly made parties to prosecute and defend an action for an accounting and proper application of partnership property on behalf of their intestates. Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

Partner's Interest Not Subject to Statute of Frauds. — A partner's interest in partnership assets — including real property — is a personal property interest. As such, it is not subject to the statute of frauds. Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

However, land owned individually by one who entered into a partnership could not become a partnership asset absent some written agreement sufficient to satisfy the statute of frauds, despite G.S. 59-40(c), which recognizes that title to real property may be in the name of one or more, but not all, of the partners, and this section, which makes a partner's interest in partnership property, even real property, a personal property interest. Ludwig v. Walter, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

Deed of Trust Did Not Create a Security Interest. — Where financing statements were not filed in either the office of the Secretary of State or the office of the Register of Deeds in the county of the debtor's place of business, with the result that no security interest in debtor's partnership interest was perfected prior to the commencement of his Chapter 7 case, even if the deed of trust had been intended to create a security interest in debtor's partnership interest, it would be avoidable by the trustee and ineffective. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-57. Assignment of partner's interest.

(a) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(b) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners. (1941, c. 374, s. 27.)

Cross References. — As to assignment of a limited partnership interest, see G.S. 59-701 et seq.

CASE NOTES

Deed of trust executed by debtor did not create a security interest in the partnership interest of debtor in partnership property; the trustee, was entitled to avoid such deed of trust to the extent that the deed of trust was alleged to create a security interest in the partnership interest of debtor. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

§ 59-58. Partner's interest subject to charging order.

(a) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(b) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(1) With separate property, by any one or more of the partners, or

(2) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(c) Nothing in this Act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership. (1941, c. 374, s. 28; 2000-140, s. 101(n).)

Cross References. — As to liability of limited partner to third parties, see G.S. 59-303.

Part 6. Dissolution and Winding Up.

§ 59-59. Dissolution defined.

The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business. (1941, c. 374, s. 29.)

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

Applied in H-K Corp. v. Chance, 25 N.C. App. 61, 212 S.E.2d 34 (1975).

Cited in Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982); Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

§ 59-60. Partnership not terminated by dissolution.

On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed. (1941, c. 374, s. 30.)

CASE NOTES

Continuance of Lease as Partnership Affair. — Where legal title to the property remains in a dissolved partnership, a lease under which one party is named tenant continues as a partnership affair. The partnership affairs thereby are incomplete, and the partnership, though dissolved, has not yet "terminated." Simmons v. Quick Stop Food Mart, Inc., 56 N.C. App. 105, 286 S.E.2d 807, rev'd on other grounds, 307 N.C. 33, 296 S.E.2d 275 (1982).

Property Not Deeded to Partner Still Owned by Partnership. — Where partners dissolved their partnership and did not wind up the partnership affairs, parcel of property which was inadvertently not deeded to one partner continued to be owned by the partnership. McGahren v. First Citizens Bank & Trust Co., 111 F.3d 1159 (4th Cir. 1997), cert. denied, 522 U.S. 950, 118 S. Ct. 369, 139 L. Ed. 2d 287 (1997), aff'd, 165 F.3d 19 (4th Cir. 1998), cert. denied, 526 U.S. 1066, 119 S. Ct. 1458, 143 L. Ed. 2d 544 (1999).

Cited in Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968); Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982); Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

§ 59-61. Causes of dissolution.

Dissolution is caused:

(1) Without violation of the agreement between the partners,
  a. By the termination of the definite term or particular undertaking specified in the agreement,
  b. By the express will of any partner when no definite term or particular undertaking is specified,
  c. By the express will of all partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specific term or particular undertaking,
  d. By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner, unless the partnership agreement provides otherwise;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under G.S. 59-62. (1941, c. 374, s. 31; 1943, c. 384.)

CASE NOTES

Termination. — Under the Uniform Partnership Act, "termination" is used to designate the point in time when all the partnership affairs are wound up. Crosby v. Bowers, 87 N.C. App. 338, 361 S.E.2d 97 (1987).

The death of a partner ordinarily dissolves the partnership as of that date. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950); Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955). See also, Bank v. Hollingsworth, 135 N.C. 556, 47 S.E. 618 (1904); Walker v. Miller, 139 N.C. 448, 52 S.E. 125 (1905).

Trial court erred in granting a widow summary judgment in partners' action alleging that a partnership with her deceased husband did not dissolve upon his death because presumably, upon the husbands death, the benefits and burdens of his interest in the partnership passed to the widow; the husband proposed that his and the widow's partnership interest be passed to their surviving children if both of them died prior to a certain date, and although both the husband and widow did not die before that date, the provision showed an intent for the business relationship with the partners to continue in the event of the husband's death. Wiggs v. Peedin, — N.C. App. —, 669 S.E.2d

844, 2008 N.C. App. LEXIS 2243 (2008).

Absent Agreement to the Contrary. — In the absence of an express agreement to the contrary, every partnership is dissolved by the death of one of the partners. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Distinction Between Partnership for Indefinite Period and One for Specified Term as Concerns Dissolution. — According to the majority view, the only difference, so far as concerns the rights of dissolution by one partner, between a partnership for an indefinite period and one for a specified term, is that in the case of a partnership for a definite term a dissolution before the expiration of the stipulated time is a breach of agreement which subjects such partner to a claim for damages for breach of contract if the dissolution is not justified, whereas the dissolution of a partnership at will affords the other partner no ground for complaint; in either case, the action of one partner actually dissolves the partnership. Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 564 (1968).

The significance of a partnership being one at will, i.e., without any definite term or undertaking to be accomplished, is that the termination by the election of a partner is not a breach of contract. Having the legal right to terminate, it would seem that there is no liability for its exercise whatever the motive, and whatever may be the injurious consequences to copartners who have neglected to protect themselves by an agreement to continue for a definite term. Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

Unilateral Dissolution of a Partnership at Will. — A partnership at will, i.e., without any definite term or undertaking to be accomplished, can be dissolved by operation of law, upon any partner's unequivocal expression of an intent and desire to dissolve the partnership, without violating the partnership agreement. Sturm v. Goss, 90 N.C. App. 326, 368 S.E.2d 399 (1988).

Filing of a lawsuit constituted an unequivocal expression of intent to dissolve, and, assuming the will to dissolve was not expressed by any partner earlier, the partnership was automatically dissolved on that date. Thus, a judicial decree of dissolution would have been superfluous, and the trial court's failure to declare the partnership dissolved was not error. Sturm v. Goss, 90 N.C. App. 326, 368 S.E.2d 399 (1988).

Applied in Langdon v. Hurdle, 17 N.C. App. 530, 195 S.E.2d 72 (1973); Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982); Cole v. Graves, 101 N.C. App. 396, 399 S.E.2d 136 (1991).

§ 59-62. Dissolution by decree of court.

(a) On application by or for a partner the court shall decree a dissolution whenever:

(1) A partner has been adjudicated incompetent or is shown to be of unsound mind,

(2) A partner becomes in any other way incapable of performing his part of the partnership contract,

(3) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(4) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(5) The business of the partnership can only be carried on at a loss,

(6) Other circumstances render a dissolution equitable.

(b) On the application of the purchaser of a partner's interest under G.S. 59-57 and 59-58:

(1) After the termination of the specified term or particular undertaking,

(2) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

(c) The name of a registered limited liability partnership becomes available for use by another entity as provided in G.S. 55D-21. (1941, c. 374, s. 32; 1985, c. 589, s. 29; 2001-358, s. 41; 2001-387, ss. 173, 175(a); 2001-413, s. 6; 2001-487, s. 107(b).)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section by adding subsection (c), was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

CASE NOTES

Filing of a lawsuit constituted an unequivocal expression of intent to dissolve, and, assuming the will to dissolve was not expressed by any partner earlier, the partnership was automatically dissolved on that date. Thus, a judicial decree of dissolution would have been superfluous, and the trial court's failure to declare the partnership dissolved was not error. Sturm v. Goss, 90 N.C. App. 326, 368 S.E.2d 399 (1988).

Allegations Held Sufficient Predicate for Dissolution. — Where a complaint alleged the existence of a partnership and a conspiracy to deprive plaintiff partner of possession and control of the partnership assets pursuant to which defendant partner had transferred all the partnership property to defendant transferee, and sought a settlement and an accounting of the partnership affairs, the allegations were a sufficient predicate for the dissolution of the partnership, entitling plaintiff to an accounting and proper application of all the partnership property. Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

Order of Dissolution Upheld. — An order of dissolution, having been prayed for and not resisted, and the court's order having resolved all differences between the parties regarding liability to each other, as well as having resolved that the partnership would conduct no further business, undoubtedly was appropriate. Ludwig v. Walter, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

Cited in Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

§ 59-63. General effect of dissolution on authority of partner.

Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,
  a. When the dissolution is not by the act, bankruptcy or death of a partner; or
  b. When the dissolution is by such act, bankruptcy or death of a partner, in cases where G.S. 59-64 so requires,
(2) With respect to persons not partners, as declared in G.S. 59-65. (1941, c. 374, s. 33.)

CASE NOTES

Breach of Partnership Agreement as Prerequisite to Judicial Dissolution. — The statute does not require a breach of the partnership agreement as a prerequisite to judicial dissolution. Crosby v. Bowers, 87 N.C. App. 338, 361 S.E.2d 97 (1987).

Termination. — Under the Uniform Partnership Act, "termination" is used to designate the point in time when all the partnership affairs are wound up. Crosby v. Bowers, 87 N.C. App. 338, 361 S.E.2d 97 (1987).

Sale of partnership assets upon dissolution is an act appropriate for winding up. Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982).

§ 59-64. Right of partner to contribution from copartners after dissolution.

Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(1) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(2) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy. (1941, c. 374, s. 34.)

CASE NOTES

Applied in Ludwig v. Walter, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

§ 59-65. Power of partner to bind partnership to third persons after dissolution; publication of notice of dissolution.

(a) After dissolution a partner can bind the partnership except as provided in subsection (c)

(1) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(2) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

a. Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

b. Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been published at least once a week for four successive weeks in some newspaper qualified for legal advertising in each county in which the partnership business was regularly carried on, or if no such newspaper is published in the county, posted for 30 days at the courthouse and three other public places in the county.

(b) The liability of a partner under subdivision (a)(2) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(1) Unknown as a partner to the person with whom the contract is made; and

(2) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(c) The partnership is in no case bound by any act of a partner after dissolution

(1) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(2) Where the partner has become bankrupt; or

(3) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who

a. Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

b. Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in subdivision (a)(2)b.

(d) Nothing in this section shall affect the liability under G.S. 59-46 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business. (1941, c. 374, s. 35; 1951, c. 381, s. 1.)

Legal Periodicals. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 409 (1950).

CASE NOTES

Applied in Ludwig v. Walter, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

Cited in Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982).

§ 59-66. Effect of dissolution on partner's existing liability.

(a) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(b) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(c) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(d) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts. (1941, c. 374, s. 36.)

CASE NOTES

Absent an agreement under G.S. 59-48(1), each partner must contribute towards the losses sustained by the partnership according to his share of the profits. Longley Supply Co. v. Styron, 26 N.C. App. 55, 214 S.E.2d 777 (1975).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955); Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

§ 59-67. Right to wind up.

Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court. (1941, c. 374, s. 37.)

§ 59-68. Rights of partners to application of partnership property.

(a) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interest in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under G.S. 59-66, subsection (b), he shall receive in cash only the net amount due him from the partnership.

(b) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(1) Each partner who has not caused dissolution wrongfully shall have:
  a. All the rights specified in subsection (a) of this section, and
  b. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(2) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (b)(1)b of this section, and in like manner indemnify him against all present or future partnership liabilities.

(3) A partner who has caused the dissolution wrongfully shall have:
  a. If the business is not continued under the provisions of subdivision (b)(2) all the rights of a partner under subsection (a), subject to clause (b)(1)b, of this section,
  b. If the business is continued under subdivision (b)(2) of this section, the right as against his copartners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the goodwill of the business shall not be considered. (1941, c. 374, s. 38.)

CASE NOTES

Under the principle of marshaling of assets, each partner has the right to have the partnership property applied to the payment or security of partnership debts, in order to relieve him from personal liability. Casey v. Grantham, 239 N.C. 121, 79 S.E.2d 735 (1945).

Applied in Ludwig v. Walter, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955); Lewis v. Edwards, 159 N.C. App. 384, 583 S.E.2d 387, 2003 N.C. App. LEXIS 1519 (2003).

§ 59-69. Rights where partnership is dissolved for fraud or misrepresentation.

Where partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(1) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(2) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and
(3) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership. (1941, c. 374, s. 39.)

CASE NOTES

Assertion of Lien on Partnership Assets Based on Claim of Fraud. — While it is well settled that each partner has the right to insist that partnership assets be applied in payment of partnership debts, the right is not, in fact, a lien as such, because it is equally well settled that a partner has no individual ownership in any specific assets of the firm. The right, lien, quasi-lien or whatever else it may be called does not exist for any practical purpose until the affairs of the partnership have to be wound up or the share of a partner has to be ascertained. Such a lien based on fraud does not come into existence until actual dissolution occurs. Wolfe v. Hewes, 41 N.C. App. 88, 254 S.E.2d 204 (1979).

§ 59-70. Rules for distribution.

In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:
(1) The assets of the partnership are
  a. The partnership property,
  b. The contributions of the partners necessary for the payment of all the liabilities specified in subdivision (2) of this section.
(2) The liabilities of the partnership shall rank in order of payment, as follows:
  a. Those owing to creditors other than partners,
  b. Those owing to partners other than for capital and profits,
  c. Those owing to partners in respect of capital,
  d. Those owing to partners in respect of profits.
(3) The assets shall be applied in the order of their declaration in subdivision (1) of this section to the satisfaction of the liabilities.
(4) The partners shall contribute, as provided by G.S. 59-48, subdivision (1) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.
(5) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in subdivision (4) of this section.
(6) Any partner or his legal representative shall have the right to enforce the contributions specified in subdivision (4) of this section, to the extent of the amount which he has paid in excess of his share of the liability.
(7) The individual property of a deceased partner shall be liable for the contributions specified in subdivision (4) of this section.
(8) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.
(9) Where a partner has become bankrupt or his estate is insolvent the claims against the separate property shall rank in the following order:
  a. Those owing to separate creditors,

b. Those owing to partnership creditors,
c. Those owing to partners by way of contribution. (1941, c. 374, s. 40.)

Cross References. — As to distribution of assets of and withdrawal from limited partnership, see G.S. 59-504, 59-601 et seq.

Legal Periodicals. — For note on marshaling of assets, see 36 N.C.L. Rev. 229 (1958).

CASE NOTES

Determination of Liabilities in Receivership Proceedings. — When a partner seeks a dissolution of a partnership and, with the consent of the other partners, a receiver is appointed to take possession of partnership assets for distribution to the parties entitled thereto, the law contemplates a judicial determination of the liabilities of the partnership. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

No Distribution to Partners Until Such Determination Made. — Until the liabilities of the partnership have been determined, there can be no distribution to the partners. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

When Judgment Recoverable Against Individual Partners. — Where the partnership assets are insufficient to discharge the partnership obligations, claimant may, in the proceedings in which a receiver was appointed, have judgment against the individual partners for the balance of his claim. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Applied in Benson v. Roberson, 226 N.C. 103, 36 S.E.2d 729 (1946).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-71. Liability of persons continuing the business in certain cases.

(a) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(b) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(c) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in subsections (a) and (b) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(d) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(e) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of G.S. 59-68, subdivision (b)(2), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(f) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(g) The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of the partnership property only.

(h) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(i) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(j) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership. (1941, c. 374, s. 41.)

CASE NOTES

Continuation of Partnership Business. — The business of the parties' partnership was continued after the partnership's dissolution as contemplated by G.S. 59-71(c) when the business was continued without liquidation of the partnership affairs. Lewis v. Edwards, 147 N.C. App. 39, 554 S.E.2d 17, 2001 N.C. App. LEXIS 1060 (2001).

Where company did not promise to pay the creditors of a dissolved partnership, it was not liable under subsection (d) of this section. Pendergrass v. Card Care, Inc., 333 N.C. 233, 424 S.E.2d 391 (1993).

§ 59-72. Rights of retiring partner or estate of deceased partner when the business is continued.

When any partner retires or dies, and the business is continued under any of the conditions set forth in G.S. 59-71, subsections (a), (b), (c), (e), (f), or G.S. 59-68, subdivision (b)(2), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by G.S. 59-71, subsection (h). (1941, c. 374, s. 42.)

CASE NOTES

Interest on Award for Judicial Accounting. — G.S. 59-72, which specifically addresses interest on an award for judicial accounting, upon a partner's retirement from a partnership, controls over the general statute dealing with interest on judgments. Lewis v. Edwards, 147 N.C. App. 39, 554 S.E.2d 17, 2001 N.C. App. LEXIS 1060 (2001).

Date From Which Interest was Calculated. — Interest was properly calculated, based on G.S. 59-72, from the date of the dissolution of a professional certified accounting practice, where the withdrawing partner had paid partnership debts after withdrawing from the partnership; the date of the payment of debts, which occurred about two-and-a-half years after the dissolution, was not the date from which interest would be calculated for the monies paid toward the partnership debts, as the trial court had already adjusted the value of the partnership assets, as of the date of dissolution, as a result of the payment of the debts. Lewis v. Edwards, 159 N.C. App. 384, 583 S.E.2d 387, 2003 N.C. App. LEXIS 1519 (2003).

§ 59-73. Accrual of actions.

The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary. (1941, c. 374, s. 43.)

CASE NOTES

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

ARTICLE 2A.

Conversion and Merger.

Part 1. General Provisions.

§ 59-73.1. Definitions.

As used in this Article:

(1) "Business entity" means a domestic corporation (including a professional corporation as defined in G.S. 55B-2), a foreign corporation (including a foreign professional corporation as defined in G.S. 55B-16), a domestic or foreign nonprofit corporation, a domestic or foreign limited liability company, a domestic or foreign limited partnership, a domestic partnership, or any other partnership.

(2) "Domestic partnership" means a partnership as defined in G.S. 59-36 that is formed under the laws of this State, including a registered limited liability partnership, but excluding a domestic limited partnership.

(3) "Partnership" means a partnership as defined in G.S. 59-36 whether or not formed under the laws of this State including a registered limited liability partnership and a foreign limited liability partnership, but excluding a domestic limited partnership and a foreign limited partnership. (1999-369, s. 4.1; 2001-387, ss. 106, 107.)

Editor's Note. — The definitions within subdivisions (1) and (2), were enacted by Session Laws 1999-369, s. 4.1, in the reverse order, and were redesignated to preserve alphabetical order at the direction of the Revisor of Statutes.

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Legal Periodicals. — For "Legislative Survey: Business & Banking," see 22 Campbell L. Rev. 253 (2000).

§§ 59-73.2 through 59-73.7: Recodified as §§ 59-73.20, 59-73.30, 59-73.31, 58-73.32, and 59-73.33, respectively, by Session Laws 2001-387, s. 105(b).

§§ 59-73.8, 59-73.9: Reserved for future codification purposes.

Part 2. Conversion to Domestic Partnership.

§ 59-73.10. Conversion.

A business entity other than a domestic partnership may convert to a domestic partnership if:

(1) The conversion is permitted by the laws of the state or country governing the organization and internal affairs of the converting business entity; and

(2) The converting business entity complies with the requirements of this Part and, to the extent applicable, the laws referred to in subdivision (1) of this section. (2001-387, s. 108.)

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 59-73.11. Plan of conversion.

(a) The converting business entity shall approve a written plan of conversion containing:

(1) The name of the converting business entity, its type of business entity, and the state or country whose laws govern its organization and internal affairs;

(2) The name of the resulting domestic partnership into which the converting business entity shall convert;

(3) The terms and conditions of the conversion; and

(4) The manner and basis for converting the interests in the converting business entity into interests, obligations, or securities of the resulting domestic partnership or into cash or other property in whole or in part.

(a1) The plan of conversion may contain other provisions relating to the conversion.

(a2) The provisions of the plan of conversion, other than the provisions required by subdivisions (1) and (2) of subsection (a) of this section, may be made dependent on facts objectively ascertainable outside the plan of conversion if the plan of conversion sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(2) A determination or action by the converting business entity or by any other person, group.

(3) The terms of, or actions taken under, an agreement to which the converting business entity is a party, or any other agreement or document.

(b) The plan of conversion shall be approved in accordance with the laws of the state or country governing the organization and internal affairs of the converting business entity.

(c) After a plan of conversion has been approved as provided in subsection (b) of this section but before the articles of conversion become effective, the plan of conversion may be amended or abandoned to the extent permitted by the laws that govern the organization and internal affairs of the converting business entity. (2001-387, s. 108; 2001-487, s. 62(r); 2005-268, s. 52.)

§ 59-73.12. Filing of articles of conversion by converting business entity.

(a) After a plan of conversion has been approved by the converting business entity as provided in G.S. 59-73.11, the converting business entity shall deliver articles of conversion to the Secretary of State for filing. The articles of conversion shall state:

(1) That the domestic partnership is being formed pursuant to a conversion of another business entity;
(2) The name of the resulting domestic partnership, a designation of its mailing address, and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address;
(3) The name of the converting business entity, its type of business entity, and the state or country whose laws govern its organization and internal affairs; and
(4) That a plan of conversion has been approved by the converting business entity as required by law.

If the resulting domestic partnership is to be a registered limited liability partnership when the conversion takes effect, then instead of the converting business entity delivering the articles of conversion to the Secretary of State for filing, the articles of conversion shall be included as part of the application for registration filed pursuant to G.S. 59-84.2 in addition to the matters otherwise required or permitted by law.

If the plan of conversion is abandoned after the articles of conversion have been filed with the Secretary of State but before the articles of conversion become effective, an amendment to the articles of conversion withdrawing the articles of conversion shall be delivered to the Secretary of State for filing prior to the time the articles of conversion become effective.

(b) The conversion takes effect when the articles of conversion become effective.

(c) Certificates of conversion shall also be registered as provided in G.S. 47-18.1. (2001-387, s. 108; 2001-487, s. 62(s); 2002-159, s. 34(a).)

§ 59-73.13. Effects of conversion.

(a) When the conversion takes effect:

(1) The converting business entity ceases its prior form of organization and continues in existence as the resulting domestic partnership;
(2) The title to all real estate and other property owned by the converting business entity continues vested in the resulting domestic partnership without reversion or impairment;
(3) All liabilities of the converting business entity continue as liabilities of the resulting domestic partnership;
(4) A proceeding pending by or against the converting business entity may be continued as if the conversion did not occur; and
(5) The interests in the converting business entity that are to be converted into interests, obligations, or securities of the resulting domestic

partnership or into the right to receive cash or other property are thereupon so converted, and the former holders of interests in the converting business entity are entitled only to the rights provided in the plan of conversion.

The conversion shall not affect the liability or absence of liability of any holder of an interest in the converting business entity for any acts, omissions, or obligations of the converting business entity made or incurred prior to the effectiveness of the conversion. The cessation of the existence of the converting business entity in its prior form of organization in the conversion shall not constitute a dissolution or termination of the converting business entity.

(b) When the conversion takes effect, the resulting domestic partnership is deemed:

(1) To agree that it may be served with process in this State for enforcement of (i) any obligation of the converting business entity and (ii) any obligation of the resulting domestic partnership arising from the conversion; and

(2) To have appointed the Secretary of State as its agent for service of process in any such proceeding. Service on the Secretary of State of any such process shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 59-35.2. Upon receipt of service of process on behalf of a resulting domestic partnership in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the resulting domestic partnership. If the resulting domestic partnership is a registered limited liability partnership, the address for mailing shall be its principal office or, if there is no principal office on file, its registered office. If the resulting domestic partnership is not a registered limited liability partnership, the address for mailing shall be the mailing address designated pursuant to G.S. 59-73.12(a)(2). (2001-387, s. 108; 2001-387, s. 170(c).)

§§ 59-73.14 through 59-73.19: Reserved for future codification purposes.

Part 3. Conversion of Domestic Partnership.

§ 59-73.20. Conversion.

A domestic partnership may convert to a different business entity if:

(1) The conversion is permitted by the laws of the state or country governing the organization and internal affairs of such other business entity; and

(2) The converting domestic partnership complies with the requirements of this Part and, to the extent applicable, the laws referred to in subdivision (1) of this section. (1999-369, s. 4.1; 2001-387, ss. 105(b), 109, 110.)

Editor's Note. — Session Laws 2001-387, ss. 105(b) and 110, effective January 1, 2002, provide that former G.S. 59-73.2 is recodified and rewritten as this section.

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 59-73.21. Plan of conversion.

(a) The converting domestic partnership shall approve a written plan of conversion containing:

(1) The name of the converting domestic partnership;

(2) The name of the resulting business entity into which the domestic partnership shall convert, its type of business entity, and the state or country whose laws govern its organization and internal affairs;

(3) The terms and conditions of the conversion; and

(4) The manner and basis for converting the interests in the domestic partnership into interests, obligations, or securities of the resulting business entity or into cash or other property in whole or in part.

(a1) The plan of conversion may contain other provisions relating to the conversion.

(a2) The provisions of the plan of conversion, other than the provisions required by subdivisions (1) and (2) of subsection (a) of this section, may be made dependent on facts objectively ascertainable outside the plan of conversion if the plan of conversion sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(2) A determination or action by the converting domestic partnership or by any other person, group, or body.

(3) The terms of, or actions taken under, an agreement to which the converting domestic partnership is a party, or any other agreement or document.

(b) The plan of conversion shall be approved by the domestic partnership in the manner provided for the approval of the conversion in a written partnership agreement or, if there is no such provision, by the unanimous consent of its partners. If any partner of the converting domestic partnership has or will have personal liability for any existing or future obligation of the resulting business entity solely as a result of holding an interest in the resulting business entity, then in addition to the requirements of the preceding sentence, approval of the plan of conversion by the domestic partnership shall require the consent of that partner. The converting domestic partnership shall provide a copy of the plan of conversion to each partner of the converting domestic partnership at the time provided in a written partnership agreement or, if there is no such provision, prior to its approval of the plan of conversion.

(c) After a plan of conversion has been approved by a domestic partnership but before the articles of conversion become effective, the plan of conversion (i) may be amended as provided in the plan of conversion, or (ii) may be abandoned, subject to any contractual rights, as provided in the plan of conversion or written partnership agreement or, if not so provided, as determined in the manner necessary for approval of the plan of conversion. (2001-387, s. 111; 2001-487, s. 62(t); 2005-268, s. 53.)

§ 59-73.22. Articles of conversion.

(a) After a plan of conversion has been approved by the converting domestic partnership as provided in G.S. 59-73.21, the converting domestic partnership shall deliver articles of conversion to the Secretary of State for filing. The articles of conversion shall state:

(1) The name of the converting domestic partnership;

(2) The name of the resulting business entity, its type of business entity, the state or country whose laws govern its organization and internal

affairs, and, if the resulting business entity is not authorized to transact business or conduct affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address; and

(3) That a plan of conversion has been approved by the domestic partnership as required by law.

(b) If the domestic partnership is converting to a business entity whose formation requires the filing of a document with the Secretary of State, then notwithstanding subsection (a) of this section the articles of conversion shall be included as part of that document and shall contain the information required by the laws governing the organization and internal affairs of the resulting business entity.

(c) If the plan of conversion is abandoned after the articles of conversion have been filed with the Secretary of State but before the articles of conversion become effective, the converting domestic partnership shall deliver to the Secretary of State for filing prior to the time the articles of conversion become effective an amendment of the articles of conversion withdrawing the articles of conversion.

(d) The conversion takes effect when the articles of conversion become effective.

(e) Certificates of conversion shall also be registered as provided in G.S. 47-18.1. (2001-387, s. 111; 2001-487, s. 62(u).)

§ 59-73.23. Effects of conversion.

(a) When the conversion takes effect:

(1) The converting domestic partnership ceases its prior form of organization and continues in existence as the resulting business entity;

(2) The title to all real estate and other property owned by the converting domestic partnership continues vested in the resulting business entity without reversion or impairment;

(3) All liabilities of the converting domestic partnership continue as liabilities of the resulting business entity;

(4) A proceeding pending by or against the converting domestic partnership may be continued as if the conversion did not occur; and

(5) The interests in the converting domestic partnership that are to be converted into interests, obligations, or securities of the resulting business entity or into the right to receive cash or other property are thereupon so converted, and the former holders of interests in the converting domestic partnership are entitled only to the rights provided in the plan of conversion.

The conversion shall not affect the liability or absence of liability of any holder of an interest in the converting domestic partnership for any acts, omissions, or obligations of the converting domestic partnership made or incurred prior to the effectiveness of the conversion. The cessation of the existence of the converting domestic partnership in its form of organization as a domestic partnership in the conversion shall not constitute a dissolution or termination of the converting domestic partnership.

(b) If the resulting business entity is not a domestic corporation, a domestic limited partnership, or a domestic limited liability company, when the conversion takes effect the resulting business entity is deemed:

(1) To agree that it may be served with process in this State for enforcement of (i) any obligation of the converting domestic partnership and (ii) any obligation of the resulting business entity arising from the conversion; and

(2) To have appointed the Secretary of State as its agent for service of process in any such proceeding. Service on the Secretary of State of

any such process shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 59-35.2. Upon receipt of service of process on behalf of a resulting business entity in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the resulting business entity. If the resulting business entity is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the resulting business entity is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to G.S. 59-73.22(a)(2). (2001-387, ss. 111, 170(c); 2001-487, s. 62(v).)

§§ 59-73.24 through 59-73.29: Reserved for future codification purposes.

Part 4. Merger.

§ 59-73.30. Merger.

A domestic partnership may merge with one or more other domestic partnerships or other business entities if:

(1) The merger is permitted by laws of the state or country governing the organization and internal affairs of each other merging business entity; and

(2) Each merging domestic partnership and each other merging business entity comply with the requirements of this Part and, to the extent applicable, the laws referred to in subdivision (1) of this section. (1999-369, s. 4.1; 2001-387, ss. 105(b), 112.)

Editor's Note. — Session Laws 2001-387, s. 105(b), provides that G.S. 59-73.2, 59-73.3, 59-73.4, 59-73.5, and 59-73.6 are recodified as G.S. 59-73.20, 59-73.30, 59-73.31, 59-73.32, and 59-73.33, respectively, in Article 2A of Chapter 59 of the General Statutes, as enacted by this act.

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 59-73.31. Plan of merger.

(a) Each merging domestic partnership and each other merging business entity shall approve a written plan of merger containing:

(1) For each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs;

(2) The name of the merging business entity that shall survive the merger;

(3) The terms and conditions of the merger; and

(4) The manner and basis for converting the interests in each merging business entity into interests, obligations, or securities of the surviving business entity or into cash or other property in whole or in part.

(a1) The plan of merger may contain other provisions relating to the merger.

(a2) The provisions of the plan of merger, other than the provisions referred to in subdivisions (1) and (2) of subsection (a) of this section, may be made dependent on facts objectively ascertainable outside the plan of merger if the plan of merger sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(2) A determination or action by the domestic partnership or by any other person, group, or body.

(3) The terms of, or actions taken under, an agreement to which the domestic partnership is a party, or any other agreement or document.

(b) In the case of a merging domestic partnership, the plan of merger must be approved in the manner provided in a written partnership agreement that is binding on all the partners for approval of a merger with the type of business entity contemplated in the plan of merger or, if there is no provision, by the unanimous consent of its partners. If any partner of a merging domestic partnership has or will have personal liability for any existing or future obligation of the surviving business entity solely as a result of holding an interest in the surviving business entity, then in addition to the requirements of the preceding sentence, approval of the plan of merger by the domestic partnership shall require the consent of that partner. In the case of each other merging business entity, the plan of merger must be approved in accordance with the laws of the state or country governing the organization and internal affairs of such merging business entity.

(c) After a plan of merger has been approved by the domestic partnership but before the articles of merger become effective, the plan of merger (i) may be amended as provided in the plan of merger, or (ii) may be abandoned (subject to any contractual rights) as provided in the plan of merger or a written partnership agreement that is binding on all the partners or, if not so provided, as determined by the unanimous consent of the partners. (1999-369, s. 4.1; 2001-387, ss. 105(b), 112, 113; 2005-268, s. 54.)

Editor's Note. — Session Laws 2001-387, ss. 105(b), 112, and 113, effective January 1, 2002, recodified former G.S. 59-73.4 as this section.

§ 59-73.32. Articles of merger.

(a) After a plan of merger has been approved by each merging domestic partnership and each other merging business entity as provided in G.S. 59-73.31, the surviving business entity shall deliver articles of merger to the Secretary of State for filing. The articles of merger shall set forth:

(1) Repealed by Session Laws 2005-268, s. 55, effective October 1, 2005.

(2) For each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs.

(3) The name of the merging business entity that will survive the merger and, if the surviving business entity is not authorized to transact business or conduct affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address.

(4) A statement that the plan of merger has been approved by each merging business entity in the manner required by law.

(5) Repealed by Session Laws 2005-268, s. 55, effective October 1, 2005.

If the plan of merger is amended after the articles of merger have been filed but before the articles of merger become effective, and any statement in the articles of merger becomes incorrect as a result of the amendment, the surviving business entity shall deliver to the Secretary of State for filing prior to the time the articles of merger become effective an amendment to the articles of merger correcting the incorrect statement. If the articles of merger are abandoned after the articles of merger are filed but before the articles of merger become effective, the surviving business entity shall deliver to the Secretary of State for filing prior to the time the articles of merger become effective an amendment reflecting the abandonment of the plan of merger.

(b) A merger takes effect when the articles of merger become effective.

(c) Certificates of merger shall also be registered as provided in G.S. 47-18.1. (1999-369, s. 4.1; 2001-387, ss. 105(b), 112, 114; 2005-268, s. 55.)

Editor's Note. — Session Laws 2001-387, ss. 105(b), 112, and 114, effective January 1, 2002, recodified former G.S. 59-73.5 as this section.

§ 59-73.33. Effects of merger.

(a) When a merger takes effect:

(1) Each other merging business entity merges into the surviving business entity, and the separate existence of each merging business entity except the surviving business entity ceases;

(2) The title to all real estate and other property owned by each merging business entity is vested in the surviving business entity without reversion or impairment;

(3) The surviving business entity has all liabilities of each merging business entity;

(4) A proceeding pending by or against any merging business entity may be continued as if the merger did not occur, or the surviving business entity may be substituted in the proceeding for a merging business entity whose separate existence ceases in the merger;

(5) The interests in each merging business entity that are to be converted into interests, obligations, or securities of the surviving business entity or into the right to receive cash or other property are thereupon so converted, and the former holders of the interests are entitled only to the rights provided to them in the plan of merger or, in the case of former holders of shares in a domestic corporation, as defined in G.S. 55-1-40, any rights they may have under Article 13 of Chapter 55 of the General Statutes; and

(6) If the surviving business entity is not a domestic corporation, the surviving business entity is deemed to agree that it will promptly pay to the dissenting shareholders of any merging domestic corporation the amount, if any, to which they are entitled under Article 13 of Chapter 55 of the General Statutes and otherwise to comply with the requirements of Article 13 as if it were a surviving domestic corporation in the merger.

The merger shall not affect the liability or absence of liability of any holder of an interest in a merging business entity for any acts, omissions, or obligations of any merging business entity made or incurred prior to the effectiveness of the merger. The cessation of separate existence of a merging business entity shall not constitute a dissolution or termination of the merging business entity.

(b) If the surviving business entity is not a domestic limited liability company, a domestic corporation, a domestic nonprofit corporation, or a domestic limited partnership, when the merger takes effect the surviving business entity is deemed:

(1) To agree that it may be served with process in this State in any proceeding for enforcement of (i) any obligation of any merging

domestic limited liability company, domestic corporation, domestic nonprofit corporation, domestic limited partnership, or other partnership as defined in G.S. 59-36 that is formed under the laws of this State, (ii) the rights of dissenting shareholders of any merging domestic corporation under Article 13 of Chapter 55 of the General Statutes, and (iii) any obligation of the surviving business entity arising from the merger; and

(2) To have appointed the Secretary of State as its registered agent for service of process in any such proceeding. Service on the Secretary of State of any such process shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process and the fee required by G.S. 59-35.2. Upon receipt of service of process on behalf of a surviving business entity in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving business entity. If the surviving business entity is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the surviving business entity is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to G.S. 59-73.32(a)(3). (1999-369, s. 4.1; 2000-140, s. 52; 2001-358, s. 10(a); 2001-387, ss. 105(b), 112, 115, 170(c), 173, 175(a); 2002-159, s. 17; 2007-385, s. 5.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, ss. 105(b), 112, and 115, effective January 1, 2002, in subdivision (b)(2), recodified former G.S. 59-73.6 as this section.

This section was amended several times in 2001 in the coded bill drafting format provided in § 120-20.1. Session Laws 2001-358, s. 10 (a) amended subsection (b)(2) of § 59-73.6 by substituting "59-35.1(c)" for "59-73.7(c)." The section was then recodified as § 59-73.33 by Session Laws 2001-387, s. 105(b). Without referring to the change made by Session Laws 2001-358 in subsection (b)(2), Session Laws 2001-387, ss. 115 and 170(c) subsequently amended subsection (b)(2) by substituting "59-35.1(f)" for "59-73.7(c)" and then substituting "59-35.2" for "59-35.1(f)." The fees that were to have been in § 59-35.1 (c), as amended in Session Laws 2001-358, are now in § 59-35.2. The section is set out in the form above at the direction of the Revisor of Statutes.

ARTICLE 3.

Surviving Partners.

§ 59-74. Surviving partner to give bond.

Upon the death of any member of a partnership, the surviving partner shall, within 30 days, execute before the clerk of the superior court of the county where the partnership business was conducted, a bond payable to the State of North Carolina, with sufficient surety conditioned upon the faithful performance of his duties in the settlement of the partnership affairs. The amount of such bond shall be fixed by the clerk of the court; and the settlement of the estate and the liability of the bond shall be the same as under the law governing administrators and their bonds. (1915, c. 227, ss. 1, 2, 3; C.S., s. 3277.)

Cross References. — As to death of partner causing dissolution of partnership, see G.S. 59-61.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

The purpose of this section is limited to the protection of those who are interested in the property or estate administered by the surviving partner, who is required to account to them and pay over their interest in case there is a surplus after paying the partnership debts. It is a trust relationship in which only they have a legal interest. Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948).

Coverage of Bond. — The bond required of surviving partners by this section is primarily for the protection of those interested in the deceased partner's interest in the surplus after the partnership has been wound up; such bond has no retroactive effect, and does not become liable for any maladministration prior to its filing. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

The giving of a bond cannot be regarded as a condition precedent to the maintenance of an action by a surviving partner, since G.S. 59-75 provides an alternative remedy upon failure of the surviving partner to give bond. Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948).

Objection that surviving partner has not filed bond is not available to debtor of the estate. Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948).

Applied in Reel v. Boyd, 198 N.C. 214, 151 S.E. 192 (1930).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-75. Effect of failure to give bond.

Upon the failure of the surviving partner to execute the bond provided for in G.S. 59-74, the clerk of the superior court shall, upon application of any person interested in the estate of the deceased partner, appoint a collector of the partnership, who shall be governed by the same law governing an administrator of a deceased person. (1915, c. 227, s. 4; C.S., s. 3278.)

Cross References. — As to administration of decedent's estates, see Chapter 28A.

CASE NOTES

Cited in Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948); In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950); Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-76. Surviving partner and personal representative to make inventory.

When a member of any partnership dies the surviving partner, within 60 days after the death of the deceased partner, together with the personal representative of the deceased partner, shall make out a full and complete inventory of the assets of the partnership, including real estate, if there be any, together with a schedule of the debts and liabilities thereof, a copy of which inventory and schedule shall be retained by the surviving partner, and a copy thereof shall be furnished to the personal representative of the deceased partner. (1901, c. 640; Rev., s. 2540; C.S., s. 3279.)

Cross References. — As to joint tenancy in partnership property, see G.S. 41-2.

CASE NOTES

Upon the death of a partner, his interest in the partnership property vests in the surviving partner for administration in winding up the partnership, and the surviving partner stands as a trustee charged with the duty of faithful management and accounting to those entitled to the deceased partner's interest after the settlement of the debts of the partnership. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

The surviving partner has the duty of closing up the partnership affairs, the reduction of personal property to cash and the settlement of partnership affairs, and title to the personal property vests at once in the surviving partner and not in the personal representative of the deceased partner. Sherrod v. Mayo, 156 N.C. 144, 72 S.E. 216 (1911).

Assets Impressed with Trust. — The death of a partner, in the absence of any stipulation in the articles of partnership to the contrary, works an immediate dissolution, and the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts and turn over to his personal representative the share of the deceased partner. Walker v. Miller, 139 N.C. 448, 52 S.E. 125 (1905).

It is the right and duty of a surviving partner to close up the affairs of the firm. He has the right, therefore, to receive and to collect the debts and assets of the partnership, and to apply the same toward payment of the debts and liabilities of the firm. Weisel v. Cobb, 114 N.C. 22, 18 S.E. 943 (1894); Hodgin v. Bank, 128 N.C. 110, 38 S.E. 294 (1901).

After the dissolution of a firm by the death of one of the partners, it is the duty of the surviving partner to settle up the joint estate in the manner most conducive to the interest of all persons interested. Calvert v. Miller, 94 N.C. 600 (1886).

Creation of New Debts. — A surviving partner has no right to create or contract new debts binding upon the partnership, except to the extent of purchasing new material and making new debts so far as may be necessary to work up unfinished material and sell the same. Howell, Orr & Co. v. Boyd Mfg. Co., 116 N.C. 806, 22 S.E. 5 (1895).

Power to Renew or Endorse Note. — A surviving partner has no power after dissolution to renew or endorse a firm note in the name of the firm. Bank v. Hollingsworth, 135 N.C. 556, 47 S.E. 618 (1904).

A surviving partner who, more than two years after dissolution of the firm, endorsed a note in the firm name for the renewal of outstanding notes similarly endorsed, was individually liable on such endorsement, though it did not bind the firm. Bank v. Hollingsworth, 135 N.C. 556, 47 S.E. 618 (1904).

Injunction When There Is Danger of Misapplication of Funds. — In case of danger of misapplication of partnership funds by the surviving partner, the court would certainly, in behalf of the representatives of a deceased partner, interfere and restrain by injunction the surviving partner from such acts, or grant other proper relief; and there is no reason why it should not interfere in behalf of a creditor in such a case. Hodgin v. Bank, 128 N.C. 110, 38 S.E. 294 (1901).

Surviving Partner Held Agent of Executor. — Where one of the members of a firm was constituted its general managing agent by the articles of partnership, and upon the death of one partner his executor consented to a continuance of the business, it was held that the manager became the agent of the executor as well as of the other surviving member, and a demand and refusal to account were necessary to terminate the agency and put the statute of limitations in operation. Patterson v. Lilly, 90 N.C. 82 (1884).

Arrangement Between Distributees and Legatees Held a Partnership. — An arrangement between distributees and legatees to permit their property, with the consent and cooperation of the representatives of the deceased partners, to remain in common and to be used for their joint benefit, adopting the name of the old firm, constituted a partnership. Walker v. Miller, 139 N.C. 448, 52 S.E. 125 (1905).

Surviving partner of insolvent firm is not entitled to have personal property exemptions paid out of partnership assets. Southern Comm'n Co. v. Porter, 122 N.C. 692, 30 S.E. 119 (1898).

Representative of a deceased partner cannot be sued while there is a surviving partner. Burgwin v. Hostler (2nd Sec.), 1 N.C. 75 (1799).

Competency of Testimony of Surviving Partner. — In an action for goods sold to a firm, the testimony of one partner, who admitted his liability by failing to answer, that the goods were furnished by the plaintiff on the order of the firm, was not competent as against the executor of the deceased partner or against the firm. Charlotte Oil & Fertilizer Co. v. Rippy, 124 N.C. 643, 32 S.E. 980 (1899); Moore v. Palmer, 132 N.C. 969, 44 S.E. 673 (1903).

A surviving partner, who assigned partnership property of an insolvent firm to pay his own debts pro rata with those of the firm, could not be allowed to testify that he did not thereby intend to defraud the firm creditors. Southern Comm'n Co. v. Porter, 122 N.C. 692, 30 S.E. 119 (1898).

Cited in Bank v. Hodgin, 129 N.C. 247, 39 S.E. 959 (1901); Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-77. When personal representative may take inventory; receiver.

If the surviving partner should neglect or refuse to have such inventory made, the personal representative of the deceased partner may have the same made in accordance with the provisions of G.S. 59-76. Should any surviving partner fail to take such an inventory or refuse to allow the personal representative of the deceased partner's estate to do so, such personal representative of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for such partnership, who shall thereupon proceed to wind up the same and dispose of the assets thereof in accordance with law. (1901, c. 640, s. 2; Rev., s. 2541; C.S., s. 3280; 2000-140, s. 101(o); 2001-387, s. 116.)

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

CASE NOTES

Jurisdiction to Appoint Receiver. — While the clerk of the superior court has no jurisdiction to appoint a receiver for a partnership under this section, when the surviving partners have failed or refused to file the inventory required by G.S. 59-76, the superior court on appeal from an order of the clerk in the proceeding acquires jurisdiction to appoint such receiver. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Appointment of Receiver When Assignee of Surviving Partner Holds for Indefinite Term. — Where an assignment was made by a surviving partner of an insolvent firm, and the assignee was empowered to continue the business for an indefinite term, a receiver could be appointed to administer the partnership fund among the creditors, even though the deed of assignment was not set aside. Southern Comm'n Co. v. Porter, 122 N.C. 692, 30 S.E. 119 (1898).

Where the surviving partner of a firm was appointed receiver of the firm, he could not maintain an action against one who, as surety for the accommodation of the deceased partner, endorsed the latter's note, which was discounted by the firm, if it appeared that the assets of the partnership were sufficient to pay its debts and leave a surplus against the deceased partner's share, of which the note could be charged. Patton v. Carr, 117 N.C. 176, 23 S.E. 182 (1895).

Duty of Assignee to Charge Interest. — Where the surviving partner of a firm conveyed the assets to an assignee to settle the estate, it was the duty of the assignee, notwithstanding a contrary custom existing in the town where the business had been conducted, to charge and collect interest on all good overdue accounts from the end of a year after dissolution of the partnership, and he was liable to the surviving partner for his failure to do so. Weisel v. Cobb, 118 N.C. 11, 24 S.E. 782 (1896), rehearing denied, 122 N.C. 67, 30 S.E. 312 (1898).

Liability of Assignee for Interest. — The assignee of a surviving partner is chargeable with interest on partnership moneys kept by him after 12 months from the time he assumed the trust until he disbursed it. Weisel v. Cobb, 118 N.C. 11, 24 S.E. 782 (1896).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-78. Notice to creditors.

Every surviving partner, within 30 days after the death of the deceased partner, shall notify all persons having claims against the partnership which were in existence at the time of the death of the deceased partner, to exhibit the same to the surviving partner within six months from the date of first publication of such notice. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, but there is a newspaper having general circulation in the county, then at the option of the surviving partner the notice shall be published in the newspaper having general circulation in the county and posted at the courthouse or the notice shall be posted at the courthouse and four other public places in the county. (1901, c. 640, s. 3; Rev., s. 2542; C.S., s. 3281; 1951, c. 381, s. 2; 1973, c. 1410, ss. 1, 2.)

CASE NOTES

Where a dissolution of a firm occurs by the death of one of the partners, the giving of notice of such dissolution is not necessary to prevent liability from attaching to the estate of the deceased partner or of the surviving partners for any future contracts made in the name of the firm. Bank v. Hollingsworth, 135 N.C. 556, 47 S.E. 618 (1904).

§ 59-79. Debts paid pro rata; liens.

All debts and demands against a copartnership, where one partner has died, shall be paid pro rata, except debts which are a specific lien on property belonging to the partnership. (1901, c. 640, s. 4; Rev., s. 2543; C.S., s. 3282.)

CASE NOTES

Debts Created by Surviving Partner. — While a surviving partner cannot enter into contracts or create liabilities which will bind the estate of his deceased partner, yet he is not bound to sacrifice the interests of the firm, and if he contracts debts, bona fide, for the interest of the common property, he may pay them out of the common fund. Calvert v. Miller, 94 N.C. 600 (1886).

Payment of Creditors Advancing Funds to Market Product. — Where a surviving partner has purchased materials and contracted new debts to complete unfinished products and placed the finished article on the market, the creditors advancing the necessary funds are entitled to payment out of the assets of the partnership. Howell, Orr & Co. v. Boyd Mfg. Co., 116 N.C. 806, 22 S.E. 5 (1895).

Prior Encumbrance of Surviving Partner. — The claims of a surviving partner upon the proceeds of sale of the deceased partner's half of the real estate, a mill property, to reimburse him to the amount of half the expenditures incurred in the conduct of the joint business and improvements put upon the property, constituted a prior encumbrance and had to be paid, to the postponement of creditors of the deceased partner. Mendenhall v. Benbow, 84 N.C. 646 (1881).

Suit Against Accommodation Endorser by Note. — A note executed by a member of a partnership to a third party who, as surety for the accommodation of the maker, endorsed it and received no benefit from it, could not be subject of an action at law against the endorser by the firm, nor in case of the death of the maker of the note could the surviving partner maintain an action on the note against the accommodation endorsers unless the firm was insolvent. Patton v. Carr, 117 N.C. 176, 23 S.E. 182 (1895).

Assignment Held Fraudulent as to Creditors. — Where, in an assignment by a surviving partner of an insolvent firm for an indefinite term, assignee had the right to employ servants, to replenish stock, and to pay out of the proceeds the firm debts as well as the individual debts of the survivor pro rata, assignment was fraudulent as against creditors. Southern Comm'n Co. v. Porter, 122 N.C. 692, 30 S.E. 119 (1898).

Bank Not Entitled to Apply Survivor's Deposit to Debts of Firm. — When a bank knew that the plaintiff was the only surviving partner of a firm, and that he was making deposits as such, it had no right to apply them to the payment of a debt created by the partnership before its dissolution, without the consent of the depositor. Hodgin v. People's Nat'l Bank, 125 N.C. 503, 34 S.E. 709 (1899).

Personal Debt as Set-Off. — In an action brought by a surviving partner for a debt, a debt due from him may be pleaded as a set-off. Hogg's Ex'rs v. Ashe, 2 N.C. 471 (1797).

Defendant could not avail herself of a debt due to her by a deceased member of the firm, even though the contract between the latter and the defendant was that the debt, being for the board of his partner, was to be paid out of the assets of the store in which the plaintiff and the defendant were partners. Norment v. Johnston, 32 N.C. 89 (1849).

§ 59-80. Effect of failure to present claim in six months.

In an action brought on a claim which was not presented within six months from the first publication of the general notice to creditors, the surviving partner shall not be chargeable for any assets that he may have paid in satisfaction of any debts before such action was commenced, nor shall any costs be recovered in such action against the surviving partner. (1901, c. 640, s. 5; Rev., s. 2544; C.S., s. 3283; 1973, c. 1410, s. 3.)

§ 59-81. Procedure for purchase by surviving partner.

(a) Appraisal of Property. — The surviving partner may, if he so desire, make application to the clerk of the superior court of the county in which the partnership existed, after first giving notice to the executor or administrator of the time of the hearing of such application, for the appointment of three judicious, disinterested appraisers, one of whom may be named by the surviving partner, one by the representative of the deceased partner's estate, and the third named by the two appraisers selected, whose duty it shall be to make out under oath a full and complete inventory and appraisement of the entire assets of the partnership, including real estate if there be any, together with a schedule of the debts and liabilities thereof, and to deliver the same to the surviving partner; they shall also deliver a copy to the executor or administrator, and file a copy with the clerk of the court.

(b) Surviving Partner May Purchase. — The surviving partner may, with the consent of the executor or administrator of the deceased partner and the approval of the clerk of the superior court by whom such executor or administrator was appointed, purchase the interest of such deceased partner in the partnership assets at the appraised value thereof, including the good will of the business, first deducting therefrom the debts and liabilities of the partnership, for cash or upon giving to the executor or administrator his promissory note or notes, with good approved security, and satisfactory to the executor or administrator, for the payment of the interest of such deceased partner in the partnership assets.

(c) Surviving Partner to Give Bond. — In case the surviving partner shall avail himself of the privilege of purchasing such interest as provided for in this section, he shall give bond to the executor or administrator with surety for the payment of the debts and liabilities of the partnership, and for the performance of all contracts for which the partnership is liable.

(d) Sale of Real Estate. — In case of such sale of the real estate belonging to the partnership, the title to the real estate so purchased shall not pass until the sale thereof has been reported to and confirmed by the clerk of the superior court of the county in which the partnership was located, in a special proceeding to which the widow and heirs at law or devisees of the deceased partner are duly made parties. (1901, c. 640, s. 6; Rev., s. 2545; 1911, c. 12; C.S., s. 3284.)

CASE NOTES

Cited in Lewis v. Boling, 42 N.C. App. 597, 257 S.E.2d 486 (1979).

§ 59-82. Surviving partner to account and settle.

In case the surviving partner shall not avail himself of the privilege of purchasing the interest of the deceased partner, he shall, within six months from the date of the first publication of notice to creditors, file with the clerk of the superior court of the county where the partnership was located, an account, under oath, stating his action as surviving partner, and shall come to a settlement with the executor or administrator of the deceased partner: Provided, that the clerk of the superior court shall have power, upon good cause shown, to extend the time within which said final settlement shall be made. The surviving partner for his services in settling the partnership estate shall receive commissions to be allowed by the court. (1901, c. 640, s. 7; Rev., s. 2546; C.S., s. 3285; 1947, c. 781; 1957, c. 783, s. 6; 1973, c. 1410, s. 4.)

CASE NOTES

Division of Partnership Property. — There can be no division of partnership property until all the accounts have been taken and the clear interest of each partner ascertained. Baird v. Baird, 21 N.C. 524 (1837); Mendenhall v. Benbow, 84 N.C. 646 (1881).

Presumption of Equal Interest. — In the absence of evidence to the contrary, each partner is presumed to be equally interested in the joint business. State ex rel. Worthy v. Brower, 93 N.C. 344 (1885).

If an agreement for a common or special partnership appears to have existed between parties for the purchase of property, with intent to sell the same for the profit of the parties, and no express agreement be proved adjusting the division or share of the profits, the law extends the concern to all the goods purchased by either of the parties; the parties are entitled to share the profits, without regard to the payments or advances made by either for the purpose of effecting the purchase, if there can be no contract as to the amount of the advances to be made by them respectively. Taylor v. Taylor & Justice, 6 N.C. 70 (1811).

Note Arising Out of Partnership Business. — In stating an account between an executor and the surviving partner of the testator, it is not error to charge the surviving partner with the value of a note due the testator of the plaintiff individually, if such note arose from or grew out of the business of the partnership business. Royster v. Johnson, 73 N.C. 474 (1875).

Surviving Partner to Make Settlement with Personal Representative of Deceased Partner. — The deceased partner's interest being personal property, this section requires the surviving partner to make settlement with the personal representative of the deceased partner; furthermore, there is placed upon the personal representative of the deceased partner the duty to require that a true accounting be made either by the surviving partner or by a receiver under court supervision. Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

Right of Personal Representative to Sue for Accounting. — The right to sue for an accounting of the partnership assets and affairs upon the death of one of the partners vests exclusively in the personal representative of the deceased partner. Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

Compensation of Surviving Partner. — Within the limitation of this section, a surviving partner is entitled to reasonable compensation for his services in settling up the partnership business. Royster v. Johnson, 73 N.C. 474 (1875).

For case upholding two and one-half percent commissions on receipts and disbursements, see Weisel v. Cobb, 118 N.C. 11, 24 S.E. 782 (1896), rehearing dismissed, 122 N.C. 67, 30 S.E. 312 (1898).

Liability of Surviving Partner for Loss. — Where the surviving partner has acted in good faith in a fiduciary character he is not chargeable with loss. Thompson v. Rogers, 69 N.C. 357 (1873).

Cited in Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

§ 59-83. Accounting compelled.

In case any surviving partner fails to come to a settlement with the executor or administrator of the deceased partner within the time prescribed by law, the clerk of the superior court may, at the instance of such executor, administrator or other person interested in such deceased partnership estate, cite the surviving partners to a final settlement as provided for by law in the case of executors and administrators. (1901, c. 640, s. 8; Rev., s. 2547; C.S., s. 3286.)

§ 59-84. Settlement otherwise provided for.

When the original articles of partnership in force at the death of any partner or the will of a deceased partner make provision for the settlement of the deceased partner's interest in the partnership, and for a disposition thereof different from that provided for in this Chapter, the interest of such deceased partner in the partnership shall be settled and disposed of in accordance with the provisions of such articles of partnership or of such will. (1901, c. 640, s. 6; Rev., s. 2545; C.S., s. 3287.)

CASE NOTES

Applied in Langdon v. Hurdle, 15 N.C. App. 158, 189 S.E.2d 517 (1972).

Cited in Cole v. Graves, 101 N.C. App. 396, 399 S.E.2d 136 (1991).

Article 3A.

Miscellaneous Provisions.

§ 59-84.1. Partnership to comply with "assumed name" statute; income taxation.

(a) Every partnership other than a limited partnership shall comply with, and be subject to, the provisions of Articles 14 and 15 of Chapter 66 of the General Statutes in all cases in which the same are applicable.

(b) A partnership, including a registered limited liability partnership and a foreign limited liability partnership, and a partner of one of these partnerships are subject to taxation under Article 4 of Chapter 105 of the General Statutes in accordance with their classification for federal income tax purposes. Accordingly, if any such partnership is classified for federal income tax purposes as a C corporation as defined in G.S. 105-131(b)(2) or an S corporation as defined in G.S. 105-131(b)(8), the partnership and its partners are subject to tax under Article 4 of Chapter 105 of the General Statutes to the same extent as a C corporation or an S corporation, as the case may be, and its shareholders. If any such partnership is classified for federal income tax purposes as a partnership, the partnership and its partners are subject to tax under Article 4 of Chapter 105 of the General Statutes accordingly. If any such partnership is classified for federal income tax purposes as other than a corporation or a partnership, the partnership and its partners are subject to tax under Article 4 of Chapter 105 of the General Statutes in a manner consistent with that classification. This section does not require a partnership, including any registered limited liability partnership or foreign limited liability partnership authorized to transact business in this State, to obtain an administrative ruling from the Internal Revenue Service on its classification under the Internal Revenue Code. (1951, c. 381, s. 9; 1993, c. 354, s. 5; 2001-387, s. 117.)

Editor's Note. — Session Laws 1999-362, s. 6, effective January 1, 2000, and applicable to registered limited liability partnerships existing on or after that date, added an Article 3B to Chapter 59 of the General Statutes. The first two sections of Article 3B are G.S. 59-84.2 and 59-84.3, which were previously enacted as part of this Article.

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

ARTICLE 3B.

Registered Limited Liability Partnerships.

§ 59-84.2. Registered limited liability partnerships.

(a) A partnership whose internal affairs are governed by the laws of this State, other than a limited partnership, may become a registered limited liability partnership by filing with the Secretary of State an application stating all of the following:

(1) The name of the partnership.
(2) The street address, and the mailing address if different from the street address, of its principal office and the county in which the principal office is located.
(3) The name and street address, and the mailing address if different from the street address, of the partnership's registered agent and registered office for service of process.
(4) The county in this State in which the registered office is located.
(5), (6) Repealed by Session Laws 2001-387, s. 156(b), effective January 1, 2002.
(7) The fiscal year end of the partnership.

(a1) The terms and conditions on which a partnership becomes a limited liability partnership must be approved in the manner provided in the partnership agreement; provided, however, if the partnership agreement does not contain any such provision, the terms and conditions shall be approved (i) in the case of a partnership having a partnership agreement that expressly considers obligations to contribute to the partnership, in the manner necessary to amend those provisions, or (ii) in any other case, in the manner necessary to amend the partnership agreement.

(b) through (f) Repealed by Session Laws 2001-387, s. 156(b), effective January 1, 2002.

(f1) A partnership becomes a registered limited liability partnership when its application for registration becomes effective.

(g) The status of a registered limited liability partnership and the liability of its partners is not affected by errors or later changes in the information required to be contained in the application for registration.

(h) A partnership shall promptly amend its registration to reflect any change in the information contained in its application for registration, other than changes that are properly included in other documents filed with the Secretary of State. A registration is amended by filing a certificate of amendment with the Secretary of State. The certificate of amendment shall set forth:

(1) The name of the partnership as reflected on the application for registration.
(2) The date of filing of the application for registration.
(3) The amendment to the application for registration.

(i) Each registered limited liability partnership must maintain a registered office and registered agent as required by Article 4 of Chapter 55D of the

General Statutes and is subject to service on the Secretary of State under that Article.

(j) A partnership may cancel its registration by filing a certificate of cancellation with the Secretary of State. The certificate of cancellation shall set forth:

(1) The name of the partnership as reflected on the application for registration;
(2) The date of filing of the application for registration;
(3) A mailing address to which the Secretary of State may mail a copy of any process served on the Secretary of State under this subsection;
(4) A commitment to file with the Secretary of State a statement of any subsequent change in its mailing address; and
(5) The effective date and time of cancellation if it is not to be effective at the time of filing the certificate.

Cancellation of registration terminates the authority of the partnership's registered agent to accept service of process, notice, or demand, and appoints the Secretary of State as agent to accept service on behalf of the partnership with respect to any action or proceeding based upon any cause of action arising in this State, or arising out of business transacted in this State, during the time the partnership was registered as a registered limited liability partnership. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process, notice, or demand and the fee required by G.S. 59-35.2. Upon receipt of process, notice, or demand in the manner provided in this section, the Secretary of State shall immediately mail a copy of the process, notice, or demand by registered or certified mail, return receipt requested, to the partnership at the mailing address designated pursuant to this subsection.

(k) If a registered limited liability partnership is dissolved but its business is continued by some of its partners with or without others in a new partnership under the same name, then (i) the new partnership shall automatically succeed to the registration of the dissolved original partnership as a registered limited liability partnership and (ii) the dissolved original partnership shall be deemed to be registered as a registered limited liability partnership until the winding up of its affairs is completed. (1993, c. 354, s. 5; 1999-362, ss. 6, 7; 2000-140, ss. 53, 101(p); 2001-358, s. 51(a); 2001-387, ss. 118, 156, 173, 175(a); 2001-413, s. 6; 2002-58, s. 5.)

Editor's Note. — Session Laws 1999-362, s. 6, effective January 1, 2000, and applicable to registered limited liability partnerships existing on or after that date, added the Article 3B heading. The first two sections of Article 3B are G.S. 59-84.2 and 59-84.3, which had been part of Article 3A.

Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 118 had amended this section. However, s. 156(a) of c. 387 repealed s. 118, contingent upon the enactment of Session Laws 2001-358. Session Laws 2001-358 was enacted August 10, 2001.

Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Legal Periodicals. — For comment, "How the Uniform Partnership Act Determines Ultimate Liability for a Claim Against a General Partnership and Provides for the Settling of

Accounts Between Partners," see 17 Campbell L. Rev. 333 (1995).

For comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina," see 18 Campbell L. Rev. 121 (1996).

§ 59-84.3. Name of registered limited liability partnerships.

A registered limited liability partnership's name must meet the requirements of G.S. 55D-20 and G.S. 55D-21. (1993, c. 354, s. 5; 1999-362, ss. 6, 8; 2001-358, s. 39; 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 1999-362, s. 6, effective January 1, 2000, and applicable to registered limited partnerships existing on or after that date, added an Article 3B to Chapter 59 of the General Statutes and included this section, which was previously enacted, as part of this Article.

Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

This section, as amended by Session Laws 2001-358, s. 39, effective January 1, 2002, is applicable to documents submitted for filing on or after that date.

§ 59-84.4. Annual report for Secretary of State.

(a) Each registered limited liability partnership and each foreign limited liability partnership authorized to transact business in this State shall deliver to the Secretary of State for filing an annual report, in a form prescribed by the Secretary of State, that sets forth all of the following:

(1) The name of the registered limited liability partnership or foreign limited liability partnership and the state or country under whose law it is formed.

(2) The street address, and the mailing address if different from the street address, of the registered office, the county in which the registered office is located, and the name of its registered agent at that office in this State, and a statement of any change of the registered office or registered agent, or both.

(3) The street address and telephone number of its principal office.

(4) A brief description of the nature of its business.

(5) The fiscal year end of the partnership.

If the information contained in the most recently filed annual report has not changed, a certification to that effect may be made instead of setting forth the information required by subdivisions (2) through (4) of this subsection. The Secretary of State shall make available the form required to file an annual report.

(b) Information in the annual report must be current as of the date the annual report is executed on behalf of the registered limited liability partnership or the foreign limited liability partnership.

(c) The annual report shall be delivered to the Secretary of State by the fifteenth day of the fourth month following the close of the registered or foreign limited liability partnership's fiscal year.

(d) If an annual report does not contain the information required by this section, the Secretary of State shall promptly notify the reporting registered or foreign limited liability partnership in writing and return the report to it for correction. If the report is corrected to contain the information required by this section and delivered to the Secretary of State within 30 days after the effective date of notice, it is deemed to be timely filed.

(e) Amendments to any previously filed annual report may be filed with the Secretary of State at any time for the purpose of correcting, updating, or augmenting the information contained in the annual report.

(f) The Secretary of State may revoke the registration of a registered limited liability partnership or foreign limited liability partnership if the Secretary of State determines that:

(1) The registered limited liability partnership or foreign limited liability partnership has not paid, within 60 days after they are due, any penalties, fees, or other payments due under this Chapter;

(2) The registered limited liability partnership or foreign limited liability partnership does not deliver its annual report to the Secretary of State on or before the date it is due;

(3) The registered limited liability partnership or foreign limited liability partnership has been without a registered agent or registered office in this State for 60 days or more; or

(4) The registered limited liability partnership or foreign limited liability partnership does not notify the Secretary of State within 60 days of the change, resignation, or discontinuance that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued.

(g) If the Secretary of State determines that one or more grounds exist under subsection (f) of this section for revoking the registration of the registered limited liability partnership or foreign limited liability partnership, the Secretary of State shall mail the registered limited liability partnership or foreign limited liability partnership written notice of that determination. If, within 60 days after the notice is mailed, the registered limited liability partnership or foreign limited liability partnership does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground does not exist, the Secretary of State shall revoke the registration of a registered limited liability partnership or foreign limited liability partnership by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date. The Secretary of State shall file the original certificate of revocation and mail a copy to the registered limited liability partnership or foreign limited liability partnership.

(h) A registered limited liability partnership or foreign limited liability partnership whose registration is revoked under this section may apply to the Secretary of State for reinstatement. If, at the time the registered limited liability partnership applies for reinstatement, the name of the registered limited liability partnership is not distinguishable from the name of another entity authorized to be used under G.S. 55D-21, then the registered limited liability partnership must change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the other entity before the Secretary of State may prepare a certificate of reinstatement. The procedures for reinstatement and for the appeal of any denial of the registered limited liability partnership or foreign limited liability partnership's application for reinstatement shall be the same procedures applicable to business corporations under G.S. 55-14-22, 55-14-23, and 55-14-24. The effect of reinstatement of a limited liability partnership shall be the same as for a corporation under G.S. 55-14-22. (1999-362, s. 9; 2001-387, s. 119; 2001-390, s. 13.)

ARTICLE 4.

Business Under Assumed Name Regulated.

§§ 59-85 through 59-88: Transferred to §§ 66-68 to 66-71 by Session Laws 1951, c. 381, s. 7.

§ 59-89: Transferred to § 66-72 by Session Laws 1951, c. 381, s. 8.

ARTICLE 4A.

Foreign Limited Liability Partnerships.

§ 59-90. Law governing foreign limited liability partnership.

(a) The law of the state or jurisdiction under which a foreign limited liability partnership is formed governs relations among the partners and between the partners and the partnership and the liability of partners for obligations of the partnership.

(b) A foreign limited liability partnership may not be denied a statement of foreign registration by reason of any difference between the law under which the partnership was formed and the law of this State.

(c) A statement of foreign registration does not authorize a foreign limited liability partnership to engage in any business or exercise any power that a partnership may not engage in or exercise in this State as a registered limited liability partnership. (1999-362, s. 10.)

§ 59-91. Statement of foreign registration.

(a) Before transacting business in this State, a foreign limited liability partnership must file an application for registration as a foreign limited liability partnership. The application must contain:

(1) The name of the foreign limited liability partnership that satisfies the requirements of the state or other jurisdiction under whose law it is formed and meets the requirements of Article 3 of Chapter 55D of the General Statutes.

(2) The street address, and the mailing address if different from the street address, of the partnership's principal office, and the county in which the principal office is located.

(3) The name and street address, and the mailing address if different from the street address, for the partnership's registered agent and registered office for service of process, and the county in which the registered office is located.

(4), (5) Repealed by Session Laws 2001-387, s. 157(b), effective January 1, 2002.

(6) The fiscal year end of the partnership.

The foreign limited liability partnership shall deliver with the completed application a certificate of existence, or a document with similar import, duly authenticated by the Secretary of State or other official having custody of the records of registered limited liability partnerships in the state or country under whose law it is registered.

(b) Each foreign limited liability partnership maintaining a statement of foreign registration in this State must maintain a registered office and registered agent as required by Article 4 of Chapter 55D of the General Statutes and is subject to service on the Secretary of State under that Article.

(c) through (g) Repealed by Session Laws 2001-387, s. 157(b), effective January 1, 2002.

(h) A foreign limited liability partnership authorized to transact business in this State shall be subject to the provisions of G.S. 59-84.4 regarding annual reports and revocation of registration.

(i) A foreign limited liability partnership becomes registered as a foreign limited liability partnership when its application for registration becomes effective.

(j) A foreign limited liability partnership shall promptly amend its registration to reflect any change in the information contained in its application for registration, other than changes that are properly included in other documents filed with the Secretary of State. A registration is amended by filing a certificate of amendment with the Secretary of State. The certificate of amendment shall set forth:

(1) The name of the foreign limited liability partnership under which it is registered in this State;
(2) The date of filing of the application for registration; and
(3) The amendment to the application for registration.

(k) A foreign limited liability partnership may cancel its registration by filing a certificate of cancellation with the Secretary of State. The certificate of cancellation shall set forth:

(1) The name of the foreign limited liability partnership under which it is registered in this State;
(2) The date of filing of the application for registration;
(3) A mailing address to which the Secretary of State may mail a copy of any process served on the Secretary of State under this subsection;
(4) A commitment to file with the Secretary of State a statement of any subsequent change in its mailing address; and
(5) The effective date and time of cancellation if it is not to be effective at the time of filing the certificate.

Cancellation of registration terminates the authority of the foreign limited liability partnership's registered agent to accept service of process, notice, or demand and appoints the Secretary of State as agent to accept such service on behalf of the foreign limited liability partnership with respect to any action or proceeding based upon any cause of action arising in this State, or arising out of business transacted in this State, during the time the foreign limited liability partnership was registered in this State. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process, notice, or demand and the fee required by G.S. 59-35.2. Upon receipt of process, notice, or demand in the manner herein provided, the Secretary of State shall immediately mail a copy of the process, notice, or demand by registered or certified mail, return receipt requested, to the foreign limited liability partnership at the mailing address designated pursuant to this subsection.

(*l*) Whenever a foreign limited liability partnership authorized to transact business in this State ceases its separate existence as a result of a statutory merger or consolidation permitted by the laws of the state or country under which it was organized, or converts into another type of entity as permitted by those laws, the surviving or resulting entity shall apply for a certificate of withdrawal for the foreign limited liability partnership by delivering to the Secretary of State for filing a copy of the articles of merger, consolidation, or conversion or a certificate reciting the facts of the merger, consolidation, or conversion, duly authenticated by the Secretary of State or other official having custody of limited liability partnership records in the state or country under the laws of which the foreign limited liability partnership was organized. If the surviving or resulting entity is not authorized to transact business or conduct affairs in this State, the articles or certificate must be accompanied by an application which must set forth:

(1) The name of the foreign liability limited partnership [sic] authorized to transact business in this State, the type of entity and name of the surviving or resulting entity, and a statement that the surviving or resulting entity is not authorized to transact business or conduct affairs in this State;

(2) A statement that the surviving or resulting entity consents that service of process based on any cause of action arising in this State, or arising out of business transacted in this State, during the time the foreign limited liability partnership was authorized to transact business in this State, may thereafter be made by service thereof on the Secretary of State;

(3) A mailing address to which the Secretary of State may mail a copy of any process served upon the Secretary under subdivision (2) of this subsection; and

(4) A commitment to file with the Secretary of State a statement of any subsequent change in its mailing address.

(m) If the Secretary of State finds that the articles or certificate and the application for withdrawal, if required, conform to law, the Secretary of State shall:

(1) Endorse on the articles or certificate and the application for withdrawal, if required, the word "filed" and the hour, day, month, and year of filing thereof;

(2) File the articles or certificate and the application, if required;

(3) Issue a certificate of withdrawal; and

(4) Send to the surviving or resulting entity or its representative the certificate of withdrawal, together with a copy of the application, if required, affixed thereto.

(n) After the withdrawal of the foreign limited liability partnership is effective, service of process on the Secretary of State in accordance with subsection (l) of this section shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process and the fee required by G.S. 59-35.2. Upon receipt of process in the manner herein provided, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving or resulting entity at the mailing address designated pursuant to subsection (l) of this section. (1999-362, s. 10; 2000-140, s. 54; 2001-358, ss. 40, 51(b); 2001-387, ss. 120, 157, 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Session Laws 2001-387, s. 120, had amended this section. However, s. 157(a) of c. 387 repealed s. 120, contingent upon the enactment of Session Laws 2001-358. Session Laws 2001-358 was enacted on August 10, 2001.

Subdivision (a)(1) and subsection (b), as amended by Session Laws 2001-358, ss. 40 and 51(b), effective January 1, 2002, are applicable to documents submitted for filing on or after that date.

§ 59-92. Effect of failure to register.

(a) A foreign limited liability partnership transacting business in this State may not maintain an action or proceeding in this State unless it has in effect a registration as a foreign limited liability partnership.

(b) The failure of a foreign limited liability partnership to have in effect a registration as a foreign limited liability partnership does not impair the validity of a contract or act of the foreign limited liability partnership or preclude it from defending an action or proceeding in this State.

(c) A limitation on personal liability of a partner is not waived solely by transacting business in this State without a registration as a foreign limited liability partnership.

(d) A foreign limited liability partnership failing to register as a foreign limited liability partnership as required by this Article shall be liable to the State for the years or parts thereof during which it transacted business in this State without having registered in an amount equal to all fees and taxes which would have been imposed by law upon the foreign limited liability partnership had it duly applied for and received such permission, plus interest and all penalties imposed by law for failure to pay such fees and taxes. In addition, the foreign limited liability partnership shall be liable for a civil penalty of ten dollars ($10.00) for each day, but not to exceed a total of one thousand dollars ($1,000) for each year or part thereof, it transacts business in this State without having registered. The Attorney General may bring actions to recover all amounts due the State under the provisions of this subsection. (1999-362, s. 10.)

§ 59-93. Activities not constituting transacting business.

(a) Without excluding other activities that may not constitute transacting business in this State, a foreign limited liability partnership shall not be considered to be transacting business in this State for the purposes of this Article by reason of carrying on in this State any one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its partners or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of the partnership's own securities, or appointing and maintaining trustees or depositories with relation to those securities;

(5) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where the orders require acceptance without this State before becoming binding contracts;

(6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State, the conducting of foreclosure proceedings and sales, the acquiring of property at foreclosure sale, and the management and rental of such property for a reasonable time while liquidating its

investment, provided no office or agency therefor is maintained in this State;

(7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same;

(8) Transacting business in interstate commerce;

(9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature;

(10) Selling through independent contractors; and

(11) Owning, without more, real or personal property.

(b) This section does not apply in determining the contacts or activities that may subject a foreign limited liability partnership to service of process, taxation, or regulation under any other law of this State. (1999-362, s. 10.)

§ 59-94. Action by Attorney General.

The Attorney General may maintain an action to restrain a foreign limited liability partnership from transacting business in this State in violation of this Article. (1999-362, s. 10.)

§§ 59-95 through 59-100: Reserved for future codification purposes.

ARTICLE 5.

Revised Uniform Limited Partnership Act.

Part 1. General Provisions.

§ 59-101. Short title.

This Article may be cited as the Revised Uniform Limited Partnership Act. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. G.S. 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

Failure to Show Demand Futility. — Investors' Fed. R. Civ. P. 23.1 derivative action against general partners, who filed for a voluntary Chapter 7 bankruptcy case, was dismissed without prejudice because the investors did not make a demand on the limited partnerships or the partners before filing their action pursuant to the Revised Uniform Limited Partnership Act, G.S. 59-101 et seq. and 6 Del. C. § 17-1001, and they did not demonstrate futility of demand due to their failure to exhaust their intracorporate remedies; the investors failed to exhaust their intracorporate remedies because they did not allege that they attempted to comply with the partnership agreements by appointing a new general partner or a liquidator following the bankruptcy, make a demand on those persons, or explain why compliance with the demand requirement was impractical. Ray v. Anderson (In re Piedmont Venture Mgmt.), — Bankr. —, 2006 Bankr. LEXIS 4017 (Bankr. W.D.N.C. May 19, 2006).

When Partner May Maintain Action Against Copartner. — As a general rule, one partner cannot sue another partner at law until there has been a complete settlement of the partnership affairs and a balance struck. However, a partner may maintain an action at law against his copartner upon claims growing out of the following state of facts: (1) where the partnership is terminated, all debts paid, and the partnership affairs otherwise adjusted with nothing remaining to be done but to pay over the amounts due by one to the other, such amount involving no complicated reckoning; (2) where the partnership is for a single venture or special purpose which has been accomplished, and nothing remains to be done except to pay over the claimant's share; (3) when the joint property has been wrongfully destroyed or converted. Roper v. Thomas, 60 N.C. App. 64, 298 S.E.2d 424 (1982), cert. denied, 308 N.C. 191, 302 S.E.2d 244 (1983), decided under former Article 1 of this Chapter.

§ 59-102. Definitions.

As used in this Article, unless the context otherwise requires:

(1) "Business" means any lawful trade, investment, or other purpose or activity, whether or not the trade, investment, purpose, or activity is carried on for profit.

(1a) "Business entity" means a domestic corporation (including a professional corporation as defined in G.S. 55B-2), a foreign corporation (including a foreign professional corporation as defined in G.S. 55B-16), a domestic or foreign nonprofit corporation, a domestic or foreign limited liability company, a domestic limited partnership, a foreign limited partnership, a registered limited liability partnership, a foreign limited liability partnership, or any other partnership as defined in G.S. 59-36 whether or not formed under the laws of this State.

(1b) "Certificate of limited partnership" means the certificate referred to in G.S. 59-201, and the certificate as amended.

(2) "Conformed copy" shall include a photostatic or other photographic copy of the original document.

(3) "Contribution" means any cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services, which a partner contributes to a limited partnership in his capacity as a partner.

(3a) "Domestic corporation" has the same meaning as in G.S. 55-1-40.

(3b) "Domestic limited liability company" has the same meaning as in G.S. 57C-1-03.

(3c) "Domestic nonprofit corporation" means a corporation as defined in G.S. 55A-1-40.

(4) "Event of withdrawal of a general partner" means an event that causes a person to cease to be a general partner as provided in G.S. 59-402.

(4a) "Foreign corporation" has the same meaning as in G.S. 55-1-40.

(4b) "Foreign limited liability company" has the same meaning as in G.S. 57C-1-03.

(4c) "Foreign limited liability limited partnership" means a foreign limited partnership whose general partners have limited liability for the obligations of the foreign limited partnership under a provision similar to the provisions of G.S. 59-403(b) pertaining to general partners in limited liability limited partnerships.

(5) "Foreign limited partnership" means a partnership formed under the laws of any state, province, country, or other jurisdiction other than this State and having as partners one or more general partners and one or more limited partners, and includes, for all purposes of the laws of the State of North Carolina, a limited liability limited partnership.

(5a) "Foreign nonprofit corporation" means a foreign corporation as defined in G.S. 55A-1-40.

(6) "General partner" means a person who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement and named in the certificate of limited partnership as a general partner.

(6a) "Limited liability limited partnership" and "registered limited liability limited partnership" mean a limited partnership that is registered under and complies with G.S. 59-210.

(7) "Limited partner" means a person who has been admitted to a limited partnership as a limited partner in accordance with the partnership agreement.

(8) "Limited partnership" and "domestic limited partnership" mean a partnership formed by two or more persons under the laws of this State and having one or more general partners and one or more limited partners, and includes, for all purposes of the laws of the State of North Carolina, a limited liability limited partnership.

(9) "Partner" means a limited or general partner.

(10) "Partnership agreement" means any valid agreement of the partners as to the affairs of a limited partnership, the conduct of its business, and the responsibilities and rights of its partners. The term "partnership agreement" includes any written or oral agreement, whether or not the agreement is set forth in a document referred to by the partners as a "partnership agreement", and includes any amendment agreed upon by the partners unanimously or in accordance with the terms of the agreement. The term also includes any agreement of the partners to waive or revise the terms of the partnership agreement in one or more specific instances and not necessarily on an ongoing or permanent basis.

(11) "Partnership interest" means a partner's share of the allocations of income, gain, loss, deduction or credit of a limited partnership and the right to receive distributions of cash or other partnership assets.

(12) "Person" means a natural person, domestic or foreign partnership, domestic or foreign limited partnership, domestic or foreign limited liability company, trust, estate, unincorporated association, domestic or foreign corporation, domestic or foreign nonprofit corporation, or another entity.

(12a) "Principal office" means the office (in or out of this State) where the principal executive offices of a limited liability limited partnership or foreign limited partnership are located, in the case of a limited liability limited partnership as designated in its most recent annual report filed with the Secretary of State or, if no annual report has yet been filed, in its application for registration as a limited liability limited partnership, or in the case of a foreign limited partnership as most recently designated in its application for registration as a foreign limited partnership or a certificate filed pursuant to G.S. 59-905.

(13) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 11; 1999-369, s. 4.2; 2001-387, s. 121; 2001-487, ss. 62(w), (x).)

Editor's Note. — Session Laws 1999-362, s. 11 redesignated former subdivision (1) as (1a). Subsequently, Session Laws 1999-369, s. 4.2 added another subdivision (1a). The original subdivision (1) has been redesignated as (1b) to preserve alphabetical order at the direction of the Revisor of Statutes.

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Legal Periodicals. — For "Legislative Survey: Business & Banking," see 22 Campbell L. Rev. 253 (2000).

§ 59-103. Name.

The name of the limited partnership must meet any requirements of Article 3 of Chapter 55D of the General Statutes. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 1; 1995, c. 539, s. 34; 2001-358, s. 32; 2001-387, ss. 122, 155, 172, 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 122 had amended this section. However, s. 155 of c. 387 repealed s. 122, contingent upon the enactment of Session Laws 2001-358. Session Laws 2001-358 was enacted on August 10, 2001.

Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

This section, as rewritten by Session Laws 2001-358, s. 32, effective January 1, 2002, is applicable to documents submitted for filing on or after that date.

OPINIONS OF ATTORNEY GENERAL

Domestic limited partnerships may not operate under assumed names in North Carolina. See opinion of Attorney General to Mr. Clyde Smith, Deputy Secretary of State, — N.C.A.G. — (June 25, 1987).

§ 59-104: Repealed by Session Laws 2001-358, s. 33, effective January 1, 2002.

§ 59-105. Registered office and registered agent.

(a) Each limited partnership must maintain a registered office and registered agent as required by Article 4 of Chapter 55D of the General Statutes and is subject to service on the Secretary of State under that Article.

(b) Limited partnerships formed prior to October 1, 1986, shall file a certificate of limited partnership with the Office of the Secretary of State pursuant to G.S. 59-201(a) designating the address of the registered office of the limited partnership and the identity of the registered agent at such address.

(b1) through (e) Repealed by Session Laws 2001-358, s. 50(a), effective January 1, 2002. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 2; 1989, c. 209; 2000-140, s. 101(q); 2001-358, s. 50(a); 2001-387, ss. 123, 155, 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 123 had amended this section. However, s. 155 of c. 387 repealed s. 123, contingent upon the enactment of Session Laws 2001-358. Session Laws 2001-358 was enacted on August 10, 2001.

This section, as rewritten by Session Laws 2001-358, s. 50(a), effective January 1, 2002, is applicable to documents submitted for filing on or after that date.

§ 59-106. Records to be kept.

(a) Each limited partnership shall keep in this State at an office in this State:

(1) A current list of the full name and last known mailing address of each partner set forth in alphabetical order;

(2) A copy of the certificate of limited partnership and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed;

(3) Copies of the limited partnership's federal, State and local income tax returns and reports, if any, for the three most recent years;

(4) Copies of any then effective written partnership agreements and copies of any financial statements of the limited partnership for the three most recent years; and

(5) A written record that contains:

a. The amount of cash and a description and statement of the agreed value of the other property or services contracted by each partner and which each partner has agreed to contribute;

b. The times at which or events on the happening of which any additional contributions agreed to be made by each partner are to be made;

c. Any right of a partner to receive distribution of property, including cash from the limited partnership; and

d. Events upon the happening of which the limited partnership is to be dissolved and its affairs wound up.

The written record required pursuant to this subdivision may be part of a written partnership agreement or may be contained in one or more other documents or records.

(b) The books and records are subject to inspection and copying at the reasonable request, and at the expense, of any partner during ordinary business hours. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987 (Reg. Sess., 1988), c. 1031, s. 2; 1997-456, s. 27; 1999-362, s. 12.)

§ 59-107. Nature of business.

A limited partnership may be formed for and carry on any lawful business. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 13.)

§ 59-108. Business transactions of partner with the partnership.

Except as provided in the partnership agreement, a partner may lend money to and transact other business with the limited partnership and, subject to G.S. 59-804 and other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§§ 59-109 through 59-200: Reserved for future codification purposes.

Part 2. Formation; Certificate of Limited Partnership.

§ 59-201. Certificate of limited partnership.

(a) In order to form a limited partnership, a certificate of limited partnership must be executed and filed in the office of the Secretary of State and set forth:

(1) The name of the limited partnership.
(2) The address, including county and city or town, and street and number, if any, of the registered office and the name of the registered agent at such address for service of process required to be maintained by G.S. 55D-30.
(3) If the limited partnership is to dissolve by a specific date, the latest date upon which the limited partnership is to dissolve. If no date for dissolution is specified, there shall be no limit on the duration of the limited partnership.
(4) The name and the address, including county and city or town, and street and number, if any, of each general partner.
(5) The address, including county and city or town, and street and number, if any, of the office at which the records referred to in G.S. 59-106 are kept, if such records are not kept at the registered office.

(b) Unless a delayed effective date is specified in the certificate of limited partnership, a limited partnership is formed at the effective time and date of the filing of the certificate of limited partnership in the office of the Secretary of State if there has been substantial compliance with the requirements of this section.

(c) Domestic limited partnership filings filed prior to October 1, 1986, with the Office of Register of Deeds pursuant to G.S. 59-2(a)(2) shall evidence the existence of limited partnerships formed prior to October 1, 1986, and shall be public notice of only those matters contained in G.S. 59-201(a) and shall be used for no other purpose.

(d) A limited partnership may also be formed through the conversion of another business entity in accordance with Part 10A of this Article.

(e) If the limited partnership is to be a limited liability limited partnership at its formation, then instead of separately filing the application for registration as a limited liability limited partnership, the application for registration shall be included as part of the certificate of limited partnership. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 3; 1987 (Reg. Sess., 1988), c. 1031, s. 3; 1997-485, s. 24; 1999-369, s. 4.3; 2000-140, s. 17; 2001-358, s. 50(b); 2001-387, ss. 124, 124A, 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Section 59-2, referred to in subsection (c), was repealed by Session Laws 1985 (Regular Session, 1986), c. 989, s. 2. See now this Article.

Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Subdivision (a)(2), as amended by Session Laws 2001-358, s. 50(b), effective January 1, 2002, is applicable to documents submitted for filing on or after that date.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

For 1997 Legislative Survey, see 20 Campbell L. Rev. 389.

§ 59-202. Amendment to certificate.

(a) A certificate of limited partnership is amended by filing a certificate of amendment thereto in the office of the Secretary of State. The certificate shall set forth:

(1) The name of the limited partnership;
(2) The date of filing of the certificate; and
(3) The amendment to the certificate.

(b) Within 30 days after the happening of any of the following events an amendment to a certificate of limited partnership reflecting the occurrence of the event or events shall be filed:

(1) The admission of a new general partner;
(2) The withdrawal of a general partner; or
(3) The continuation of the business under G.S. 59-801 after an event of withdrawal of a general partner.

(c) A general partner who becomes aware that any statement in a certificate of limited partnership was false when made or that any arrangements or other facts described have changed, making the certificate inaccurate in any respect, shall promptly amend the certificate.

(d) Repealed by Session Laws 1987, c. 531, s. 4. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 4.)

§ 59-203. Cancellation of certificate.

A certificate of limited partnership shall be cancelled upon the dissolution and the commencement of winding up of the partnership or at any other time that there are no limited partners. A certificate of cancellation shall be filed in the office of the Secretary of State and set forth:

(1) The name of the limited partnership;
(2) The date of filing of its certificate of limited partnership;
(3) The reason for filing the certificate of cancellation;
(4) The effective date of cancellation if it is not to be effective upon the filing of the certificate; and
(5) Any other information the partners filing the certificate determine. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1997-485, s. 25.)

§ 59-204. Execution of documents.

(a) Each certificate required by this Article to be filed in the office of the Secretary of State shall be executed in the following manner:

(1) An original certificate of limited partnership must be signed by all general partners;
(2) A certificate of amendment must be signed by at least one general partner and by each other partner designated in the certificate as a new general partner; and
(3) A certificate of cancellation must be signed by all general partners.

Any other document submitted by a domestic or foreign limited partnership for filing pursuant to this or any other Chapter must be signed by at least one general partner.

(b) Any person may sign a certificate by an attorney-in-fact.

(b1) Repealed by Session Laws 2001-358, s. 10(c), effective January 1, 2002.

(c) The execution of a certificate or amendment by a general partner constitutes an affirmation under the penalties of perjury that the facts stated therein are true. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1991, c. 153, s. 1; 1997-485, s. 22; 1999-369, s. 4.4; 2001-358, ss. 10(b), (c); 2001-387, ss. 125, 155, 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 125 had amended this section. However,s. 155 of c. 387 repealed s. 125, contingent upon the enactment of Session Laws 2001-358. Session Laws 2001-358 was enacted on August 10, 2001.

Subsections (a) and (b1), as amended by Session Laws 2001-358, ss. 10(b) and (c), effective January 1, 2002, are applicable to documents submitted for filing on or after that date.

Legal Periodicals. — For 1997 Legislative Survey, see 20 Campbell L. Rev. 389.

CASE NOTES

Failure of Partner to Sign Amendment. — Amendment to partnership agreement was invalid under former G.S. 59-25(a)(2) where the amendment was neither signed nor sworn to by one co-general partner since he was a "member" for purposes of former G.S. 59-25. Wagner v. R, J & S Assocs., 84 N.C. App. 555, 353 S.E.2d 234, cert. denied, 320 N.C. 177, 358 S.E.2d 71 (1987).

§ 59-205. Execution by judicial act.

If a person fails or refuses to execute a certificate pursuant to G.S. 59-204, any other person who is adversely affected by the failure or refusal, may petition the court for the county in which the partnership's registered office is located to direct the execution of the certificate. If the court finds that it is proper for the certificate to be executed and that any person so designated has failed or refused to execute the certificate, it shall order an appropriate person to prepare, and the Secretary of State to record, an appropriate certificate. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 14.)

§ 59-206. Filing requirements.

A document required or permitted by this Article to be filed by the Secretary of State must be filed under Chapter 55D of the General Statutes. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 5; 1991, c. 153, s. 2; 1995, c. 539, s. 35; 1997-485, ss. 17, 26; 1999-362, s. 15; 1999-369, ss. 4.5, 4.6; 2001-358, ss. 10(d), 34; 2001-387, ss. 126, 155, 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 126 had amended this section. However, s. 155 of c. 387 repealed s. 126, contingent upon the enactment of Session Laws 2001-358. Session Laws 2001-358 was enacted on August 10, 2001.

This section, as rewritten by Session Laws 2001-358, ss. 10(d) and 34, effective January 1, 2002, is applicable to documents submitted for filing on or after that date.

§§ 59-206.1, 59-206.2: Repealed by Session Laws 2001-358, s. 10(e), effective January 1, 2002.

§ 59-207. Liability for false statement in certificate.

If any certificate of limited partnership or certificate of amendment or cancellation contains a false statement, one who suffers loss by reliance on the statement may recover damages for the loss from:

(1) Any person who executes the certificate, or causes another to execute it on his behalf, and knew, and any general partner who knew or should have known, the statement to be false at the time the certificate was executed; and

(2) Any general partner who thereafter knows or should have known that any arrangement or other fact described in the certificate has changed, making the statement inaccurate in any respect within a sufficient time before the statement was relied upon reasonably to have enabled that general partner to cancel or amend the certificate, or to file a petition for its cancellation or amendment under G.S. 59-205. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-208. Notice.

The fact that a certificate of limited partnership is on file in the office of the Secretary of State is notice that the partnership is a limited partnership and the persons designated therein as general partners are general partners, but it is not notice of any other fact. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-209. Certificate of existence.

(a) Anyone may apply to the Secretary of State to furnish a certificate of existence for a domestic limited partnership or a certificate of authorization for a foreign limited partnership.

(b) A certificate of existence or authorization sets forth:

(1) The domestic limited partnership's name or the foreign limited partnership's name used in this State;

(2) That (i) the domestic limited partnership has filed a certificate of limited partnership under the law of this State, the effective date of the filing, and the period of the domestic limited partnership's duration, or (ii) the foreign limited partnership is authorized to transact business in this State;

(3) If the limited partnership has registered as a limited liability limited partnership, that the registration has not been cancelled or revoked;

(4) That a certificate of cancellation of the certificate of limited partnership has not been filed; and

(5) Other facts of record in the office of the Secretary of State that may be requested by the applicant.

(c) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State may be relied upon as conclusive evidence that the domestic limited partnership has filed a certificate of limited partnership and has not filed a certificate of cancellation or that the foreign limited partnership is authorized to transact business in this State, and, if applicable, that the domestic limited partnership has registered as a limited liability limited partnership and that such registration has not been cancelled or revoked. (2001-387, s. 127.)

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 59-210. Limited liability limited partnerships.

(a) To become a limited liability limited partnership, a limited partnership shall file with the Secretary of State an application stating:

(1) The name of the limited liability limited partnership, which must satisfy the requirements of Article 3 of Chapter 55D of the General Statutes.
(2) The street address, and mailing address if different from the street address, of its principal office, and the county in which the principal office is located.
(3) The fiscal year end of the limited liability limited partnership.

(b) The terms and conditions on which a limited partnership becomes a limited liability limited partnership shall be approved in the manner provided in the partnership agreement; provided, however, if the partnership agreement does not contain any such provision, the terms and conditions must be approved (i) in the case of a limited partnership having a partnership agreement that expressly considers obligations to contribute to the partnership, in the manner necessary to amend those provisions, or (ii) in any other case, in the manner necessary to amend the partnership agreement.

(c) A limited partnership becomes a limited liability limited partnership when its application for registration becomes effective.

(d) The status of a limited liability limited partnership and the liability of its partners is not affected by errors or later changes in the information required to be contained in the application for registration.

(e) A limited liability limited partnership shall promptly amend its registration to reflect any change in the information contained in its application for registration, other than changes that are properly included in other documents filed with the Secretary of State. A registration is amended by filing a certificate of amendment with the Secretary of State. The certificate of amendment shall set forth:

(1) The name of the limited liability limited partnership as reflected on the application for registration;
(2) The date of filing of the application for registration; and
(3) The amendment to the application for registration.

(f) A limited liability limited partnership may cancel its registration by filing a certificate of cancellation with the Secretary of State. The certificate of cancellation shall set forth:

(1) The name of the limited liability limited partnership as reflected on the application for registration;
(2) The date of filing of the application for registration; and
(3) The effective date and time of cancellation if it is not to be effective at the time of filing the certificate.

(g) A limited liability limited partnership shall be subject to the provisions of G.S. 59-84.4 as if it were a registered limited liability partnership. (2001-387, ss. 127, 158; 2001-413, s. 8.)

Editor's Note. — Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§§ 59-211 through 59-300: Reserved for future codification purposes.

Part 3. Limited Partners.

§ 59-301. Admission of limited partners.

(a) In connection with the formation of a limited partnership, a person is admitted as a limited partner upon the later to occur of:

(1) The formation of the limited partnership; or

(2) The time provided for becoming a limited partner pursuant to and upon compliance with the partnership agreement.

(b) After the formation of a limited partnership, a person may be admitted as an additional limited partner:

(1) In the case of a person acquiring a partnership interest directly from the limited partnership, at the time provided pursuant to, and upon the compliance with, the partnership agreement; and

(2) In the case of an assignee of a partnership interest of a partner who has the power, as provided in G.S. 59-704, to grant the assignee the right to become a limited partner, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 16.)

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

§ 59-302. Voting.

The partnership agreement may grant to all or a specified group of the limited partners the right to vote (on a per capita or other basis) upon any matter. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 17.)

§ 59-303. Liability to third parties.

A limited partner is not liable for the obligations of a limited partnership by reason of being a limited partner and does not become liable for the obligations of a limited partnership by participating in the management or control of the business of the limited partnership. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1997-456, s. 27; 1999-362, s. 18.)

CASE NOTES

Cited in Post & Front Properties, Ltd. v. Roanoke Constr. Co., 117 N.C. App. 93, 449 S.E.2d 765 (1994).

§ 59-304. Person erroneously believing himself limited partner.

(a) Except as provided in subsection (b), a person who makes a contribution to a business enterprise and erroneously but in good faith believes that the person has become a limited partner in the enterprise is not a general partner in the enterprise and is not bound by its obligations by reason of making the contribution, receiving distributions from the enterprise, or exercising any rights of a limited partner, if, on ascertaining the mistake, he:

(1) Causes an appropriate certificate of limited partnership [or] certificate of amendment to be executed and filed; or
(2) Withdraws from future equity participation in the enterprise.

(b) A person who makes a contribution of the kind described in subsection (a) of this section is liable as a general partner to any third party who transacts business with the enterprise in the case in which:

(1) The third party actually believed in good faith that the person was a general partner at the time of the transaction; and
(2) The third party transacted business with the enterprise before either:
  a. An appropriate certificate has been filed pursuant to subsection (a) of this section to reflect that the person is not a general partner; or
  b. The person has given notice to the partnership of withdrawal from future equity participation and before the withdrawal was effective. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 19.)

Editor's Note. — The bracketed "[or]" was inserted in subdivision (a)(1) at the direction of the Revisor of Statutes to reflect the apparent intention of the Legislature.

§ 59-305. Information.

Each limited partner has the right to:

(1) Inspect and copy any of the partnership records required to be maintained by G.S. 59-106; and
(2) Obtain from the general partners from time to time upon reasonable demand (i) true and full information regarding the state of the business and financial condition of the limited partnership, (ii) promptly after becoming available, a copy of the limited partnership's federal, State, and local income tax returns for each year, and (iii) other information regarding the affairs of the limited partnership as is just and reasonable. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 20.)

§§ 59-306 through 59-400: Reserved for future codification purposes.

Part 4. General Partners.

§ 59-401. Admission of additional general partners.

Unless otherwise provided in the partnership agreement, after the filing of a limited partnership's original certificate of limited partnership, additional general partners may be admitted only with the specific written consent of each partner. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

§ 59-402. Events of withdrawal.

Except as approved by the specific written consent of all partners at the time, a person ceases to be a general partner of a limited partnership upon the happening of any of the following events:

(1) The general partner withdraws from the limited partnership as provided in G.S. 59-602;

(2) The general partner ceases to be a member of the limited partnership as provided in G.S. 59-702;

(3) The general partner is removed as a general partner in accordance with the partnership agreement;

(4) Unless otherwise provided in writing in the partnership agreement, the general partner: (i) makes an assignment for the benefit of creditors; (ii) files a voluntary petition in bankruptcy; (iii) is adjudicated a bankrupt or insolvent; (iv) files a petition or answer seeking for himself any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the general partner in any proceeding of this nature; or (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of the general partner's properties;

(5) Unless otherwise provided in writing in the partnership agreement, 120 days after the commencement of any proceeding against the general partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within 90 days after the appointment without the general partner's consent or acquiescence of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any such stay, the appointment is not vacated;

(6) In the case of a general partner who is a natural person,
  a. The general partner's death; or
  b. The entry of an order by a court of competent jurisdiction adjudicating the general partner incompetent to manage his or her person or property;

(7) In the case of a general partner who is acting as a general partner by virtue of being a trustee of a trust, the termination of the trust (but not merely the substitution of a new trustee);

(8) In the case of a general partner that is a separate partnership, the dissolution and commencement of winding up of the separate partnership;

(9) In the case of a general partner that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter;

(10) Unless otherwise provided in the partnership agreement, or with the consent of all partners, in the case of a general partner that is an estate, the distribution by the fiduciary of the estate's entire interest in the partnership;

(11) In the case of a general partner that is a limited liability company, the dissolution and commencement of winding up of the limited liability company; or

(12) In the case of a general partner that is not a natural person, trust, separate partnership, corporation, estate, or limited liability company, the termination of the general partner. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1997-456, s. 27; 1999-362, ss. 21, 22; 2001-387, ss. 128, 129, 130, 131.)

Editor's Note. — Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 59-403. General powers and liabilities.

(a) Except as provided in this Article or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions and liabilities of a partner in a partnership without limited partners.

(b) Except as provided in this Article, a general partner of a limited partnership that is not a limited liability limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners, and a general partner of a limited liability limited partnership has the liabilities of, and has the limitation on liability afforded to, a partner in a registered limited liability partnership under the North Carolina Uniform Partnership Act to persons other than the partnership and the other partners with respect to debts and obligations of the limited partnership incurred while it is a limited liability limited partnership. Except as provided in this Article or in the partnership agreement, a general partner of a limited partnership that is not a limited liability limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners, and a general partner of a limited liability limited partnership has the liabilities of, and has the limitation on liability afforded to, a partner in a registered limited liability partnership under the North Carolina Uniform Partnership Act to the partnership and to the other partners.

(c) Unless otherwise provided in the partnership agreement, a general partner of a limited partnership has the power and authority to delegate to one or more other persons the general partner's rights and powers to manage and control the business and affairs of the limited partnership, including to delegate to agents, officers, and employees of the general partner or the limited partnership, and to delegate by a management agreement or another agreement with, or otherwise to, other persons. Unless otherwise provided in the partnership agreement, a delegation by a general partner of a limited partnership shall not cause the general partner to cease to be a general partner of the limited partnership and shall not reduce or absolve the general partner of the general partner's duties or obligations to the limited partnership or its other partners. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 6; 2001-387, ss. 132, 133.)

Editor's Note. — Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. G.S. 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

CASE NOTES

Cited in Whitacre P'ship. v. BioSignia, Inc., 153 N.C. App. 608, 574 S.E.2d 475, 2002 N.C. App. LEXIS 1275 (2002).

§ 59-404. Contributions by a general partner.

A general partner of a limited partnership may make contributions to the partnership and share in the profits and losses of, and in distributions from, the limited partnership as a general partner. A general partner also may make contributions to and share in profits, losses, and distributions as a limited partner. A person who is both a general partner and a limited partner has the rights and powers, and is subject to the restrictions and liabilities, of a general partner and, except as provided in the partnership agreement, also has the powers, and is subject to the restrictions, of a limited partner to the extent of his participation in the partnership as a limited partner. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-405. Voting.

The partnership agreement may grant to all or certain identified general partners the right to vote (on a per capita or any other basis), separately or with all or any class of the limited partners, on any matter. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§§ 59-406 through 59-500: Reserved for future codification purposes.

Part 5. Finance.

§ 59-501. Form of contribution.

The contribution of a partner may be in cash, property, or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

§ 59-502. Liability for contributions.

(a) Except as provided in the partnership agreement, a partner is obligated to the limited partnership to perform any enforceable promise to contribute cash or property or to perform services, even if the partner is unable to perform because of death, disability or any other reason. If a partner does not make the required contribution of property or services, the partner is obligated at the option of the limited partnership to contribute cash equal to that portion of the agreed value of the stated contribution that has not been made. As used in this section, the term "agreed value" means an amount or other measure of value as (i) is provided in the partnership agreement, or (ii) if not provided in the partnership agreement, is required to be set forth in the written records required pursuant to G.S. 59-106.

(b) Unless otherwise provided in the partnership agreement, the obligation of a partner to make a contribution or return money or other property paid or distributed in violation of this Article may be compromised only by consent of all the partners. Any such compromise, however, shall not affect the rights of a creditor whose claim arose prior to the date of the compromise.

(c) No promise by a limited partner to contribute to the limited partnership is enforceable unless in a writing signed by the limited partner. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 23.)

§ 59-503. Sharing income, gain, loss, deduction or credit.

Income, gain, loss, deduction or credit of a limited partnership shall be allocated among the partners, and among classes of partners, in the manner provided in the partnership agreement. To the extent the partnership agreement does not provide for the allocation of items of income, gain, loss, deduction, or credit, then those items shall be allocated on the basis of the agreed value of the contributions made by each partner to the extent they have been received by the partnership and have not been returned. As used in this section, the term "agreed value" means an amount or other measure of value as (i) is provided in the partnership agreement, or (ii) if not provided in the partnership agreement, is required to be set forth in the written records required pursuant to G.S. 59-106. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 24.)

§ 59-504. Sharing of distributions.

Distributions of cash or other assets of a limited partnership shall be made among the partners, and among classes of partners, in the manner provided in the partnership agreement. To the extent the partnership agreement does not provide for the sharing of distributions among the partners, distributions shall be made among the partners on the basis of the agreed value of the contributions made by each partner to the extent they have been received by the partnership and have not been returned. As used in this section, the term "agreed value" means an amount or other measure of value as (i) is provided in the partnership agreement, or (ii) if not provided in the partnership agreement, is required to be set forth in the written records required pursuant to G.S. 59-106. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 25.)

§§ 59-505 through 59-600: Reserved for future codification purposes.

Part 6. Distribution and Withdrawal.

§ 59-601. Interim distributions.

Except as provided in this Article, a partner is entitled to receive distributions from a limited partnership before his withdrawal from the limited partnership and before the dissolution and winding up thereof to the extent and at the times or upon the happening of the events specified in the partnership agreement. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

§ 59-602. Withdrawal of general partner.

After filing of the original certificate of limited partnership, a general partner may withdraw from a limited partnership at any time by giving written notice to the other partners, but if the withdrawal violates the partnership agreement, the limited partnership may recover from the withdrawing general partner, in addition to its other remedies, any damages for breach of the partnership agreement and may offset the damages against the amount otherwise distributable or payable to the partner. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 26.)

§ 59-603. Withdrawal of limited partner.

A limited partner may withdraw from a limited partnership only at the time or upon the happening of events specified in writing in and in accordance with the partnership agreement, including any amendment or addendum to the partnership agreement agreed upon by the partners unanimously or in accordance with the terms of the agreement and made in connection with any permitted withdrawal. If the partnership agreement does not specify in writing the time or the events upon the happening of which a limited partner may withdraw, a limited partner may not withdraw prior to the time for the dissolution and winding up of the limited partnership. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 27.)

Editor's Note. — Session Laws 1999-362, s. 27, which rewrote this section, was effective October 1, 1999, and applicable to (i) any limited partnership formed before that date, only if validly adopted in writing by its partners or otherwise as a part of its partnership agreement, and (ii) all limited partnerships formed on or after that date.

§ 59-604. Distribution upon withdrawal.

Except as provided in this Article, upon withdrawal any withdrawing partner is entitled to receive any distribution to which the partner is entitled under the partnership agreement and, if not otherwise provided in the agreement, the partner is entitled to receive, within a reasonable time after withdrawal, the fair value of the partner's partnership interest in the limited partnership as of the date of withdrawal, based upon the partner's right to share in distributions from the limited partnership. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 28.)

§ 59-605. Distribution in kind.

Except as provided in writing in the limited partnership agreement, (1) a partner, regardless of the nature of his contribution, has no right to demand and receive any distribution from a limited partnership in any form other than cash; and (2) a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to him exceeds a percentage of that asset which is equal to the percentage in which he shares in distributions from the limited partnership. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-606. Right to distribution.

Subject to the other provisions of Part 6 of this Article, at the time a partner becomes entitled to receive a distribution, the partner has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 29.)

§ 59-607. Limitations on distribution.

A partner shall not receive a distribution from a limited partnership to the extent that, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests, exceed the fair value of the partnership assets. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-608. Liability upon return of contribution.

(a) If a partner has received the return of any part of his contribution without violation of the partnership agreement or this Article, he is liable to the limited partnership for a period of one year thereafter for the amount of the returned contribution, but only to the extent necessary to discharge the limited partnership's liabilities to creditors who extended credit to the limited partnership during the period the contribution was held by the partnership.

(b) If a partner has received the return of any part of his contribution in violation of the partnership agreement or this Article, he is liable to the limited partnership for a period of six years thereafter for the amount of the contribution wrongfully returned.

(c) A partner receives a return of the partner's contribution to the extent that a distribution to the partner reduces the partner's share of the fair value of the net assets of the limited partnership below the agreed value of the partner's contribution which has not been distributed to the partner. As used in this section, the term "agreed value" means an amount or other measure of value as (i) is provided in the partnership agreement, or (ii) if not provided in the partnership agreement, is required to be set forth in the written records required pursuant to G.S. 59-106. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 30.)

§§ 59-609 through 59-700: Reserved for future codification purposes.

Part 7. Assignment of Partnership Interest.

§ 59-701. Nature of partnership interest.

A partnership interest is personal property. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

§ 59-702. Assignment of partnership interest.

Except as provided in the partnership agreement, a partnership interest is assignable in whole or in part. Subject to G.S. 59-801(3) an assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the allocation and distribution to which the assignor would be entitled. Except as provided in the partnership agreement, a partner ceases to be a partner and to have the power to exercise any rights and powers of a partner upon assignment of all of the partner's partnership interest. Except as provided in the partnership agreement, neither the pledge or granting of a security interest in any or all of the partnership interest of a partner nor the pledge or granting of a lien or other encumbrance against any or all of the partnership interest of a partner shall cause the partner to cease to be a partner or cease to have the power to exercise any rights or powers of a partner. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 7; 1999-362, s. 31.)

§ 59-703. Rights of creditor.

On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. The general partners shall have no liability to a partner for payments to a judgment creditor pursuant to this provision. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. This Article does not deprive any partner of the benefit of any exemption laws applicable to his partnership interest. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-704. Right of assignee to become limited partner.

(a) An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that (1) the assignor gives the assignee that right in accordance with authority described in the partnership agreement, or (2) all other partners consent.

(b) An assignee who has become a limited partner has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a limited partner under the partnership agreement and this Article. An assignee who becomes a limited partner also is liable for the obligations of the assignee's assignor to make and return contributions as provided in Parts 5 and 6 of this Article. However, the assignee is not obligated for liabilities that (i) are unknown to the assignee at the time the assignee became a limited partner and (ii) could not be ascertained from the written provisions of the partnership agreement.

(c) If an assignee of a partnership interest becomes a limited partner, the assignor is not released from his liability to the limited partnership under G.S. 59-207, 59-502, and 59-608. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 32.)

§ 59-705. Power of estate of deceased or incompetent partner.

If a partner who is an individual dies or a court of competent jurisdiction adjudges him to be incompetent to manage his person or his property, the partner's executor, administrator, guardian, conservator, or other legal representative may exercise all of the partner's rights for the purpose of settling his estate or administering his property, including any power the partner had to give an assignee the right to become a limited partner. If a partner is a corporation, trust, or other entity and is dissolved or terminated, the powers of that partner may be exercised by its legal representative or successor. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§§ 59-706 through 59-800: Reserved for future codification purposes.

Part 8. Dissolution.

§ 59-801. Nonjudicial dissolution.

(a) A limited partnership is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following:

(1) At the time specified in the certificate of limited partnership or upon the happening of events specified in writing in the partnership agreement;

(2) Written consent of all partners;

(3) An event of withdrawal of a general partner unless:

  a. At the time there is at least one other general partner, in which case, unless otherwise provided in a written partnership agreement or agreed upon by all remaining partners, (i) the limited partnership is not dissolved, (ii) the limited partnership shall not be wound up, and (iii) the business of the limited partnership shall be continued by the remaining general partners; or

  b. Within 90 days after the withdrawal, all remaining partners, or a lesser number or portion of the partners provided in the partnership agreement, agree in writing to continue the business of the limited partnership and to the appointment of one or more additional general partners if necessary or desired, in which case the limited partnership is not dissolved and is not required to be wound up by reason of the event of withdrawal;

(3a) Ninety days after the withdrawal of the limited partnership's last limited partner, unless the limited partnership admits at least one limited partner before the end of the 90 days; or

(4) Entry of a decree of judicial dissolution under G.S. 59-802.

(b) The causes of dissolution of a limited partnership shall be governed solely by this Article. Article 2 of this Chapter, which governs the causes of dissolution of a partnership without limited partners, does not apply and shall not govern the causes of dissolution of a limited partnership. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 33.)

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

§ 59-802. Judicial dissolution.

On application by or for a partner the court may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement. The limited partnership's name becomes available for use by another entity as provided in 55D-21. (1985 (Reg. Sess., 1986), c. 989, s. 2; 2001-358, s. 36; 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

This section, as amended by Session Laws 2001-358, s. 36, effective January 1, 2002, is applicable to documents submitted for filing on or after that date.

§ 59-803. Winding up.

Except as provided in the partnership agreement, the general partners who have not wrongfully dissolved a limited partnership or, if none, the limited partners, may wind up the limited partnership's affairs; but the court may wind up the limited partnership's affairs upon application of any partner, his legal representative, or assignee. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-804. Distribution of assets.

Upon the winding up of a limited partnership, the assets shall be distributed as follows:

(1) To creditors, including limited partners who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners under G.S. 59-601 or G.S. 59-604;

(2) To general partners who are creditors to the extent otherwise permitted by law, in satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners under G.S. 59-601 or G.S. 59-604;

(3) Except as provided in the partnership agreement, to partners and former partners in satisfaction of liabilities for distributions under G.S. 59-601 or G.S. 59-604; and

(4) Except as provided in the partnership agreement, to partners first for the return of their contributions and secondly respecting their partnership interests, in the proportions in which the partners share in distributions. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§§ 59-805 through 59-900: Reserved for future codification purposes.

Part 9. Foreign Limited Partnerships.

§ 59-901. Law governing.

Subject to the Constitution of this State, (i) the laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its partners, and (ii) a foreign limited partnership may not be denied registration by reason of any difference between those laws and the laws of this State. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 34.)

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

§ 59-902. Registration.

(a) Before transacting business in this State, a foreign limited partnership shall procure a certificate of authority to transact business in this State from the Secretary of State. No foreign limited partnership shall be entitled to transact in this State any business which a limited partnership organized under this Article is not permitted to transact. In order to register, a foreign limited partnership shall deliver to the Secretary of State an application for registration as a foreign limited partnership, signed by a general partner and setting forth:

(1) The name of the foreign limited partnership and, if different, the name under which it proposes to register and transact business in this State;

(2) The jurisdiction and date of its formation;

(3) The date of formation and the period of duration;

(4) The street address, and the mailing address if different from the street address, of the principal office of the foreign limited partnership, and the county in which the principal office is located;

(5) The street address, and the mailing address if different from the street address, of the registered office of the foreign limited partnership in this State, the county in which the registered office is located, and the name of its proposed registered agent in this State;

(6) If the certificate of limited partnership filed in the foreign limited partnership's state of organization is not required to include the names and addresses of the partners, a list of the names and addresses or, at the election of the foreign limited partnership, a list of the names and addresses of the general partners and the address, including county and city or town, and street and number, of the office at which is kept a list of the names and addresses of the limited partners and their capital contributions, together with an undertaking by the foreign limited partnership to keep such records until such foreign limited partnership's registration in this State is cancelled;

(7) A statement that in consideration of the issuance of a certificate of authority to transact business in this State, the foreign limited partnership appoints the Secretary of State of North Carolina as the agent to receive service of process, notice, or demand, whenever the foreign limited partnership fails to appoint or maintain a registered agent in this State or whenever any such registered agent cannot with reasonable diligence be found at the registered office;

(8) The names and addresses including county and city or town, and street and number, if any, of all of the general partners;

(8a) Whether the foreign limited partnership is a foreign limited liability partnership; and

(9) The effective date and time of the registration if it is not to be effective at the time of filing of the application.

(b) Without excluding other activities which shall not constitute transacting business in this State, a foreign limited partnership shall not be considered to be transacting business in this State, for the purpose of this Article, by reason of carrying on in this State any one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its partners or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities;

(5) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this State before becoming binding contracts;

(6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State, the conducting of foreclosure proceedings and sale, the acquiring of property at foreclosure sale and the management and rental of such property for a reasonable time while liquidating its investment, provided no office or agency therefor is maintained in this State;

(7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same;

(8) Transacting business in interstate commerce; and

(9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature.

(c) Each foreign limited partnership authorized to transact business in this State must maintain a registered agent as required by Article 4 of Chapter 55D of the General Statutes and is subject to service on the Secretary of State under that Article.

(d) through (e) Repealed by Session Laws 2001-358, s. 50(b), effective January 1, 2002. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 8.1; 2000-140, s. 55; 2001-358, s. 50(c); 2001-387, ss. 134, 159, 173, 175(a); 2001-413, s. 6; 2001-487, s. 62(y).)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-

413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 134 had amended this section. However, s. 159(a) of c. 387 repealed s. 134, contingent upon the enactment of Session Laws 2001-358. Session Laws 2001-358 was enacted on August 10, 2001.

This section, as amended by Session Laws 2001-358, s. 50(c), effective January 1, 2002, is applicable to documents submitted for filing on or after that date.

OPINIONS OF ATTORNEY GENERAL

Assumed Name. — There is no authority for allowing a foreign limited partnership to operate under any more than one assumed name, and the assumed name under which it operates must be the one registered with the Secretary of State. See opinion of Attorney General to Mr. Clyde Smith, Deputy Secretary of State, — N.C.A.G. — (June 25, 1987).

§ 59-903. Issuance of registration.

If the Secretary of State finds that an application satisfies the requirements of this Article, the Secretary shall, when all requisite fees have been tendered as in this Article prescribed:

(1) Endorse on the application the word "filed", and the hour, day, month and year of the filing thereof;

(2) File in the office of the Secretary of State the application;

(3) Issue a certificate of authority to transact business in this State to which the Secretary shall affix the conformed copy of the application; and

(4) Send to the foreign limited partnership or its representative the certificate of authority, together with the conformed copy of the application affixed thereto. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 8; 1997-485, s. 27; 1999-362, s. 35.)

§ 59-904. Name.

A foreign limited partnership may register with the Secretary of State under any name that meets the requirements of Article 3 of Chapter 55D of the General Statutes. (1985 (Reg. Sess., 1986), c. 989, s. 2; 2001-358, s. 35; 2001-387, ss. 135, 155, 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 135 had amended this section. However, s. 155 of c. 387 repealed s. 134, contingent upon the enactment of Session Laws 2001-358. Session Laws 2001-358 was enacted on August 10, 2001.

This section, as amended by Session Laws 2001-358, s. 35, effective January 1, 2002, is applicable to documents submitted for filing on or after that date.

§ 59-905. Changes and amendments.

If any statement in the application for registration of a foreign limited partnership was false when made or any arrangements or other facts described have changed, making the application inaccurate in any respect, the foreign limited partnership shall promptly file in the office of the Secretary of State an original and one conformed copy of a certificate, signed by a general partner, correcting such statement. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-906. Cancellation of registration.

A foreign limited partnership may cancel its registration by filing with the Secretary of State a certificate of cancellation signed by a general partner. A cancellation does not terminate the authority of the Secretary of State to accept service of process on the foreign limited partnership with respect to causes of action arising out of the transactions of business in this State. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-907. Transaction of business without registration.

(a) No foreign limited partnership transacting business in this State without permission obtained through a certificate of authority under this Article shall be permitted to maintain any action or proceeding in any court of this State unless such foreign limited partnership shall have obtained a certificate of authority prior to trial.

(b) The failure of a foreign limited partnership to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of the foreign limited partnership and shall not prevent the foreign limited partnership from defending any action or proceeding in any court of this State.

(c) A foreign limited partnership failing to obtain permission to transact business in this State as required by this Article or by prior statutes then applicable shall be liable to the State for the years or parts thereof during which it transacted business in this State without such permission in an amount equal to all fees and taxes which would have been imposed by law upon such foreign limited partnership had it duly applied for and received such permission plus interest and all penalties imposed by law for failure to pay such fees and taxes, plus five hundred dollars ($500.00) and costs. The Attorney General shall bring actions to recover all amounts due the State under the provisions of this section.

(d) The Secretary of State is hereby directed to require that every foreign limited partnership transacting business in this State comply with the provisions of this Article. The Secretary of State is authorized to employ such assistants as shall be deemed necessary in his office for the purpose of enforcing the provisions of this Article and for making such investigations as shall be necessary to ascertain foreign limited partnerships now transacting business in this State which may have failed to comply with the provisions of this Article.

(e) A limited partner of a foreign limited partnership is not liable as a general partner of the foreign limited partnership solely by reason of the foreign limited partnership's having transacted business in this State without registration.

(f) A foreign limited partnership, by transacting business in this State without registration, appoints the Secretary of State as its agent for service of process with respect to causes of action arising out of the transaction of business in this State. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 36; 2000-140, s. 101(r).)

§ 59-908. Action by Attorney General.

The Attorney General may bring an action to restrain a foreign limited partnership from transacting business in this State in violation of this Article. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-909. Withdrawal of foreign limited partnership by reason of a merger, consolidation, or conversion.

(a) Whenever a foreign limited partnership authorized to transact business in this State ceases its separate existence as a result of a statutory merger or consolidation permitted by the laws of the state or country under which it was organized, or converts into another type of entity as permitted by those laws, the surviving or resulting entity shall apply for a certificate of withdrawal for the foreign limited partnership by delivering to the Secretary of State for filing a copy of the articles of merger, consolidation, or conversion or a certificate reciting the facts of the merger, consolidation, or conversion, duly authenticated by the Secretary of State or other official having custody of limited partnership records in the state or country under the laws of which the foreign limited partnership was organized. If the surviving or resulting entity is not authorized to transact business or conduct affairs in this State, the articles or certificate must be accompanied by an application which must set forth:

(1) The name of the foreign limited partnership authorized to transact business in this State, the type of entity and name of the surviving or resulting entity, and a statement that the surviving or resulting entity is not authorized to transact business or conduct affairs in this State;
(2) A statement that the surviving or resulting entity consents that service of process based on any cause of action arising in this State, or arising out of business transacted in this State, during the time the foreign limited partnership was authorized to transact business in this State, may thereafter be made by service thereof on the Secretary of State;
(3) A mailing address to which the Secretary of State may mail a copy of any process served upon the Secretary under subdivision (a)(2) of this section; and
(4) A commitment to file with the Secretary of State a statement of any subsequent change in its mailing address.

(b) If the Secretary of State finds that the articles or certificate and the application for withdrawal, if required, conform to law, the Secretary of State shall:

(1) Endorse on the articles or certificate and the application for withdrawal, if required, the word "filed" and the hour, day, month, and year of filing thereof;
(2) File the articles or certificate and the application, if required;
(3) Issue a certificate of withdrawal; and
(4) Send to the surviving or resulting entity or its representative the certificate of withdrawal, together with the exact or conformed copy of the application, if required, affixed thereto.

(c) After the withdrawal of the foreign limited partnership is effective, service of process on the Secretary of State in accordance with subsection (a) of this section shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 59-1106(b). Upon receipt of process in the manner provided in this subsection, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving or resulting entity at the mailing address designated pursuant to subsection (a) of this section. (1999-369, s. 4.7; 2001-387, ss. 136, 137; 2001-487, s. 62(z).)

Editor's Note. — Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§§ 59-910 through 59-1000: Reserved for future codification purposes.

Part 10. Derivative Actions.

§ 59-1001. Right of action.

A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

§ 59-1002. Proper plaintiff.

In a derivative action, the plaintiff must be a partner at the time of bringing the action and (i) must have been a partner at the time of the transaction that is the subject of the complaint or (ii) the plaintiff's status as a partner must have devolved upon the partner by operation of law or pursuant to the terms of the partnership agreement from a person who was a partner at the time of the transaction. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 37.)

§ 59-1003. Pleading.

In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-1004. Expenses.

(a) If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of any action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him to remit to the limited partnership the remainder of those proceeds received by him.

(b) In any such action, the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in defense of the action. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-1005. Dismissal of action.

Such action shall not be discontinued, dismissed, compromised or settled without the approval of the court. If the court shall determine that the interest of the partners or of the creditors of the partnership will be substantially affected by such discontinuance, dismissal, compromise, or settlement, the court, in its discretion, may direct that notice, by publication or otherwise, shall be given to such partners or creditors whose interest it determines will be so affected. If notice is so directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall be awarded as costs of the action. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-1006. Construction.

The provisions of this Article shall not be construed to deprive a partner of whatever rights of action he may possess in his individual capacity. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§§ 59-1007 through 59-1049: Reserved for future codification purposes.

Part 10A. Conversion to Limited Partnership.

§ 59-1050. Conversion.

A business entity other than a domestic limited partnership may convert to a domestic limited partnership if:

(1) The conversion is permitted by the laws of the state or country governing the organization and internal affairs of the converting business entity; and

(2) The converting business entity complies with the requirements of this part and, to the extent applicable, the laws referred to in subdivision (1) of this section. (1999-369, s. 4.8; 2001-387, s. 139.)

Editor's Note. — Session Laws 1999-369 s. 4.8, enacted the sections under this Part as G.S. 59-1007 to 59-1014; they were recodified as G.S. 59-1050 to 59-1057 at the direction of the Revisor of Statutes.

Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 59-1051. Plan of conversion.

(a) The converting business entity shall approve a written plan of conversion containing:

(1) The name of the converting business entity, its type of business entity, and the state or country whose laws govern its organization and internal affairs;

(2) The name of the resulting domestic limited partnership into which the converting business entity shall convert;

(3) The terms and conditions of the conversion; and

(4) The manner and basis for converting the interests in the converting business entity into interests, obligations, or securities of the resulting domestic limited partnership or into cash or other property in whole or in part.

(a1) The plan of conversion may contain other provisions relating to the conversion.

(a2) The provisions of the plan of conversion, other than the provisions required by subdivisions (1) and (2) of subsection (a) of this section, may be made dependent on facts objectively ascertainable outside the plan of conversion if the plan of conversion sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(2) A determination or action by the converting business entity or by any other person, group, or body.

(3) The terms of, or actions taken under, an agreement to which the converting business entity is a party, or any other agreement or document.

(b) The plan of conversion shall be approved in accordance with the laws of the state or country governing the organization and internal affairs of the converting business entity.

(c) After a plan of conversion has been approved as provided in subsection (b) of this section, but before a certificate of limited partnership for the resulting domestic limited partnership becomes effective, the plan of conversion may be amended or abandoned to the extent permitted by the laws that govern the organization and internal affairs of the converting business entity. (1999-369, s. 4.8; 2001-387, s. 140; 2005-268, s. 56.)

Editor's Note. — Session Laws 1999-369 s. 4.8, enacted this section as G.S. 59-1008; it was recodified as G.S. 59-1051 at the direction of the Revisor of Statutes.

Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 59-1052. Filing of certificate of limited partnership.

(a) After a plan of conversion has been approved by the converting business entity as provided in G.S. 59-1051, a certificate of limited partnership shall be delivered to the Secretary of State for filing. In addition to the matters required or permitted by G.S. 59-201, the certificate of limited partnership shall contain articles of conversion stating:

(1) That the domestic limited partnership is being formed pursuant to a conversion of another business entity;

(2) The name of the converting business entity, its type of business entity, and the state or country whose laws govern its organization and internal affairs; and

(3) That a plan of conversion has been approved by the converting business entity in the manner required by law.

If the plan of conversion is abandoned after the certificate of limited partnership has been filed with the Secretary of State but before the certificate of limited partnership becomes effective, an amendment withdrawing the certificate of limited partnership shall be delivered to the Secretary of State for filing prior to the time the articles of organization become effective.

(b) The conversion takes effect when the certificate of limited partnership becomes effective.

(c) Repealed by Session Laws 2001-387, s. 141.

(d) Certificates of conversion shall also be registered as provided in G.S. 47-18.1. (1999-369, s. 4.8; 2001-387, s. 141; 2002-159, s. 34(b).)

Editor's Note. — Session Laws 1999-369 s. 4.8, enacted this section as G.S. 59-1009; it was recodified as G.S. 59-1052 at the direction of the Revisor of Statutes.

Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 59-1053. Effects of conversion.

When the conversion takes effect:

(1) The converting business entity ceases its prior form of organization and continues in existence as the resulting domestic limited partnership;

(2) The title to all real estate and other property owned by the converting business entity continues vested in the resulting domestic limited partnership without reversion or impairment;

(3) All liabilities of the converting business entity continue as liabilities of the resulting domestic limited partnership;

(4) A proceeding pending by or against the converting business entity may be continued as if the conversion did not occur; and

(5) The interests in the converting business entity that are to be converted into interests, obligations, or securities of the resulting domestic limited partnership or into the right to receive cash or other property are thereupon so converted, and the former holders of interests in the converting business entity are entitled only to the rights provided in the plan of conversion.

The conversion shall not affect the liability or absence of liability of any holder of an interest in the converting business entity for any acts, omissions, or obligations of the converting business entity made or incurred prior to the effectiveness of the conversion. The cessation of the existence of the converting business entity in its prior form of organization in the conversion shall not constitute a dissolution or termination of the converting business entity. (1999-369, s. 4.8; 2000-140, s. 101(s).)

Editor's Note. — Session Laws 1999-369 s. 4.8, enacted this section as G.S. 59-1010; it was recodified as G.S. 59-1053 at the direction of the Revisor of Statutes.

§§ 59-1054 through 59-1057: Recodified as §§ 59-1070 through 59-1073 by Session Laws 2001-387, s. 143.

§§ 59-1058, 59-1059: Reserved for future codification purposes.

Part 10B. Conversion of Limited Partnership.

§ 59-1060. Conversion.

A domestic limited partnership may convert to a different business entity if:

(1) The conversion is permitted by the laws of the state or country governing the organization and internal affairs of such other business entity; and

(2) The converting domestic limited partnership complies with the requirements of this Part and, to the extent applicable, the laws referred to in subdivision (1) of this section. (2001-387, s. 142.)

Editor's Note. — Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 59-1061. Plan of conversion.

(a) The converting domestic limited partnership shall approve a written plan of conversion containing:

(1) The name of the converting domestic limited partnership;

(2) The name of the resulting business entity into which the domestic limited partnership shall convert, its type of business entity, and the state or country whose laws govern its organization and internal affairs;

(3) The terms and conditions of the conversion; and

(4) The manner and basis for converting the interests in the domestic limited partnership into interests, obligations, or securities of the resulting business entity or into cash or other property in whole or in part.

(a1) The plan of conversion may contain other provisions relating to the conversion.

(a2) The provisions of the plan of conversion, other than the provisions required by subdivisions (1) and (2) of subsection (a) of this section, may be made dependent on facts objectively ascertainable outside the plan of conversion if the plan of conversion sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(2) A determination or action by the converting domestic limited partnership or by any other person, group, or body.

(3) The terms of, or actions taken under, an agreement to which the converting domestic limited partnership is a party, or any other agreement or document.

(b) The plan of conversion shall be approved by the domestic limited partnership in the manner provided for the approval of the conversion in a written partnership agreement or, if there is no provision, by the unanimous consent of its partners. If any partner of the converting domestic limited partnership has or will have personal liability for any existing or future obligation of the resulting business entity solely as a result of holding an interest in the resulting business entity, then in addition to the requirements of the preceding sentence, approval of the plan of conversion by the domestic limited partnership shall require the consent of each such partner. The converting domestic limited partnership shall provide a copy of the plan of conversion to each partner of the converting domestic limited partnership at the time provided in a written partnership agreement or, if there is no such provision, prior to its approval of the plan of conversion.

(c) After a plan of conversion has been approved by a domestic limited partnership but before the articles of conversion become effective, the plan of conversion (i) may be amended as provided in the plan of conversion, or (ii) may be abandoned (subject to any contractual rights) as provided in the plan of conversion or written partnership agreement or, if not so provided, as determined by the general partners of the domestic limited partnership in accordance with G.S. 59-403. (2001-387, s. 142; 2001-487, s. 62(aa); 2005-268, s. 57.)

§ 59-1062. Articles of conversion.

(a) After a plan of conversion has been approved by the converting domestic limited partnership as provided in G.S. 59-1061, the converting domestic limited partnership shall deliver articles of conversion to the Secretary of State for filing. The articles of conversion shall state:

(1) The name of the converting domestic limited partnership;
(2) The name of the resulting business entity, its type of business entity, the state or country whose laws govern its organization and internal affairs, and, if the resulting business entity is not authorized to transact business or conduct affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address; and
(3) That a plan of conversion has been approved by the domestic limited partnership as required by law.

(b) If the domestic limited partnership is converting to a business entity whose formation, or whose status as a registered limited liability partnership as defined in G.S. 59-32, requires the filing of a document with the Secretary of State, then, notwithstanding subsection (a) of this section, the articles of conversion shall be included as part of that document and shall contain the information required by the laws governing the organization and internal affairs of the resulting business entity.

(c) If the plan of conversion is abandoned after the articles of conversion have been filed with the Secretary of State but before the articles of conversion become effective, the converting domestic limited partnership shall deliver to the Secretary of State for filing prior to the time the articles of conversion become effective an amendment of the articles of conversion withdrawing the articles of conversion.

(d) The conversion takes effect when the articles of conversion become effective.

(e) Certificates of conversion shall also be registered as provided in G.S. 47-18.1. (2001-387, s. 142; 2001-487, s. 62(bb).)

§ 59-1063. Effects of conversion.

(a) When the conversion takes effect:
(1) The converting domestic limited partnership ceases its prior form of organization and continues in existence as the resulting business entity;
(2) The title to all real estate and other property owned by the converting domestic limited partnership continues vested in the resulting business entity without reversion or impairment;
(3) All liabilities of the converting domestic limited partnership continue as liabilities of the resulting business entity;
(4) A proceeding pending by or against the converting domestic limited partnership may be continued as if the conversion did not occur; and
(5) The interests in the converting domestic limited partnership that are to be converted into interests, obligations, or securities of the resulting business entity or into the right to receive cash or other property are thereupon so converted, and the former holders of interests in the converting domestic limited partnership are entitled only to the rights provided in the plan of conversion.

The conversion shall not affect the liability or absence of liability of any holder of an interest in the converting domestic limited partnership for any acts, omissions, or obligations of the converting domestic limited partnership made or incurred prior to the effectiveness of the conversion. The cessation of the existence of the converting domestic limited partnership in its form of organization as a domestic limited partnership in the conversion shall not constitute a dissolution or termination of the converting domestic limited partnership.

(b) If the resulting business entity is not a domestic corporation or a domestic limited liability company when the conversion takes effect, the resulting business entity is deemed:

(1) To agree that it may be served with process in this State for enforcement of (i) any obligation of the converting domestic limited partnership, and (ii) any obligation of the resulting business entity arising from the conversion; and

(2) To have appointed the Secretary of State as its agent for service of process in any such proceeding. Service on the Secretary of State of any such process shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 59-1106(b). Upon receipt of service of process on behalf of a resulting business entity in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the resulting business entity. If the resulting business entity is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the resulting business entity is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to G.S. 59-1062(a)(2). (2001-387, s. 142.)

§§ 59-1064 through 59-1069: Reserved for future codification purposes.

Part 10C. Merger.

§ 59-1070. Merger.

A domestic limited partnership may merge with one or more other domestic limited partnerships or other business entities if:

(1) The merger is permitted by the laws of the state or country governing the organization and internal affairs of each other merging business entity; and

(2) Each merging domestic limited partnership and each other merging business entity comply with the requirements of this Part, and, to the extent applicable, the laws referred to in subdivision (1) of this section. (1999-369, s. 4.8; 2001-387, ss. 143, 144.)

Editor's Note. — Session Laws 2001-387, ss. 143 and 144, effective January 1, 2002, recodified former G.S. 59-1054 as this section.

Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 59-1071. Plan of merger.

(a) Each merging domestic limited partnership and each other merging business entity shall approve a written plan of merger containing:

(1) For each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs;

(2) The name of the merging business entity that shall survive the merger;

(3) The terms and conditions of the merger;
(4) The manner and basis for converting the interests in each merging business entity into interests, obligations, or securities of the surviving business entity or into cash or other property in whole or in part; and
(5) If the surviving business entity is a domestic limited partnership, any amendments to its certificate of limited partnership that are to be made in connection with the merger.

(a1) The plan of merger may contain other provisions relating to the merger.

(a2) The provisions of the plan of merger, other than the provisions referred to in subdivisions (1), (2), and (5) of subsection (a) of this section, may be made dependent on facts objectively ascertainable outside the plan of merger if the plan of merger sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.
(2) A determination or action by the domestic limited partnership or by any other person, group, or body.
(3) The terms of, or actions taken under, an agreement to which the domestic limited partnership is a party, or any other agreement or document.

(b) In the case of a merging domestic limited partnership, the plan of merger must be approved in the manner provided in a written partnership agreement that is binding on all the partners for approval of a merger with the type of business entity contemplated in the plan of merger, or, if there is no provision, by the unanimous consent of its partners. If any partner of a merging domestic limited partnership has or will have personal liability for any existing or future obligation of the surviving business entity solely as a result of holding an interest in the surviving business entity, then in addition to the requirements of the preceding sentence, approval of the plan of merger by the domestic limited partnership shall require the consent of that partner. In the case of each other merging business entity, the plan of merger must be approved in accordance with the laws of the state or country governing the organization and internal affairs of the merging business entity.

(c) After a plan of merger has been approved by a domestic limited partnership, but before the articles of merger become effective, the plan of merger (i) may be amended as provided in the plan of merger, or (ii) may be abandoned (subject to any contractual rights) as provided in the plan of merger or a written partnership agreement that is binding on all the partners or, if there is no such provision, as determined by the unanimous consent of the partners. (1999-369, s. 4.8; 2001-387, ss. 143, 145; 2005-268, s. 58.)

Editor's Note. — Session Laws 2001-387, ss. 143 and 145, effective January 1, 2002, recodified former G.S. 59-1055 as this section.

§ 59-1072. Articles of merger.

(a) After a plan of merger has been approved by each merging domestic limited partnership and each other merging business entity as provided in G.S. 59-1071, the surviving business entity shall deliver articles of merger to the Secretary of State for filing. The articles of merger shall set forth:

(1) Repealed by Session Laws 2005-268, s. 59, effective October 1, 2005.

(2) For each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs.

(3) The name of the merging business entity that will survive the merger and, if the surviving business entity is not authorized to transact business or conduct affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address.

(3a) If the surviving business entity is a domestic limited partnership, any amendment to its certificate of limited partnership as provided in the plan of merger.

(4) A statement that the plan of merger has been approved by each merging business entity in the manner required by law.

(5) Repealed by Session Laws 2005-268, s. 59, effective October 1, 2005.

If the plan of merger is amended after the articles of merger have been filed but before the articles of merger become effective, and any statement in the articles of merger becomes incorrect as a result of the amendment, the surviving business entity promptly shall deliver to the Secretary of State for filing prior to the time the articles of merger become effective an amendment to the articles of merger correcting the incorrect statement. If the articles of merger are abandoned after the articles of merger are filed but before the articles of merger become effective, the surviving business entity shall deliver to the Secretary of State for filing prior to the time the articles of merger become effective an amendment reflecting abandonment of the plan of merger.

(b) A merger takes effect when the articles of merger become effective.

(c) Certificates of merger shall also be registered as provided in G.S. 47-18.1. (1999-369, s. 4.8; 2001-387, ss. 143, 146; 2001-487, s. 62(cc); 2005-268, s. 59.)

Editor's Note. — Session Laws 2001-387, ss. 143 and 146, effective January 1, 2002, recodified former G.S. 59-1056 as this section.

§ 59-1073. Effects of merger.

(a) When the merger takes effect:

(1) Each other merging business entity merges into the surviving business entity, and the separate existence of each merging business entity except the surviving business entity ceases;

(2) The title to all real estate and other property owned by each merging business entity is vested in the surviving business entity without reversion or impairment;

(3) The surviving business entity has all liabilities of each merging business entity;

(4) A proceeding pending by or against any merging business entity may be continued as if the merger did not occur, or the surviving business entity may be substituted in the proceeding for a merging business entity whose separate existence ceases in the merger;

(5) If a domestic limited partnership is the surviving business entity, its certificate of limited partnership shall be amended to the extent provided in the articles of merger;

(6) The interests in each merging business entity that are to be converted into interests, obligations, or securities of the surviving business entity or into the right to receive cash or other property are thereupon so converted, and the former holders of the interests are entitled only to the rights provided to them in the plan of merger or, in the case of former holders of shares in a domestic corporation as defined in G.S.

55-1-40, any rights they have under Article 13 of Chapter 55 of the General Statutes; and

(7) If the surviving business entity is not a domestic corporation, the surviving business entity is deemed to agree that it will promptly pay to the dissenting shareholders of any merging domestic corporation the amount, if any, to which they are entitled under Article 13 of Chapter 55 of the General Statutes and otherwise to comply with the requirements of Article 13 as if it were a surviving domestic corporation in the merger.

The merger shall not affect the liability or absence of liability of any holder of an interest in a merging business entity for any acts, omissions, or obligations of any merging business equity made or incurred prior to the effectiveness of the merger. The cessation of separate existence of a merging business entity in the merger shall not constitute a dissolution or termination of such merging business entity.

(b) If the surviving business entity is not a domestic limited liability company, a domestic corporation, a domestic nonprofit corporation, or a domestic limited partnership, when the merger takes effect the surviving business entity is deemed:

(1) To agree that it may be served with process in this State in any proceeding for enforcement of (i) any obligation of any merging domestic limited liability company, domestic corporation, domestic nonprofit corporation, domestic limited partnership or other partnership as defined in G.S. 59-36 that is formed under the laws of this State, (ii) the rights of dissenting shareholders of any merging domestic corporation under Article 13 of Chapter 55 of the General Statutes, and (iii) any obligation of the surviving business entity arising from the merger; and

(2) To have appointed the Secretary of State as its agent for service of process in any such proceeding. Service on the Secretary of State of any such process shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 59-1106(b). Upon receipt of service of process on behalf of a surviving business entity in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving business entity. If the surviving business entity is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the surviving business entity is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to G.S. 59-1072(a)(3). (1999-369, s. 4.8; 2001-387, ss. 143, 147; 2005-268, s. 60; 2007-385, s. 6.)

Editor's Note. — Session Laws 2001-387, ss. 143 and 147, effective January 1, 2002, recodified former G.S. 59-1057 as this section.

§§ 59-1074 through 59-1100: Reserved for future codification purposes.

Part 11. Miscellaneous.

§ 59-1101. Construction and application.

This Article shall be so applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Article among states enacting it. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

§ 59-1102. Rules for cases not provided for in this Article.

In any case not provided for in this Article the provisions of Article 2 of this Chapter govern. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-1103. Severability.

If any provision of this Article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-1104. Effective date and repeal.

(a) Except as set forth below, the effective date of this Article is October 1, 1986, and Article 1 of Chapter 59 of the North Carolina General Statutes is hereby repealed subject to the following:

(1) G.S. 59-501, 59-502, and 59-608 shall apply only to contributions and distributions made after the effective date;

(2) G.S. 59-704 applies only to assignments made after the effective date;

(3) G.S. 59-804 shall not be construed so as to change the priority of creditors for transactions entered into prior to the effective date;

(4) Unless agreed otherwise by the partners, the applicable provisions of existing law governing allocation of profits and losses (rather than the provisions of G.S. 59-503), distribution to a withdrawing partner (rather than the provisions of G.S. 59-604), and the distribution of assets upon the winding up of a limited partnership (rather than the provisions of G.S. 59-804) shall govern limited partnerships formed before the effective date of this Article herein.[;]

(5) The repeal of any prior statutory provision by this Article shall not impair, or otherwise affect, the organization or continued existence of a limited partnership existing at the effective date of this Article, nor shall the repeal by this Article of any such prior provision be construed so as to impair any contract or to affect any right accrued prior to the effective date of this Article; but such limited partnerships shall be subject to the procedural and other requirements of this Article except as otherwise specified in G.S. 59-1104(a). Provided, that failure to comply with the requirements of this Article by such limited partnerships shall not cause loss of limited liability.

(b) Any foreign limited partnership formed under the laws of another jurisdiction doing business in this State prior to the effective date shall within two years thereafter comply with Part 9 of Article 5 of Chapter 59. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, ss. 9, 10.)

§ 59-1105: Repealed by Session Laws 2001-387, s. 148, effective January 1, 2002.

§ 59-1106. Filing, service, and copying fees.

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary of State for filing:

Document	Fee
(1) Certificate of limited partnership which does not include an application for registration as a limited liability limited partnership	$50.00
(2) Certificate of limited partnership which includes an application for registration as a limited liability limited partnership	125.00
(3) Certificate of amendment	25.00
(4) Certificate of cancellation	25.00
(5) Application for reservation of name	10.00
(6) Notice of transfer of reserved name	10.00
(7) Application for registration of name	10.00
(8) Application for renewal of registration name	10.00
(9) Limited partnership's or foreign limited partnership's statement of change of registered agent or registered office or both	5.00
(10) Agent's statement of change of registered office for each affected partnership	5.00
(11) Agent's statement of resignation	No Fee
(12) Designation of registered agent or registered office or both	5.00
(13) Application for registration as foreign limited partnership	50.00
(14) Certificate of amendment of registration as foreign limited partnership	25.00
(15) Cancellation of registration as foreign limited partnership	25.00
(16) Application for certificate of withdrawal by reason of merger, consolidation, or conversion	10.00
(17) Articles of merger	50.00
(18) Articles of conversion (other than articles of conversion included as part of another document)	50.00
(19) Application for registration as a limited liability limited partnership (other than an application included in the certificate of limited partnership)	125.00
(20) Certificate of amendment of registration as a limited liability limited partnership	25.00
(21) Certificate of cancellation of registration as a limited liability limited partnership	25.00
(22) Annual report for a limited liability limited partnership	200.00
(23) Any other document required or permitted to be filed under this Article	10.00

(b) The Secretary of State shall collect a fee of ten dollars ($10.00) each time process is served on the Secretary under this Article. The party to a proceeding causing service of process is entitled to recover this fee as costs if the party prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying, comparing, and certifying a copy of any filed document relating to a domestic or foreign limited partnership:

(1) One dollar ($1.00) a page for copying or comparing a copy to the original; and

(2) Fifteen dollars ($15.00) for a paper certificate.
(3) Ten dollars ($10.00) for an electronic certificate.

(d) Repealed by Session Laws 2001-387, s. 171(b), effective January 1, 2002. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1991, c. 574, s. 3; 1995, c. 539, s. 37; 1997-485, s. 13; 2001-358, ss. 10(f), 37; 2001-387, ss. 149, 171(a), 171(b), 173, 175(a); 2001-413, s. 6; 2002-126, s. 29A.31.)

Editor's Note. — Session Laws 2001-358, ss. 10(f) and 37, effective January 1, 2002, and applying to documents submitted for filing on or after that date, had amended this section. However, Session Laws 2001-387, s. 171(a), repealed ss. 10(f) and 37 of 2001-358, effective January 1, 2002.

Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2008-194, s. 2, provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, 'notice' shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section [August 8, 2008]."

§ 59-1107. Income taxation.

A limited partnership, a foreign limited partnership authorized to transact business in this State, and a partner of one of these partnerships are subject to taxation under Article 4 of Chapter 105 of the General Statutes in accordance with their classification for federal income tax purposes. Accordingly, if a limited partnership or a foreign limited partnership authorized to transact business in this State is classified for federal income tax purposes as a C corporation as defined in G.S. 105-131(b)(2) or an S corporation as defined in G.S. 105-131(b)(8), the partnership and its partners are subject to tax under Article 4 of Chapter 105 of the General Statutes to the same extent as a C corporation or an S corporation, as the case may be, and its shareholders. If a limited partnership or a foreign limited partnership authorized to transact business in this State is classified for federal income tax purposes as a partnership, the partnership and its partners are subject to tax under Article 4 of Chapter 105 of the General Statutes accordingly. If a limited partnership or a foreign limited partnership authorized to transact business in this State is classified for federal income tax purposes as other than a corporation or a partnership, the partnership and its partners are subject to tax under Article 4 of Chapter 105 of the General Statutes in a manner consistent with that classification. This section does not require a limited partnership or a foreign limited partnership to obtain an administrative ruling from the Internal Revenue Service on its classification under the Internal Revenue Code. (2001-387, s. 150.)

Editor's Note. — Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Chapter 59B.

Uniform Unincorporated Nonprofit Association Act.

Sec.
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§ 59B-1. Short title.

This Chapter may be cited as the Uniform Unincorporated Nonprofit Association Act. (2006-226, s. 1.)

NORTH CAROLINA COMMENT

This Chapter is based upon the Uniform Unincorporated Nonprofit Association Act (hereinafter "Uniform Act") and is the result of a study performed by the General Statutes Commission, partly due to S.L. 2004-161, s. 7.1. The Commission filed its report with the General Assembly on May 11, 2006.

Editor's Note. — Session Laws 2006-226, s. 34, makes this Chapter effective January 1, 2007.

Session Laws 2006-226, s. 5 is a severability clause.

Session Laws 2006-226, s. 6, provides: "This act does not affect an action or proceeding commenced or right accrued before this act takes effect."

Session Laws 2006-226, s. 7, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Unincorporated Nonprofit Association Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 59B-2. Definitions.

In this Chapter:

(1) "Member" means a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association.

(2) "Nonprofit association" means an unincorporated organization, other than one created by a trust and other than a limited liability company, consisting of two or more members joined by mutual consent for a common, nonprofit purpose. However, joint tenancy, tenancy in common, or tenancy by the entireties does not by itself establish a nonprofit association, even if the co-owners share use of the property for a nonprofit purpose.

(3) "Person" means an individual, corporation, limited liability company, business trust, estate, trust, partnership, association, joint venture,

government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States. (2006-226, s. 1.)

OFFICIAL COMMENT

1. With respect to relations external to a nonprofit association, whether a person is a member of the organization determines principally a member's responsibility to third parties. Internally, whether a person is a member might determine specified rights and responsibilities, including access to facilities, voting, and obligation to pay dues. This Act is concerned only with determining whether a person is a member for purposes of external relations, such as liabilities to third parties on a contract of the nonprofit association. Therefore, "member" is defined in terms appropriate to these purposes. "Member" includes a person who has sufficient right to participate in the affairs of a nonprofit association so that under common law the person would be considered a co-principal and so liable for contract and tort obligations of the nonprofit association.

The definition may reach somewhat beyond decisions of some courts. Either participation in the selection of the leadership or in the development of policy is enough. Both are not required. This broad definition of member ensures that the insulation from liability is provided in all cases in which the common law might have imposed liability on a person, simply because the person was a member.

2. A fund-raising device commonly used by many nonprofit organizations is the membership drive. In most cases the contributors are not members for purposes of this Act. They are not authorized to "participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy." Simply because an association calls a person a member does not make the person a member under this Act.

Section 6 [G.S. 59B-7] nevertheless protects "a person considered to be a member by a nonprofit association" even though the person is not within the definition of member in paragraph (1) [see North Carolina Comment to G.S. 59B-7].

3. The role of a member in the affairs of an association is described as "may participate in the selection" instead of "may select or elect" the governing board and officers and 'may participate ... in the development of policy" instead of "may determine" policy. This accommodates the Act to a great variation in practices and organizational structures. For example, some nonprofit associations permit the president or chair to name some members of the governing board, such as by naming the chairs of principal committees who are designated ex officio members of the governing board. Similarly, the role in determination of policy is described in general terms. "Persons authorized to manage the affairs of the association" is used in the definition instead of president, executive director, officer, member of governing board, and the like. Given the wide variety of organizational structures of nonprofit associations to which this Act applies and the informality of some of them the more generic term is more appropriate.

4. "Person" instead of individual is used to make it clear that associations covered by this Act may have individuals, corporations, and other legal entities as members. Unincorporated nonprofit trade associations, for example, commonly have corporations as members. Some national and regional associations of local government officials and agencies have governmental units or agencies as members.

5. Paragraph (2) defines "nonprofit association." The model American Bar Association acts deal with both for-profit and nonprofit corporations. Unincorporated, for-profit organizations are largely covered by the uniform partnership acts. The differences between for-profit and nonprofit unincorporated organizations are so significant that it would be impractical to cover both in a single act. Therefore, this Act deals only with nonprofit organizations.

6. A charitable trust is a form of an unincorporated nonprofit legal organization. It is, however, not a nonprofit association within this Act. To the extent that trust law does not supply an answer to a legal problem concerning a charitable trust, a court could look to this Act to develop by analogy a common law answer.

7. The term "nonprofit association" is used instead of "association" for several reasons. The risk that this Act when placed in a state's code would be construed to apply to both nonprofit and for-profit associations should thus be avoided. Acts dealing with one kind of association when placed in a code have sometimes lost their identification and been inadvertently applied to the other kind where the term "association" alone was used. For example, the New York Joint-Stock Association Act of 1894 used the term "association," which it defined to include only for-profit organizations. "Associa-

tion" was held in 1938 to include an unincorporated political party and the act applied to it. *Richmond County v. Democratic Organization of Richmond County*, 1 NYS 2d 349 (1938). Subsequent decisions applied the act to other unincorporated nonprofit organizations. The use of "nonprofit association" instead of merely "association" should also avoid the risk of this Act being improperly used to develop a common law rule by analogy from this Act to apply in a case involving a for-profit association. Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1908); Robert F. Williams, *Statutes as Sources of Law Beyond their Terms in Common Law Cases*, 50 Geo. Wash. L. Rev. 554 (1982).Legal issues concerning unincorporated for-profit associations that are not partnerships and so not controlled by a partnership act would be governed by a State's other statutory or common law. Resort to one of the two partnership acts for the purposes of developing a common law rule by analogy would be appropriate. Resort for this purpose to this Act in the case of an unincorporated for-profit association would not be appropriate.

8. Two or more persons is the common statutory requirement to constitute an unincorporated nonprofit association. New Jersey, on the other hand, requires that there be seven or more members to be an association under its laws. This Act suggests the smaller number - two. Consideration was given to specifying "one" instead of "two." For example, the developer of a condominium may have created a condominium association as an unincorporated nonprofit association. Before any units are sold the developer as owner of all units has all of the memberships in the association. Should it be treated as a nonprofit association under this Act from the beginning? It should not. Can one person be "joined by mutual consent for a common purpose?" To ask the question would seem to be to answer it. If the concern is to give the developer the entity protections provided by this Act, it is very likely that it already has some protection because it is a business corporation. Nevertheless, the number is placed in brackets, in part, to raise the question whether the number should be one or two or even a larger number.

The members must be joined together for a common purpose. Several States provide that they be "joined together for a **stated** common purpose" (emphasis added). Because of the informality of many ad hoc associations, it is prudent not to impose the requirement that the common purpose be "stated." Very probably, it is the small, informal, ad hoc associations and those third parties affected by them that most need this Act.

9. "Nonprofit" is not defined. A common definition - it is an association whose net gains do not inure to the benefit of its members and which makes no distribution to its members, except on dissolution - does not work for all nonprofit associations. Consumer cooperatives, for example, make distributions to their members; but they are not for-profit organizations. Those consumer cooperatives not organized under specific state or federal laws need the benefits of this Act.

It is instructive to note that the drafting committee for the ABA Model Nonprofit Corporation Act finally determined that it could not develop a satisfactory definition of nonprofit. Instead, the act contains rules, regulations, and procedures applicable separately to each of the three kinds of nonprofit corporation - public benefit, mutual benefit, and religious. It does not define the three kinds; it described what they can do and how they may function. Considering the corporation's intended activities and the rules, regulations, and procedures applicable to each of the three different kinds of corporations, a choice is made. Having made a choice, the corporation is bound by the rules, regulations, and procedures prescribed for the kind of nonprofit corporation chosen.

10. The final sentence of paragraph (2) is adapted from Section 201(d)(1) of Uniform Partnership Act(1994). This stresses that more than common ownership and use is required. For example, that three families own a lake cottage and share its use does not make the three families a nonprofit association. Paragraph (2) precludes arrangements that are merely common ownership from being a nonprofit association under this Act.

11. The definition of "person" in paragraph (3) is a standard NCCUSL definition.

12. The definition of "State" in paragraph (4) is a standard NCCUSL definition.

NORTH CAROLINA COMMENT

In subdivision (2), the General Statutes Commission added "and other than a limited liability company" to exclude limited liability companies from the Uniform Act's definition of "nonprofit association." In subdivision (3), the Commission added "limited liability company" to expressly include limited liability companies in the Uniform Act's definition of "person."

§ 59B-3. Supplementary general principles of law and equity.

Principles of law and equity supplement this Chapter unless displaced by a particular provision of it. (2006-226, s. 1.)

OFFICIAL COMMENT

1. This section is adapted from Uniform Commercial Code Section 1-103[(b)]. The reference in Section 1-103[(b)] to "the law merchant" and its examples of supplementary rules, such as those of principal and agent and estoppel, were deleted as irrelevant or incomplete and unnecessary. This change in language does not manifest any change in substance.

2. This Act contains no rules concerning governance. However, recourse to rules of governance must be had to apply some of the Act's rules. For example, whether a nonprofit association is liable under a contract made for it by an individual depends on whether the individual had the necessary authority to act as agent. Was the individual given the authority by someone empowered by the nonprofit association to give the authority? To decide a case like this a court must resort to the rules of the nonprofit association or, if there are none applicable or none at all, to the common law or other statutory law of the jurisdiction.

3. Efforts were made to develop default internal rules of governance - applicable if an association had none or none that were applicable. This effort demonstrated the complexity and difficulty of fashioning rules that would reasonably fit a wide variety of nonprofit associations - large and small, public benefit, mutual benefit, and religious, and of short and indefinite duration. It was thought best to leave this question to other law of the jurisdiction.

§ 59B-4. Title to property; choice of law.

Real and personal property in this State may be acquired, held, encumbered, and transferred by a nonprofit association, whether or not the nonprofit association or a member has any other relationship to this State. (2006-226, s. 1.)

OFFICIAL COMMENT

This section is consistent with Restatement (Second) of Conflict of Laws Section 223 (1971). Section 3 makes a conveyance or devise of land located in a State that has adopted this Act effective even though it would not be effective under the law of the State in which the nonprofit association has its principal office or other significant relationship. No relationship of the nonprofit association other than that the property is situated in the State is required.

NORTH CAROLINA COMMENT

The General Statutes Commission replaced the Uniform Act's catchline "Territorial application" with "Title to property; choice of law" as more descriptive.

§ 59B-5. Real and personal property; nonprofit association as legatee, devisee, or beneficiary.

(a) A nonprofit association is a legal entity separate from its members for the purposes of acquiring, holding, encumbering, and transferring real and personal property.

(b) A nonprofit association, in its name, may acquire, hold, encumber, or transfer an estate or interest in real or personal property.

(c) A nonprofit association may be a beneficiary of a trust or contract, a legatee, or a devisee.

(d) Any judgments and executions against a nonprofit association bind its real and personal property in like manner as if it were incorporated. (2006-226, s. 1.)

OFFICIAL COMMENT

1. Subsection (a) makes a nonprofit association a legal entity separate from its members for purposes of its dealing with real and personal property. This reverses the common law view that a non-profit association was not a legal entity.

2. Subsection (b) is based on Section 3-102(8), Uniform Common Interest Act. It reverses the common law rule. Inasmuch as an unincorporated nonprofit association was not a legal entity at common law, it could not acquire, hold, or convey real or personal property. Harold J. Ford, *Unincorporated Non-Profit Associations*, 1-45 (Oxford Univ. Press (1959); 15 A.L.R. 2d 1451 (1951); Warburton, *The Holding of Property by Unincorporated Associations*, Conveyancer 318 (September-October 1985).

3. This strict common law rule has been modified in various ways in most jurisdictions by courts and statutes. For example, courts have held that a gift by will or inter vivos transfer of real property to a nonprofit association is not effective to vest title in the nonprofit association but is effective to vest title in the officers of the association to hold as trustees for the members of the association. *Matter of Anderson's Estate*, 571 P. 2d 880 (Okla. App. 1977).

A New York statute specifies that a grant by will of real or personal property to an unincorporated association is effective if within three years after probate of the will the association incorporates. McKinney's N.Y. Estates, Powers, & Trust Law, Section 3-1.3 (1981).

California gives any "unincorporated society or association and every lodge or branch of any such association, and any labor organization" full right to acquire, hold, or transfer any "real estate and other property as may be necessary for the business purposes and objects of the society," and acquire and hold any property not so necessary for 10 years. California Corporations Code, Title 3, Unincorporated Associations, Section 20001 (West 1991).

As is the case with many of the problems created by the view that an unincorporated association is not an entity the statutory solutions are often partial - limited to special circumstances and associations. Subsection (b) solves this problem for all nonprofit associations, for all kinds of transactions, and for both real and personal property.

4. Even if a nonprofit association's governing documents provide that it "may not acquire real property," subsection (b) makes effective a transfer of Blackacre to the association. A different result would obviously disrupt real estate titles. The remedy for this violation of internal rules lies not in preventing title from passing but, as with other organizations, in an action by members against their association and its appropriate officers to undo the transaction.

5. Subsection (c) is a necessary corollary of subsection (b) and, thus, it may be unnecessary. However, several States expressly provide that an unincorporated, nonprofit association may be a legatee, devisee, or beneficiary. See, for example, Md. Estates & Trusts Code Ann. Section 4-301 (1991). Therefore, it is desirable to continue this as an express rule. Subsection (c) applies to both trusts and contracts. Not all state statutes apply expressly to both.

NORTH CAROLINA COMMENT

The General Statutes Commission placed "in its name" in commas in subsection (b) and added subsection (d), which was adapted from G.S. 1-69.1. Subsection (b) is consistent with the provisions of former G.S. 39-24 and former G.S. 39-25.

§ 59B-6. Statement of authority as to real property.

(a) A nonprofit association may execute and record a statement of authority to transfer an estate or interest in real property in the name of the nonprofit association.

(b) An estate or interest in real property in the name of a nonprofit association may be transferred by a person so authorized in a statement of authority recorded in the office of the register of deeds in the county in which a transfer of the property would be recorded.

(c) A statement of authority must be set forth in a document styled "affidavit" that contains all of the following:

(1) The name of the nonprofit association.

(2) Reserved for future codification purposes.

(3) The street address, and the mailing address if different from the street address, of the nonprofit association, and the county in which it is

located, or, if the nonprofit association does not have an address in this State, its address out-of-state.

(4) That the association is an unincorporated nonprofit association.

(5) The name or office of a person authorized to transfer an estate or interest in real property held in the name of the nonprofit association.

(6) That the association has duly authorized the member or agent executing the statement to do so.

(d) A statement of authority must be sworn to and subscribed in the same manner as an affidavit by a member or agent who is not the person authorized to transfer the estate or interest.

(e) The register of deeds shall collect a fee for recording a statement of authority in the amount authorized by G.S. 161-10(a)(1). The register of deeds shall index the name of the nonprofit association and the member or agent signing the statement of authority or any subsequent document relating thereto as Grantor and the name of the appointee as Grantee.

(f) An amendment, including a termination, of a statement of authority must meet the requirements for execution and recording of an original statement. Unless terminated earlier, a recorded statement of authority or its most recent amendment expires by operation of law five years after the date of the most recent recording.

(g) If the record title to real property is in the name of a nonprofit association and the statement of authority is recorded in the office of the register of deeds in the county in which a transfer of real property would be recorded, the authority of the person or officer named in a statement of authority is conclusive in favor of a person who gives value without notice that the person or officer lacks authority. (2006-226, s. 1.)

OFFICIAL COMMENT

1. This section is based on Uniform Partnership Act(1994) Section 303. California Corporations Code, Title 3, Unincorporated Associations, Section 20002 (West 1991), is similar.

2. A statement of authority need not be filed to conclude an acquisition of or to hold real property. It is concerned only with the sale, lease, encumbrance, and other transfer of an estate or interest in real property. For this, it should, but need not, be filed. The filing provides important documentation.

3. Inasmuch as the statement relates to the authority of a person to act for the association in transferring real property, subsection (b) requires that the statement be filed or recorded in the officer where a transfer of the real property would be filed or recorded. This is usually the county in which the real estate is situated. This is where a title search concerning the real estate would be conducted. Uniform Partnership Act (1994) Section 303 provides for central filing, such as with the Secretary of State, but its statement of partnership authority concerns authority of partners generally, not just with respect to real estate.

4. "Filed" and "recorded" are bracketed to direct an enacting State to choose. In most jurisdictions "recorded" will be the appropriate choice.

5. Subsection (c)(2) [not enacted in North Carolina] deals with the problem caused by the similarity of names of small local nonprofit associations. There is no duplication of federal tax identification numbers. Therefore, any confusion of identity is avoided by this requirement.

Subsection (c)(3) may present a problem for small, ad-hoc nonprofit associations. They may have no fixed office address. They may meet in the homes of their leaders. However, if they distribute literature or file petitions they are likely to have a mailing address.

Subsection (c)(4) informs those relying on the statement of the precise character of the organization. Knowing that the organization is an unincorporated nonprofit association may cause the person dealing with the organization to act differently.

6. Subsection (c)(5) permits the statement to identify as the person who can act for the association one who holds a particular office, such as president. This designation relieves the association from the need to make additional filings on each change of officers. Under local title standards and practices the transferee and filing or recording office are likely to require a certificate of incumbency if the statement designates the holder of an office.

7. Subsection (d) is designed to reduce the risk of fraud and to reflect law and practice

applicable to other organizations. It requires someone other than the person authorized to deal with the real property to execute the statement of authority on behalf of the nonprofit association. Whether the formalities of execution must conform to those of a deed or an affidavit is left for each State to determine.

8. Subsection (f) makes a statement inoperative five years after its most recent recording or filing. This prevents a statement whose recording or filing is unknown by the association's current leadership from being effective. Reliance on a filing or recording this old is, in effect, not in good faith.

9. Subsection (g) is based on Uniform Partnership Act (1994) Section 303(h). Its obvious purpose is to protect good faith purchasers for value without notice who rely on the statement, including those who acquire a security interest in the real property. If the required signatures on the statement, deed, or both are forgeries, the effect of them is not governed by Section 5(g). Instead, Section 2 applies and would invoke the other law of the State. In many States the deed would be a nullity. See Boyer, Hovenkamp, and Kurtz, *THE LAW OF PROPERTY*, An Introductory Survey (West Pub. Co. 4th ed. 1991).

NORTH CAROLINA COMMENT

The General Statutes Commission inserted "of the register of deeds" in subsection (b) to identify the office in which a transfer of real property would be recorded.

The Commission made several changes in subsection (c). To assist the registers of deeds, the Commission modified the introductory language of the subsection by requiring a statement of authority to be set out in a document entitled "affidavit." The Commission deleted subdivision (2) (the Uniform Act's requirement for a federal tax identification number) due to concerns over identity theft and the belief that the requirement was not useful in any event. In subdivision (3), the Commission conformed the requirement for an address, in part, to similar requirements in this State's statutes regulating other entities. In subdivision (5), the Commission changed "title" to "office" in light of the references to "officer" in subsection (g) and G.S. 59B-13. The Commission added subdivision (6).

The Commission modified subsection (d) by requiring a statement of authority to be sworn to and subscribed in the same manner as an affidavit and by narrowing the subsection to specify execution by a "member or agent" rather than a "person."

In subsection (e), the Commission identified the officer authorized to collect the fee for recording a statement of authority, made the collection of the fee mandatory rather than permissive, inserted the cross-reference to the recording fee "authorized by G.S. 161-10(a)(1)," and added indexing instructions.

In subsection (f), the Commission replaced the Uniform Act's references to "cancellation," "cancelled," and "is cancelled" with "termination," "terminated," and "expires."

In subsection (g), the Commission inserted the reference to the "register of deeds" to identify the office in which a transfer of real property would be recorded and added "or officer" for more precision.

CASE NOTES

Controlling Effect of § 1-69.1. — This section was enacted in 1939. The amendment to G.S. 1-69.1, which added the requirement of an allegation of G.S. 66-68 recordation before suit may be brought by an unincorporated association in its common name, was enacted effective 1 October 1975. In the face of any irreconcilable conflict between the provisions of these two statutes, G.S. 1-69.1, being the later enactment, will control or be regarded as a qualification of the earlier statute. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Requirements of § 1-69.1 are mandatory and failure to satisfy them is not exonerated by this section. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

§ 59B-7. Liability of members or other persons.

(a) A nonprofit association is a legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities.

(b) A person is not liable for the contract, tort, or other obligations of a nonprofit association merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association.

(c) Reserved for future codification purposes.

(d) A tortious act or omission of a member or other person for which a nonprofit association is liable is not imputed to a person merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association.

(e) A member of, or a person referred to as a "member" by, a nonprofit association may assert a claim against or on behalf of the nonprofit association. A nonprofit association may assert a claim against a member or a person referred to as a "member" by the nonprofit association. (2006-226, s. 1.)

OFFICIAL COMMENT

1. At common law a nonprofit association was not a legal entity separate from its members. Borrowing from the law of partnership, the common law viewed a nonprofit association as an aggregate of its members. The members are co-principals. Subsection (a) changes that. It makes a nonprofit association a legal entity separate from its members for purposes of contract and tort.

2. This Act does not deal with liability of members or other persons acting for a nonprofit association for their own conduct. With respect to contract and tort Section 6 leaves that to the other law of the jurisdiction enacting this Act.

3. Subsections (b) through (e) are applications to common cases of the basic principle in subsection (a). Because a nonprofit association is made a separate legal entity, its members are not co-principals. Consequently they are not liable on contracts or for torts for which the association is liable. Subsection (b) specifies that result with respect to contracts.

4. Subsection (b) applies the principle in subsection (a) to relieve members and others from vicarious liability for the contracts of a nonprofit association.

5. Subsections (a) and (b) eliminate a risk that existed under common law. An agent makes an implied warranty of authority to the other contracting party. If the purported principal does not exist, the agent obviously breaches the warranty. Because an unincorporated nonprofit association was not a legal entity; one purporting to act for it breached this implied warranty. *Smith & Edwards v. Golden Spike Little League*, 577 P. 2d 132, 134 (Utah 1978). Subsection (b) treats a nonprofit association as a legal entity; therefore, an agent who acts for it within her authority does not breach the warranty.

6. **"Merely"** because a person is a member does not make the person liable on an association's contract. This formulation means that there are special circumstances that may result in liability. For example, a member may expressly become a party to a contract with the nonprofit association. Subsection (b) relieves members only of their vicarious liability. Liability for one's own conduct is left to the other law of the jurisdiction.

An agent with authority from a nonprofit association who negotiates a contract without disclosing the agent's representative status is liable on the contract. Under agency law an agent acting within the agent's scope of authority for an undisclosed or partially disclosed principal is personally liable on the contract along with the principal, unless the other contracting party agrees not to hold the agent liable. Restatement (Second) Of Agency 320-322; Reuschlein and Gregory, *Agency & Partnership* 161-163 (West 2d ed. 1990).

Courts have pierced the corporate veil of nonprofit corporations. Comment, Piercing the Nonprofit Corporation Veil, 66 Marq. L. Rev. 134 (1984). Section 6 makes a nonprofit association a legal entity for these purposes. Therefore, as a matter of its other law a jurisdiction enacting this Act may appropriately apply this doctrine to a nonprofit association. In *Macaluso v. Jenkins*, 95 Ill. App. 3d 461, 420 N.E.2d 251 (1981), the president of a nonprofit corporation was found to have so commingled its funds and assets with his own and those of a business corporation he controlled and have treated them as his own for his benefit that the corporate veil must be pierced to promote justice. He was found liable for a debt contracted in the name of the nonprofit corporation. See also Harry G. Henn & John R. Alexander, *Law of Corporations*, pp 344-352 (West 3d ed. 1983); Alfred F. Conard, *Corporations in Perspective*, pp 424-433 (Foundation Press, 1976).

7. An example of a partial statutory solution of members' liability for contracts of a nonprofit association is California Corporations Code, Title 3, Nonprofit Associations, Section 21100 (West 1991). It relieves members from liability for "debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or the purchase, leasing, designing, planning, architectural supervision, erection, contraction, repair, or furnishing of buildings or other structures, to be used for purposes of the association." As noted earlier, partial and unco-

ordinated statutory solutions of common law problems are typical.

8. Subsection (c) [combined in this section into subsection (b)] applies the principle in subsection (a) to relieve members and others from liability for torts for which the nonprofit association is liable. Inasmuch as Section 6 [this section] provides that a member is not a co-principal, the member cannot be considered to be an employer of the employee who committed the tort. Again, only relief from vicarious liability is provided.

Liability of a member or other person who acts for the nonprofit association is governed by other law of the jurisdiction. That an employer is liable for a tort committed by its employee does not excuse the employee.

9. The immunity from vicarious liability provided by subsections (b) and (c) [combined in this section into subsection (b)] does not depend on the remedy sought. Whether it is for damages for breach of contract or tort, unjust enrichment, or the like the immunity is provided.

10. Since the mid 1980's all States have enacted laws providing officers, board members, and other volunteers some protection from liability for their own negligence. The statutes vary greatly as to who is covered, for what conduct protection is given, and the conditions imposed for the freedom from liability. Some apply only to nonprofit corporations. State Liability Laws for Charitable Organizations and Volunteers (Nonprofit Risk Management & Insurance Institute, 1990); Developments, Nonprofit Corporations, 105 Harv. L. Rev. 1578, 1685-1696 (1992). This means that members and volunteers involved with unincorporated nonprofit associations do not obtain protection under those state statutes."

The 1987 Texas act, for example, relieves directors, officers, and other volunteers from liability for simple negligence that causes death, damage, or injury if the volunteer acted in the scope of her duties for a charitable organization exempt under Internal Revenue Code Section 501(c)(3) or (4). The act also limits the amounts that may be recovered from an employee or the organization if the organization carries requisite liability insurance. The constitutionality of the provision relieving volunteers from liability has been questioned under Article I, Section 13 of the Texas Constitution - the Open Courts provision. Note, The Constitutionality of the Charitable Immunity and Liability Act 1987, 40 Baylor L. Rev. 657 (1988). Some statutes premise all relief upon the organization having specified liability insurance.

Section 6 [this section] does not affect these statutes. As noted earlier Section 6 [this section] deals only with vicarious liability. These statutes concern liability for one's own conduct.

11. Although not a concern of Section 6 [this section], perhaps it should be noted that nonprofit organizations have been held liable for tortious acts and omissions not only of employees but also of members. In Guyton v. Howard, 525 So. 2d 918 (Fl. App. 1988) a nonprofit organization was held liable for the negligence of members who acted for the organization in conducting an initiation that resulted in injury.

12. Subsection (d) applies the principle in subsection (a) to reverse the common law rule that the negligence of an employee of an association is imputed to its members. A member as co-principal was vicariously responsible for an employee's conduct within the scope of the employee's duties. Section 6, however, makes the nonprofit association a legal entity. Thus, a member is not a co-principal and the employee's negligence is not imputed to a member.

Because the employee's negligence is not imputed, the member's suit against the nonprofit association for negligence by the employee is not subject to the defense of contributory negligence.

Some courts treated large nonprofit associations as entities for some purposes and so did not impute the negligence of an employee to a member. Therefore, a member could recover from the association. *Marshall v. International Longshoreman's and Warehouseman's Union*, 57 Cal. 2d 781, 371 p. 2d 987 (1962); Judson A. Crane, *Liability of an Unincorporated Association for Tortious Injury to a Member*, 16 Vand L Rev 319, 323 (1963).

13. Subsection (e) applies the principle in subsection (a) to reverse the common law rule that a member may not sue the member's unincorporated nonprofit association. A member as co-principal is logically a defendant as well as a plaintiff in such an action. The logic is that one may not sue oneself.

Subsection (a) makes an unincorporated nonprofit a legal entity. Therefore, a member is separate from the nonprofit association. There is thus no logical obstacle to either suing the other. A nonprofit association may, for example, sue a member for delinquent dues. See, for example, Section 6.13 ABA Nonprofit Corporation Act (1987)

14. The Texas Supreme Court recently overruled the common law rule and held that a member may sue the unincorporated nonprofit association of which the person is a member. *Cox v. Thee Evergreen Church*, 836 S.W.2d 167 (Tex. 1992). The court also overturned the Texas common law rule that the negligence of an employee is imputed to a member. The court referred to a statute authorizing a nonprofit association to sue and be sued and other Texas statutes giving entity status for limited purposes to unincorporated nonprofit associations. It did not, however, rely on them in overturning the historic common law rule. It simply found the old rule not suitable for present times. The

court also followed recent developments in other courts.

15. Section 6 [this section] relieves from vicarious liability not only members but also certain others. Persons who are 'authorized to participate in the management of the affairs of the nonprofit association' are protected. Persons within this group - largely directors and officers, however denominated - are likely also to be members as defined in Section 1(1) [G.S. 59B-2(1)], and protected as such. If they are not members (i.e. not co-principals) they should not be found liable at common law. Section 6 [this section] extends protection to this group out of abundant caution. It is possible that a court might misapply the common law rationale for liability to hold a non-member manager vicariously liable. Section 6 [this section] prevents that somewhat remote possibility.

Section 6 [this section] also extends protection to a person who is not within the definition of "member" in Section 1(1) [G.S. 59B-2(1)] but is "considered to be a member by the nonprofit association." [see North Carolina Comment.] A person within this clause is one who does not have the relationship to the nonprofit association that would permit a finding under the common law that the person is a co-principal. Also the person is not a director, officer, or manager within the preceding phrase. That a person not within the two preceding phrases but within the third phrase might be found vicariously liable seems quite remote. Nevertheless, Section 6 [this section] accords this person protection.

As noted earlier, Section 6 [this section] concerns vicarious liability only. Liability for one's own conduct is covered by other law of the enacting jurisdiction.

NORTH CAROLINA COMMENT

The Uniform Act in this section provides protection for a nonprofit association's members from tort and contract liability based solely on membership status. The General Statutes Commission extended this protection to cover liability based solely on membership status for the nonprofit association's other legal obligations, such as taxes and penalties. The Commission restructured the section in the process.

Throughout this section, the Commission substituted the phrase "person referred to as a member" for the Uniform Act's phrase "person considered to be a member" to eliminate possible ambiguity created by the use of the word "consider." As the Official Comment makes clear, the phrase was intended to refer to persons who do not meet the definition of "member" but are referred to by the nonprofit association as "members" to recognize their contributions (such as a financial donation) to the association.

In subsection (e), the Commission expanded the Uniform Act's provision by changing "a claim against the nonprofit association" to "a claim against or on behalf of the nonprofit association."

§ 59B-8. Capacity to assert and defend; standing.

(a) A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution.

(b) A nonprofit association may assert a claim in its name on behalf of its members or persons referred to as "members" by the nonprofit association if one or more of them have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member or a person referred to as a "member" by the nonprofit association. (2006-226, s. 1.)

OFFICIAL COMMENT

1. Subsection (a) broadly recognizes the right of a nonprofit association to participate as an entity in judicial, administrative, and governmental proceedings, and in arbitration and mediation on behalf of it and its members. It may sue and be sued. Many States have enacted statutes granting unincorporated associations these rights. Many have rejected the argument that these acts made an unincorporated nonprofit association a separate legal entity for other purposes.

2. Ohio Rev. Code Ann. Section 1745.01

(Baldwin 1991) provides that an unincorporated association may "sue or be sued as an entity under the name by which it is commonly known and called." This formulation has an element that subsection (a) does not have - a description of the association name to be used. Maryland requires that the unincorporated association have a "group name." Md. Estates & Trust Code Ann. Section 6-406(a) - (1991). As some of the informal nonprofit associations may not have fixed on a name but need the benefit of the rule, subsection (a) does not require that it have a name.

3. Subsection (b) describes an association's standing to represent the interests of its members in the proceeding. It is the federal standing rule. *Hunt v. Washington Apple Advertising Commn*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53, L. Ed. 2d 383 (1977). A nonprofit association must meet the three requirements only if it seeks to represent the interest of its members. If the suit concerns only the nonprofit association's interests, subsection (b) does not apply.

4. If participation of individual members is required, the nonprofit association does not have standing. If the injury for which a claim is made or the remedy sought is different for different members, their participation through testimony and presenting other evidence is required. The typical case in which a nonprofit association has standing is where it seeks only a declaration, injunction, or some form of prospective relief for injury to its members. *Warth v. Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

5. Subsection (b) does not require the nonprofit association to show that it suffered harm or has some interest to protect to have standing to represent the interests of its members. *Warth v. Seldin*, 422 U.S. 490, 511 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Some States require an association to have an interest to protect which is separate from that of its members. One court found that the probable loss of members if it did not take action on their behalf was a sufficient interest to protect to give it standing to represent its members. This approach certainly diminishes greatly the burden of satisfying the requirement. States have further modified the old standing rule. Recently many States have adopted the three-pronged federal rule, which is the rule in subsection (b).

This section does not re-state rules of joinder because they will be governed by the jurisdiction's other law.

NORTH CAROLINA COMMENT

Subsection (a) replaces G.S. 1-69.1 for nonprofit associations.

In subsection (b), the General Statutes Commission added the references to persons referred to as "members" by the nonprofit association.

§ 59B-9. Effect of judgment or order.

A judgment or order against a nonprofit association is not by itself a judgment or order against a member, a person referred to as a "member" by the nonprofit association, or a person authorized to participate in the management of the affairs of the nonprofit association. (2006-226, s. 1.)

OFFICIAL COMMENT

1. This section is consistent with Restatement (Second) of Judgments, Section 61(2), which provides: "If under applicable law an unincorporated association is treated as a jural entity distinct from its members, a judgment for or against the association has the same effects with respect to the association and its members as a judgment for or against a corporation ...."

2. Section 8 [this section] applies not only to judgment[s] but also to orders, such as an award rendered in arbitration or an injunction.

3. Section 8 [this section] reverses the common law rule. Under the common law's aggregate view of an unincorporated association, members, as co-principals, were individually liable for obligations of the association.

4. Some States changed the common law rule by statute. Ohio, for example, provides that the property of an unincorporated association is subject to judgment, execution, and other process and that a money judgment against the association may be "enforced only against the association as an entity" and not "against a member." Ohio Rev. Code Ann., Section 1745.02 (Baldwin 1991).

5. That a judgment against a nonprofit association is also not a judgment against one authorized to manage the affairs of the association recognizes fully the entity status of a nonprofit association.

6. An obvious corollary of this section is that

a judgment against a nonprofit association may not be satisfied against a member unless there is also a judgment against the member.

NORTH CAROLINA COMMENT

The General Statutes Commission added the reference to a person referred to as a "member" by a nonprofit association.

§ 59B-10. Disposition of personal property of inactive nonprofit association.

If a nonprofit association has been inactive for three years or longer, or a different period specified in a document of the nonprofit association, a person in possession or control of personal property of the nonprofit association may transfer custody of the property:

(1) If a document of the nonprofit association or document of gift specifies a person to whom transfer is to be made under these circumstances, to that person; or

(2) If no person is so specified, to a nonprofit association, nonprofit corporation, or other nonprofit entity pursuing broadly similar purposes, or to a government or governmental subdivision, agency, or instrumentality. (2006-226, s. 1.)

OFFICIAL COMMENT

1. Section 9 [this section] is not a dissolution rule. An inactive nonprofit association may not be one that has dissolved. It may have just stopped functioning and have taken no formal steps to dissolve. It might possibly be revived.

Section 9 [this section] gives a person in possession or control of personal property of a nonprofit association an opportunity to be relieved of responsibility for it. Compliance with the section provides a safe harbor.

2. "Inactive" is not defined. A nonprofit association that has accomplished its purpose, such as seeking approval in a school bond election, is very likely inactive. A nonprofit association that has stopped pursuing its purposes, collecting dues, holding elections of officers and board members, and conducting meetings, and has no employees would seem to be inactive.

"Inactive" does not describe a nonprofit association whose sole purpose is to act should a specific problem arise. That there has been no activity because the problem has not arisen does not make the standby organization "inactive."

A three year period of inactivity is suggested. It is unlikely that a nonprofit association that has been inactive for that period will begin functioning again. Thus, it is prudent to transfer custody of its assets to someone likely to make appropriate use of them. While it is unlikely that a nonprofit association would deal with this issue, if its document does provide a shorter or longer period, that period governs.

3. Section 9 [this section] applies only to personal property — tangible and intangible. Unclaimed property acts also apply to both kinds of personal property. All States have some form of unclaimed property act. Therefore, the relationship of these acts to this Act must be examined.

The Uniform Unclaimed Property Act (1995) applies to certain intangible and tangible personal property. If the property has been unclaimed by the owner for five or more years it is presumed abandoned. Intangible property, such as checking and savings accounts and uncollected dividends, is the main concern of these Acts. The obligor, such as a bank or other financial institution and corporation, is directed to report and turn over the property to the state administrator.

The only tangible personal property to which the Uniform Unclaimed Property Act (1995) applies, according to Section 3, is that in "a safe deposit box or any other safekeeping repository." Many States have additional statutes that apply to property abandoned in airport, bus, and railroad lockers and the like. Tangible personal property of an inactive nonprofit association in the control or possession of a member or other person is not likely to be in these places. Therefore, overlap of this Act with the other state acts with respect to tangible personal property is likely to be very limited.

Property of an inactive nonprofit association is likely to be in the possession or control of a former member, board member, officer, or employee. Especially with respect to intangible property, their relation to the property is unlike that of those regulated by the unclaimed property acts. They are custodians or fiduciaries and not obligors. Those upon whom duties are imposed by the unclaimed property acts are obligors on such intangible property as bank accounts, money orders, life insurance policies, and utility deposits. The person acting under Section 9 is very unlikely to be in the position of an obligor on such intangible property. In summary, there appears to be limited overlap.

Other special statutes may apply, such as laws governing unexpended campaign funds. Texas, for example, permits a person to retain political contributions for six years after the person is no longer an office-holder or candidate. It gives the person six choices of transferees, including a "recognized tax exempt charitable organization formed for educational, religious or scientific purposes." Tex. Code Ann. Elections Section 251.012(d) and (e) (Vernon's 1986). Minnesota provides that if an unincorporated religious society "ceases to exist or to maintain its organization" title to its real and personal property vests in the "next higher governing or supervisory" body of the same denomination. Minn. Stat. Ann. Section 315.37 (West 1992).

4. It is the custody of and not the title to the property that is transferred. To whatever purpose the property was dedicated while in the hands of the transferor, it remains so dedicated in the hands of the transferee. Identification of the persons to whom the property may be transferred and cy pres principles recognize that the purpose to which the transferee may put the property need not be precisely that to which it was initially dedicated. For example, the initial purpose may no longer be viable.

5. Section 9 [this section] does not address what should be done with real property of an inactive nonprofit association. This seems justified. A nonprofit association owning real property of significant value is unlikely to become inactive. In the rare case that it does, the assistance of a court may be obtained in making appropriate disposition of the real property, primarily to ensure good title.

6. To obtain a Section 501(c)(3) tax classification as a nonprofit association an association must specify a distribution of assets on dissolution that satisfies the Internal Revenue Code. To avoid the interpretation that Section 9 might be construed to override an approved distribution provision in an association's governing document the primacy of that distribution provision is expressly recognized in paragraph (1).

7. If there is no bylaw or other controlling document the person may transfer the custody of the personal property to another nonprofit organization or a government or governmental entity. The nonprofit organization need not have the same nonprofit purpose as the inactive one. It is enough that the transferee's purpose is "broadly similar." This requirement should not be construed narrowly. Otherwise, the risk of potential litigation over the transferor's choice will frustrate the section's purpose to provide a safe harbor.

There is no limitation with respect to the choice of a government or governmental entity.

8. Inasmuch as the transfer is made without consideration and the association almost certainly rendered insolvent, creditors of a nonprofit association would be protected by the Uniform Fraudulent Transfer Act Sections 4(a) and 5 [G.S. 39-23.4(a) and G.S. 39-23.5] and similar statutes. Whether they would also be protected if the transfer is made to the administrator of an unclaimed property statute depends on the terms of a jurisdiction's act. Uniform Unclaimed Property Act (1981) Sections 20 and 24 contemplate that a creditor may proceed against property in the hands of the administrator if the creditor claims an interest in the property, such as a security interest or judgment lien. It is less clear that Section 15 of the 1995 Act recognizes this action. However, a general creditor without some claim against the property would not be protected. It is unlikely that an inactive nonprofit association would have both unpaid creditors and a significant amount of property. Therefore, the two issues discussed above are unlikely to arise.

9. The person in possession or control is not required to give notice of the proposed transfer to anyone. An examination of to whom notice might reasonably be given reveals the difficulty with such a requirement. Almost by definition an inactive nonprofit association has no current members.

NORTH CAROLINA COMMENT

In subsection (a), the General Statutes Commission added the reference to "document of gift" to cover restricted gifts. In subsection (b), the Commission added the reference to a nonprofit entity other than a nonprofit association or nonprofit corporation.

§ 59B-11. Appointment of agent to receive service of process.

(a) A nonprofit association may file in the office of the Secretary of State a statement appointing an agent authorized to receive service of process, notice, or demand required or permitted by law to be served on a nonprofit association.

(b) A statement appointing an agent must set forth all of the following:

(1) The name of the nonprofit association.
(2) Reserved for future codification purposes.
(3) The street address, and the mailing address if different from the street address, of the nonprofit association, and the county in which it is located, or, if the nonprofit association does not have an address in this State, its address out-of-state.
(4) The name of the person in this State authorized to receive service of process and the person's address, including the street address, in this State.

(c) A statement appointing an agent must be signed and acknowledged by a person authorized to manage the affairs of a nonprofit association. The statement must also be signed and acknowledged by the person appointed agent, who thereby accepts the appointment. The appointed agent may resign by filing a resignation in the office of the Secretary of State and giving written notice to the nonprofit association at its last known address.

(d) The sole duty of the appointed agent to the nonprofit association is to forward to the nonprofit association at its last known address any notice, process, or demand that is served on the appointed agent.

(e) The Secretary of State is not an agent for service of any process, notice, or demand on any nonprofit association.

(f) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary of State for filing:

Document	Fee
(1) Statement appointing an agent to receive service of process	$5.00
(2) Amendment of statement appointing an agent	5.00
(3) Cancellation of statement appointing an agent	5.00
(4) Agent's statement of resignation	No fee

(g) An amendment to or cancellation of a statement appointing an agent to receive service of process must meet the requirements for execution of an original statement. (2006-226, s. 1.)

OFFICIAL COMMENT

1. This section authorizes but does not require a nonprofit association to file a statement authorizing an agent to receive service of process. It is, of course, not the equivalent of filing articles of incorporation. However, some nonprofit associations may find it prudent to file. Filing may assure that the nonprofit association's leadership gets prompt notice of any lawsuit filed against it. Also, depending upon the jurisdiction's other laws, filing gives some public notice of the nonprofit association's existence and address.

2. Central filing with a state official is provided. This is where parties will seek information of this kind and where this is commonly publicly filed.

3. The format of this section is very much like Section 5 [G.S. 59B-6], which concerns a statement of authority with respect to property. Because one requires local and [the] other central filing they are not combined.

NORTH CAROLINA COMMENT

The General Statutes Commission modified this section in subsection (a) by adding the reference to "notice, or demand required or permitted by law to be served on a nonprofit association." In subsection (b), the Commission deleted the Uniform Act's requirement for a federal tax identification number due to concerns over identity theft and the belief that the requirement was not useful in any event and conformed the requirement for an address, in part, to similar requirements for the statutes regulating other entities. The Commission modified subsection (c) by requiring that the agent give "written" notice of the agent's resignation to the nonprofit association "at its last known address." The Commission also added subsections (d) and (e) and substituted a fee schedule for the Uniform Act's fee provision. The filing fees in subsection (f) are the same as those for similar documents filed by nonprofit corporations and business entities.

Editor's Note. — Session Laws 2008-194, s. 2, provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, 'notice' shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section [August 8, 2008]."

§ 59B-12. Claim not abated by change.

A claim for relief against a nonprofit association does not abate merely because of a change in its members or persons authorized to manage the affairs of the nonprofit association. (2006-226, s. 1.)

OFFICIAL COMMENT

This provision reverses the common law rule of partnerships, which courts often extended to unincorporated nonprofit associations. Uniform Partnership Act (1994) Sections 29 and 31(4). This Act's entity approach requires this change of the old common law rule. Similar provisions are found in many state statutes. See, for example, Ohio Rev. Code Ann., Corporations, Section 1745.04 (Baldwin 1991); Md. Ann. Code art. 6-406(a)(2); and 12 Vt. Stat. Ann. Section 815 (Equity Pub. 1973). Uniform Partnership Act (1994) adopts an entity approach and so changes the old rule. See Sections 603(a) 701, and 801 of 1994 Act.

§ 59B-13. Venue.

For purposes of venue, a nonprofit association is a resident of a county in which it has an office or maintains a place of operation or, if on due inquiry no office or place of operation can be found, in which any officer resides. (2006-226, s. 1.)

OFFICIAL COMMENT

1. Venue, unlike service of process, is treated by statute. See for example Mont. Code Ann. Section 25-2-118(1) (1991); 28 USCA 1391. A criterion used by all States for fixing venue is the county of residence of the defendant. Most States specify as many as eight additional grounds for venue, including the county in which the real estate that is the subject of the suit is situated and the county in which the act causing, in whole or in part, the personal injury or other tort occurred. None of these additional criteria present a special problem with respect to an unincorporated nonprofit association.

2. If an aggregate view of a nonprofit association were taken, the association is resident in any county in which a member resides. See Wright, Miller, & Cooper, 15 *Federal Procedure & Practice* 3812 (1986). Conforming to the entity view of an association, Section 12 rejects the common law view.

This section is bracketed because some States have already satisfactorily solved this problem.

States have by statute modified the common law rule. Illinois, for example, provides that "a voluntary unincorporated association sued in its own name is a resident of any county in which it has an office or if on due inquiry no office can be found, in which any officer resides." Ill. Code Civ. Prac. Section 2-102(c).

3. Section 12 [this section] makes a nonprofit association a resident of any county ... in which it has an office. If it has an office in five counties, for example, it may be sued in any of the five counties.

NORTH CAROLINA COMMENT

The General Statutes Commission modified this section by expanding a nonprofit association's residence for venue purposes to include the county in which the nonprofit association maintains a place of operation or in which any officer resides.

Section 13 of the Uniform Act (Summons and complaint; service on whom) was omitted as unnecessary.

§ 59B-14. Uniformity of application and construction.

This Chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among states enacting it. (2006-226, s. 1.)

§ 59B-15. Effect as to conveyances by trustees; prior deeds validated.

(a) Nothing in this Chapter changes the law with reference to the holding and conveyance of land by the trustees of churches under Chapter 61 of the General Statutes where the land is conveyed to and held by the trustees.

(b) All deeds executed before January 1, 2007, in conformity with former G.S. 39-24 and former G.S. 39-25 are declared to be sufficient to pass title to real estate. (1939, c. 133, ss. 3, 4; 2006-226, s. 2(b).)

NORTH CAROLINA COMMENT

This section is not in the Uniform Act. It is derived from former G.S. 39-26 and former G.S. 39-27.

Cross References. — As to power of trustees of a religious body to convey property, see G.S. 61-4.

Editor's Note. — This section was formerly numbered G.S. 39-24 and 39-25. It was recodified as G.S. 59B-15 by Session Laws 2006-226, s. 2(b).

Session Laws 2006-226, s. 5 is a severability clause.

Session Laws 2006-226, s. 6, provides that: "This act does not affect an action or proceeding commenced or right accrued before this act takes effect."

Session Laws 2006-226, s. 7, provides that: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Unincorporated Nonprofit Association Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

Cross References. — As to power of trustees of a religious body to convey property, see G.S. 61-4.

Editor's Note. — This section was formerly numbered G.S. 39-24 and 39-25. It was recodified as G.S. 59B-15 by Session Laws 2006-226, s. 2(b).

Session Laws 2006-226, s. 5 is a severability clause.

Session Laws 2006-226, s. 6, provides that: "This act does not affect litigation or proceedings commenced or right accrued before this act takes effect."

Session Laws 2006-226, s. 7, provides that: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Unincorporated Nonprofit Association Act, and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

[illegible]

NORTH CAROLINA COMMENT

The General Statutes Commission modified this section by expanding a nonprofit association's residence for venue purposes to include the county in which the nonprofit association maintains a place of operation or in which it [illegible].

Section 13 of the Uniform Act (Summons and complaint; service on whom) was omitted as unnecessary.

§ 59B-14. Uniformity of application and construction.

This Chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among states enacting it. (2006-226, s. 1.)

§ 59B-15. Effect as to conveyances by trustees; prior deeds validated.

(a) Nothing in this Chapter changes the law with reference to the holding and conveyance of land by the trustees of churches under Chapter 61 of the General Statutes where the land is conveyed to and held by the trustees.

(b) All deeds executed before January 1, 2007, in conformity with former G.S. 39-24 and former G.S. 39-25 are declared to be sufficient to pass title to real estate. (1959, c. 1351, ss. 3, 4; 2006-226, s. 2(b).)

NORTH CAROLINA COMMENT

This section is not in the Uniform Act. It is derived from former G.S. 39-24 and former G.S. 39-25.

Chapter 60.

Railroads and Other Carriers.

§§ 60-1 through 60-146: Repealed and transferred by Session Laws 1963, c. 1165.

Editor's Note. — Session Laws 1963, c. 1165, amended, revised and rewrote Chapters 56, 60 and 62 of the General Statutes and recodified them as a new Chapter 62 and a new Chapter 74A.

Sections 60-1 to 60-81 and 60-88 to 60-146 were repealed by Session Laws 1963, c. 1165, s. 1. Sections 60-82 to 60-87 were transferred to G.S. 74A-1 to 74A-6 by Session Laws 1963, c. 1165, s. 2.

Chapter 61.

Religious Societies.

Sec.

61-1. Trustees may be appointed and removed.
61-2. Trustees may hold property.
61-3. Title to lands vested in trustees, or in societies.
61-4. Trustees may convey property.
61-5. Authority of bishops, ministers, etc., to acquire, hold and transfer property; prior transfers validated.
61-6. House on vacant land vests title.
61-7. Governing body of assembly authorized to adopt traffic regulations.

§ 61-1. Trustees may be appointed and removed.

(a) The conference, synod, convention or other ecclesiastical body representing any church or religious denomination within the State, as also the religious societies and congregations within the State, may from time to time and at any time appoint in such manner as such body, society or congregation may deem proper, a suitable number of persons as trustees for such church, denomination, religious society, or congregation. The body appointing may remove such trustees or any of them, and fill all vacancies caused by death or otherwise.

(b) A person serving as a trustee appointed pursuant to subsection (a) of this section or a director or officer of a religious society shall be immune individually from civil liability for monetary damages, except to the extent covered by insurance, for any act or failure to act arising out of this service, except where the person:

(1) Is compensated for his services beyond reimbursement for expenses,
(2) Was not acting within the scope of his official duties,
(3) Was not acting in good faith,
(4) Committed gross negligence or willful or wanton misconduct that resulted in the damage or injury,
(5) Derived an improper personal financial benefit from the transaction,
(6) Incurred the liability from the operation of a motor vehicle, or
(7) Is sued in an action that would qualify as a derivative action if the organization were a for-profit corporation or as a member's or director's derivative action under G.S. 55A-28.1 or G.S. 55A-28.2 if the organization were a nonprofit corporation.

The immunity in this subsection is personal to the officers, directors, and trustees and does not immunize the organization for the acts or omissions of the officers, directors, or trustees. (1796, c. 457, ss. 1, 2; 1844, c. 47; 1848, c. 76; R.C., c. 97; Code, ss. 3667, 3668; Rev., ss. 2670, 2671; C.S., s. 3568; 1987, c. 799, s. 1.)

Editor's Note. — G.S. 55A-28.1 and G.S. 55A-28.2, referred to in subdivision (b)(7), were repealed by Session Laws 1993, c. 398, s. 1, effective July 1, 1994. See now G.S. 55A-7-40 and 55A-8-24.

CASE NOTES

This section applies only to religious societies and not to educational institutions. Allen v. Baskerville, 123 N.C. 126, 31 S.E. 383 (1898); Thornton v. Harris, 140 N.C. 498, 53 S.E. 341 (1906).

This section recognizes that religious bodies must act through and appoint trustees. Pressly v. Walker, 238 N.C. 732, 78 S.E.2d 920 (1953).

Society Entitled to Remove Trustee Who

Is Faithless to Trust. — Under the provisions of this section, a religious society may remove a trustee of church property who proves faithless to his trust and may fill any vacancy thus created. Nash v. Sutton, 117 N.C. 231, 23 S.E. 178 (1895).

Individual Liability Erroneously Assessed. — When church officials sued seceders from the church to recover church property, the trial court erroneously found the seceders individually liable because, under G.S. 61-1(b), they were immune from individual liability, as they were acting on behalf of a religious society. Daniel v. Wray, 158 N.C. App. 161, 580 S.E.2d 711, 2003 N.C. App. LEXIS 1038 (2003).

Faithlessness is not required, however, and a religious society may remove trustees at will. North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

Effect of Church Regulations. — A church has authority to appoint a "suitable number" of its own trustees for the purpose of acquiring and holding church property, and remove them at will; furthermore, where the discipline of the denomination with which a church is affiliated has provided a note to be given for the trial of "offenses," this regulation refers to infractions of church discipline and does not apply to the election or removal of trustees. North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

Right of Competent Trustee to Maintain Action for Removal of Trustees, etc. — A duly appointed trustee of a religious society may maintain an action for the removal of faithless or incompetent trustees, and compel them to convey the property held by them to the purposes for which it was designed, and such trustee may also maintain an action to set up a lost deed executed for the benefit of the cestui que trust. Nash v. Sutton, 109 N.C. 550, 14 S.E. 77 (1891).

Right of Member to Sue. — In the absence of a competent trustee and a governing body authorized to appoint trustees, any member of a religious society has such a beneficial interest as will enable him, in behalf of fellow members, to maintain such action as may be necessary to protect their common interest. Nash v. Sutton, 109 N.C. 550, 14 S.E. 77 (1891).

Cited in Bridges v. Pleasants, 39 N.C. 26 (1845); King v. Richardson, 136 F.2d 849 (4th Cir. 1943); Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667 (1972); Daniel v. Wray, 158 N.C. App. 161, 580 S.E.2d 711, 2003 N.C. App. LEXIS 1038 (2003).

§ 61-2. Trustees may hold property.

The trustees and their successors have power to receive donations, and to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or congregation; and they may sue or be sued in all proper actions, for or on account of the donations and property so held or claimed by them, and for and on account of any matters relating thereto. They shall be accountable to the churches, denominations, societies and congregations for the use and management of such property, and shall surrender it to any person authorized to demand it. (1796, c. 457, ss. 1, 3; 1844, c. 47; 1848, c. 76; R.C., c. 97; Code, ss. 3667, 3668; Rev., ss. 2670, 2671; C.S., s. 3569.)

Cross References. — As to trusts and trustees generally, see G.S. 36A-1 et seq.

CASE NOTES

This section applies only to property held for religious purposes. Thornton v. Harris, 140 N.C. 498, 53 S.E. 341 (1906).

No General Capacity of Acquisition. — Religious societies or their trustees have no general capacity of acquisition; they can only take for the use of the society. And by a conveyance to trustees, for purposes forbidden by the policy of the law, nothing passes. Trustees of Quaker Soc'y of Contentnea v. Dickenson, 12 N.C. 189 (1827).

Right of Church to Use Property. — A church of the congregational system, having elected certain trustees to supercede several trustees theretofore elected, holds the church property through those trustees later elected and has the right to the use of the church for religious services without molestation from the trustees who were removed or from its conference. North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

A church is not required to be incorporated to be able to hold property; therefore, revocation of the corporate charter of the United Church of God was irrelevant to determining whether the United Church of God, Inc. had the right to control the property of its alleged local affiliate, St. Luke United Church of God of America. United Church of God, Inc. v. McLendon, 81 N.C. App. 495, 344 S.E.2d 373 (1986).

A communion service of a church is not liable to seizure and sale under an execution by a pastor for salary due him. Lord v. Hardie, 82 N.C. 241 (1880).

An individual member of a religious society has an equitable interest in the property held by the society. Nash v. Sutton, 117 N.C. 231, 23 S.E. 178 (1895).

Trusts for Special Purposes. — There is nothing in this section which precludes trustees of a certain North Carolina church from accepting trusts for special purposes; and, even if there were, a trust for a special purpose would not fail because they were named as trustees, but equity would appoint other trustees to administer it in application of the maxim that a trust will not be allowed to fail for lack of a trustee. King v. Richardson, 46 F. Supp. 510 (M.D.N.C. 1942), aff'd in part and rev'd in part, 136 F.2d 849 (4th Cir. 1943).

The trustees of a church are merely agents and have no property interest as against the governing body of the church. North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

Congregation taking possession of a church cannot contest validity of a mortgage given by the trustees for the purchase money on the ground that it was ultra vires. Rountree v. Blount, 129 N.C. 25, 39 S.E. 631 (1901).

Right of Trustees to Enforce Bequest. — Where a testator provided for building a fence around a certain chapel cemetery, the trustees of the chapel were the proper parties to require the executor to perform this provision. Cabe v. Vanhook, 127 N.C. 424, 37 S.E. 464 (1900).

Recovery of Property by Trustees. — The title to church property is vested in the trustees individually and they may recover at law, though in the writ and declaration they style themselves "trustees." Walker v. Fawcett, 29 N.C. 44 (1846).

Title Not in Controversy in Contest Between Trustees. — In a contest between two committees, each claiming to be the rightful board of trustees to hold the same title in trust for the same beneficial owner, the title did not come into controversy. Thornton v. Harris, 140 N.C. 498, 53 S.E. 341 (1906).

Right of Original Trustees to Sue Though Not Legally Appointed. — Where a conveyance was made to three persons for a certain tract of land as trustees for a church, a suit of trespass could be brought by them against the wrongdoers, even though they could not be appointed trustees according to law. Walker v. Fawcett, 29 N.C. 44 (1846).

It is only when a suit is brought by persons who claim as "successors" that a question arises as to whether the original bargainees were duly chosen the trustees of a religious congregation, and whether the persons suing were also duly chosen trustees, so as to give them legally the character of "successors" to the former, and thereby vest in them the title to the property which is necessary to support an action. Walker v. Fawcett, 29 N.C. 44 (1846).

Trustees Not Entitled to Recover for Physical Suffering of Pastor, His Family or Congregation. — In a suit by the trustees of a church against a railroad company for the improper use of its terminal or depot at or near the manse of the church, no recovery could be had for any physical suffering upon the part of their pastor, his family, or the individuals composing the congregation. Taylor v. Seaboard Air Line Ry., 145 N.C. 400, 59 S.E. 129 (1907).

Liability of Trustees for Material Ordered for Church. — The trustees of a church would be liable for material ordered by one of their number and used in building the church, even though the order was not authorized. Tull v. Trustees of M.E. Church, 75 N.C. 424 (1876).

The building committee of a church is not liable for injuries received by a workman. Wilson v. Clark, 110 N.C. 364, 14 S.E. 962 (1892).

Member of Quasi Corporation Is Engaged in Joint Enterprise. — One of the material differences between a church or denomination, religious society or congregation (a quasi corporation) in North Carolina and a real corporation organized or existing pursuant to statutory law is that a member of such a quasi corporation is engaged in a joint enterprise and may not recover damages sustained through the tortious conduct of another member thereof from the quasi corporation. Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667, cert. denied, 281 N.C. 756, 191 S.E.2d 354 (1972).

And May Not Recover for Negligence of Agent, Employee or Another Member. — This section does not authorize a member of a church or denomination, religious society or congregation (a quasi corporation) to recover of the quasi corporation for the negligence of an agent, employee or another member thereof. Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667, cert. denied, 281 N.C. 756, 191 S.E.2d 354 (1972).

Joinder of Church as Defendant Not Required in Derivative Action Against Pastor and Other Church Officers. — Trial court erred in dismissing the complaint brought by a group of church members against the pastor and various church officers due to the church members' failure to have named the church as a defendant, because the cause of action, which alleged civil conversion, various conspiracy charges, breach of the church's constitution and by-laws as well as breach of fiduciary duty, was really a derivative action in that the church members alleged that the church was unincorporated and, therefore, the church members were really suing on behalf of the church; the dispute arose from alleged missing church funds and the allegation that the church officers were permitting the pastor to remain at the church and receive his salary against the majority vote of the congregation. Bridges v. Oates, 167 N.C. App. 459, 605 S.E.2d 685, 2004 N.C. App. LEXIS 2335 (2004).

Applied in Pressly v. Walker, 238 N.C. 732, 78 S.E.2d 920 (1953).

Cited in Bridges v. Pleasants, 39 N.C. 26 (1845).

§ 61-3. Title to lands vested in trustees, or in societies.

All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregation within the State for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, society or congregation for which the glebes, lands, tenements, property and estate were so purchased, given, granted or devised, or for which such churches, chapels or other houses of public worship were built; and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance, gift, grant or will; and in case there shall be no trustees, then in such churches, denominations, societies and congregations, respectively, according to such intent. (1776, c. 107; 1796, c. 457, s. 4; R.C., c. 97, s. 1; Code, s. 3665; Rev., s. 2672; C.S., s. 3570.)

CASE NOTES

This section applies only to religious societies and not to educational institutions. Allen v. Baskerville, 123 N.C. 126, 31 S.E. 383 (1898).

Words "shall be and remain forever to the use and occupancy of that church ..." do not create an exemption for church property from execution. These words have to be considered in the context of the time they were written and of wordage required by ancient English law and custom to create a fee simple estate. Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

Sale of Property Under Execution. — There being no provision in the State Constitution exempting church property from execution, unless exempted by statute, this property is subject to sale under execution. Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

Title by Adverse Possession. — A church holding real property for a hundred years, and using it for religious purposes, acquires a fee simple title by adverse possession, independent of the validity of its deed. Gold v. Cozart, 173 N.C. 612, 92 S.E. 600 (1917).

A bequest for a religious charity must be to some definite purpose, and to some body or association of persons having a legal existence and with capacity to take. There is no provision for donations to be employed in any general system of diffusing the knowledge of Christianity throughout the earth. Bridges v. Pleasants, 39 N.C. 26 (1845).

Bequest to Build Church Where Amount Insufficient. — A provision in a will that a church is to be built from certain funds will not fail because there is not a sufficient amount of the funds to build a church as large as directed by the testator. Paine v. Forney, 128 N.C. 237, 38 S.E. 885 (1901).

Specific Trust Must Be Imperative. — A specific trust will not be superimposed upon a title conveyed to a religious congregation, authorizing the courts to interfere and control the management and disposition of the property, unless this is the clear intent of the grantor expressed in language which should be construed as imperative. Hayes v. Franklin, 141 N.C. 599, 54 S.E. 432 (1906).

No Trust Created. — The recital in a deed conveying land to the vestry and wardens of a church that it was made "for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans, or in the promotion of any other charitable or religious objects to which the property may be appropriated" created no trust, and the grantee could convey a perfect title. St. James v. Bagley, 138 N.C. 384, 50 S.E. 841 (1905).

Trustees May Hold Property as Against Majority of Members. — Where land is conveyed to the officers and trustees of the nondenominational religious organization for the purposes of the organization, its officers and trustees have title to the property in trust and are entitled to hold it for the use and occupancy of the organization as against members of the organization, even though they are in the large majority, who seek possession of the property for use and occupancy by a denominational church. Wheeless v. Barrett, 229 N.C. 282, 49 S.E.2d 629 (1948).

Rights of Majority of Congregation Withdrawing from Denomination. — A conveyance of land to trustees for the erection of a church to belong to a denomination gave the title in trust for the use of the denomination; therefore, members of the congregation of the church so erected who withdrew affiliation from the denomination, even though they were a majority of the congregation, were not entitled to the control and use of the property as against the denomination, irrespective of whether the particular church was congregational or connectional. Western N. Carolina Conference v. Tally, 229 N.C. 1, 47 S.E.2d 467 (1948).

Effect of Denomination's Failure to Act at Time of Violation. — Court found that local church, which was connectionally related to denomination yet congregational as to property, could keep property because it would be inequitable, if not unconstitutional, for a North Carolina court to enforce the denomination's "Discipline," essentially property rules, against the local church when the denomination made no effort to enforce it at the time of the alleged violations. Fire Baptized Holiness Church of God of Ams., Inc. v. McSwain, 134 N.C. App. 676, 518 S.E.2d 558 (1999).

Where a diocese receiving a devise of land was afterwards divided into two dioceses, the land became the property of both and not that of the diocese in which the land happened to be and in which the testator resided. Trustees of Diocese of E. Carolina v. Trustees of Diocese of N. Carolina, 102 N.C. 442, 9 S.E. 310 (1889).

As to the rights of an individual member of a congregation under the congregational system, see North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

For discussion of the connectional system, see Simmons v. Allison, 118 N.C. 763, 24 S.E. 716, rehearing dismissed, 118 N.C. 761, 24 S.E. 740 (1896); Tilley v. Ellis, 119 N.C. 233, 26 S.E. 29 (1896); State ex rel. Kerr v. Hicks, 154 N.C. 265, 70 S.E. 468 (1911); Gold v. Cozart, 173 N.C. 612, 92 S.E. 600 (1917).

Applied in Pressly v. Walker, 238 N.C. 732, 78 S.E.2d 920 (1953).

Cited in YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972); African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983).

§ 61-4. Trustees may convey property.

The trustees of any religious body may mortgage or sell and convey in fee simple any land owned by such body, when directed so to do by such church, congregation, society or denomination, or its committee, board or body having charge of its finances, and all such conveyances so made or heretofore made, or hereafter to be made, shall be effective to pass the land in fee simple to the purchaser or to the mortgagee for the purposes in such conveyances or mortgage expressed; and they may sell or mortgage its personal property. (1855, c. 384; 1889, c. 484; Rev., s. 2673; C.S., s. 3571.)

CASE NOTES

Sale to Promote Testator's Purpose. — Where a testator devised lands to the trustees of a certain church, "to be held by them as a rectory or residence for the ministers of said church; that the same shall not be disposed of, sold, or used in any other way or for any other purpose than the one designated," the trustees could sell the property if the purpose declared would be promoted thereby, or the court could order a sale under its general equity power. Grace Church v. Ange, 161 N.C. 314, 77 S.E. 239 (1912).

Lease of Part of Property. — Where land was conveyed to a church for the purpose of maintaining a church for worship, the court would not restrain the officers of the church from leasing a small portion of the lot for erecting a store. Hayes v. Franklin, 141 N.C. 599, 54 S.E. 432 (1906).

Applied in Immanuel Baptist Tabernacle Church of Apostolic Faith v. Southern Emmanuel Tabernacle Church, 27 N.C. App. 127, 218 S.E.2d 223 (1975).

Cited in Bond v. Town of Tarboro, 217 N.C. 289, 7 S.E.2d 617, 127 A.L.R. 695 (1940); Floyd S. Pike Elec. Contractor v. Goodwill Missionary

Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

§ 61-5. Authority of bishops, ministers, etc., to acquire, hold and transfer property; prior transfers validated.

Whenever the laws, rules, or ecclesiastic polity of any church or religious sect, society or denomination, commits to its duly elected or appointed bishop, minister or other ecclesiastical officer, authority to administer its affairs, such duly elected or appointed bishop, minister or other ecclesiastical officer shall have power to acquire by gift, purchase or otherwise, and to hold, improve, mortgage, sell and convey the property, real or personal, of any such church or religious sect, society or denomination, for the purposes, in the manner and otherwise as authorized and permitted by its laws, rules or ecclesiastic polity; and in the event of the transfer, removal, resignation or death of any such bishop, minister or other ecclesiastical officer, the title and all rights with respect to any such property shall pass to and become vested in his duly elected or appointed successor immediately upon appointment or election, and pending appointment or election of such successor, such title and rights shall be vested in such person or persons as shall be designated by the laws, rules or ecclesiastic polity of such church or religious sect, society or denomination.

All deeds, deeds of trust, mortgages, wills or other instruments made prior to March 24, 1939, to or by a duly elected or appointed bishop, minister or other ecclesiastical officer, who, at the time of the making of any such deed, deed of trust, mortgage, will or other instrument, or thereafter, had authority to administer the affairs of any church, religious sect, society or denomination under its laws, rules or ecclesiastic polity, transferring property, real or personal, of any such church or religious sect, society or denomination, are hereby ratified and declared valid; and all transfers of title and rights with respect to property, prior to March 24, 1939, from a predecessor bishop, minister or other ecclesiastical officer who has resigned or died, or has been transferred or removed, to his duly elected or appointed successor, by the laws, rules or ecclesiastic polity of any such church, or religious sect, society or denomination, either by written instruments or solely by virtue of the election or appointment of such successor, are also hereby ratified and declared valid.

This section shall not affect vested rights, or repeal any of the provisions of G.S. 61-1 to 61-4, or of G.S. 36-21 to 36-23. (1939, c. 177.)

Editor's Note. — G.S. 36-21 to 36-23, referred to in the last paragraph, were repealed by Session Laws 1977, c. 502. See now G.S. 36A-49 to 36A-51.

§ 61-6. House on vacant land vests title.

All houses and edifices erected for public religious worship on vacant lands, or on lands of the State not for other purposes intended or appropriated, together with two acres adjoining the same, shall hereafter be held and kept sacred for divine worship, to and for the use of the society by which the same was originally established. (1778, c. 132, s. 6; R.C., c. 97, s. 2; Code, s. 3666; Rev., s. 2674; C.S., s. 3572.)

CASE NOTES

Purpose of Section. — This section was enacted in 1778 for purpose of covering those cases where church houses had been built on unused or unappropriated land to which no one had title. Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C.

App. 563, 214 S.E.2d 276 (1975).

Sale of Property Under Execution. — There being no provision in the State Constitution exempting church property from execution, unless exempted by statute, this property is subject to sale under execution. Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

§ 61-7. Governing body of assembly authorized to adopt traffic regulations.

(a) The governing body of any religious organization or assembly may by appropriate resolution establish rules and regulations with respect to the use of the streets, roads, alleys, driveways, and parking lots on the grounds or premises owned or under the exclusive control of such organization, and it shall be unlawful for any person to park a motor vehicle or other vehicle on the streets, roads or on the premises of a religious assembly where parking has been prohibited by the religious assembly by the erection of "No Parking" signs at each space on the street, road or on the premises where parking is prohibited. Each space in which parking is prohibited shall be clearly designated as such by a sign no smaller than 24 inches by 24 inches. All rules and regulations adopted pursuant to the authority of this section shall be recorded in the proceedings of said governing body and copies thereof shall be filed in the office of the Secretary of State of North Carolina.

(b) It shall be unlawful for any person to park a motor vehicle or other vehicle in a parking space on the streets, roads, or premises of a religious assembly where the parking space has been designated by the religious assembly as being limited to a named individual or to a person holding a named position with the assembly; provided, that such private parking space or private parking lot be clearly designated as such by a sign no smaller than 24 inches by 24 inches prominently displayed at the entrance to the parking lot, if within a parking lot, and provided further that the private parking spaces within the lot or the private parking spaces on the streets, roads or on the premises of the religious assembly be clearly marked by signs setting forth the name of each individual for whom the space is reserved or the name of the position held with the assembly for which space is reserved.

(c) It shall be unlawful for any person to park a motor vehicle or other vehicle on the streets or roads of a religious assembly, except where parking is expressly designated, so as to interfere with, or obstruct the free flow of vehicular traffic on the streets or roads within the assembly grounds.

(d) It shall be unlawful for any person to park a motor vehicle or other vehicle at the entrance to any driveway on the grounds of a religious assembly so as to block the driveway.

(e) Any vehicle parked in violation of subsections (a), (b), (c), or (d) may be removed by the assembly, or its agents, or its employees to a place of storage and the registered owner of such motor vehicle shall become liable for removal and storage charges. Any person who removes a vehicle pursuant to subsections (a), (b), (c), or (d) shall not be held liable for damages for the removal of the vehicle to the owner, lienholder or other person legally entitled to the possession of the vehicle removed; however, any person who intentionally or negligently damages a vehicle in the removal of such vehicle, or intentionally or negligently inflicts injury upon any person in the removal of such vehicle, may be held liable for damages.

(f) A "religious assembly" is defined as being a corporation or association formed for the purpose of providing a resort community for religious and recreational purposes and where the streets and roads are solely maintained by the religious assembly without governmental funds. (1977, c. 398, s. 1; 1989, c. 644, s. 3.)

App. 563, 214 S.E.2d 276 (1975).

Sale of Property Under Execution. — There being no provision in the State Constitution exempting church property from execution, unless exempted by statute, this property is subject to sale under execution. Mark-It Elec. Contractors v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

§ 61-7. Governing body of assembly authorized to adopt traffic regulations.

(a) The governing body of any religious organization or assembly may by appropriate resolution establish rules and regulations with respect to the use of the streets, roads, alleys, driveways, and parking lots on the grounds or premises owned or under the exclusive control of such organization, and it shall be unlawful for any person to park a motor vehicle or other vehicle on the streets, roads or on the premises of a religious assembly where parking has been prohibited by the religious assembly by the erection of "No Parking" signs at each space on the street, road, or on the premises where parking is prohibited. Each space in which parking is prohibited shall be clearly designated as such by a sign no smaller than 24 inches by 24 inches. All rules and regulations adopted pursuant to the authority of this section shall be recorded in the proceedings of said governing body and copies thereof shall be filed in the office of the Secretary of State of North Carolina.

(b) It shall be unlawful for any person to park a motor vehicle or other vehicle in a parking space on the streets, roads, or premises of a religious assembly where the parking space has been designated by the religious assembly as being limited to a named individual or to a person holding a named position with the assembly, provided, that such reserved parking space or private parking lot be clearly designated as such by a sign no smaller than 24 inches by 24 inches permanently displayed at the entrance to the parking lot if within a parking lot and provided further that the private parking spaces within the lot or the private parking spaces on the streets, roads or on the premises of the religious assembly be clearly marked by signs setting forth the name of each individual for whom the space is reserved or the name of the position held with the assembly for which space is reserved.

(c) It shall be unlawful for any person to park a motor vehicle or other vehicle on the streets or roads of a religious assembly, except where parking is expressly designated, so as to interfere with, or obstruct the free flow of vehicular traffic on the streets or roads within the assembly grounds.

(d) It shall be unlawful for any person to park a motor vehicle or other vehicle at the entrance to any driveway on the grounds of a religious assembly so as to block the driveway.

(e) Any vehicle parked in violation of subsections (a), (b), (c), or (d) may be removed by the assembly at the expense of the registered owner to a place of storage and the registered owner of such motor vehicle shall become liable for removal and storage charges. Any person who removes a vehicle pursuant to subsections (a), (b), (c), or (d) shall not be held liable for damages for the removal of the vehicle to the owner, lienholder or other person legally entitled to the possession of the vehicle removed; however, any person who intentionally or negligently damages a vehicle in the removal of such vehicle, or intentionally or negligently inflicts injury upon any person in the removal of such vehicle, may be held liable for damages.

(f) A "religious assembly" is defined as being a corporation or association formed for the purpose of providing a resort community for religious and recreational purposes and where the streets and roads are solely maintained by the religious assembly without governmental funds. (1977, c. 799, s. 1; 1983, c. 643.)

Chapter 62.

Public Utilities.

Article 1.

General Provisions.

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62-3. Definitions.
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Article 2.

Organization of Utilities Commission.

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62-11. Oath of office.
62-12. Organization of Commission; adoption of rules and regulations therefor.
62-13. Chairman to direct Commission.
62-14. Commission staff; structure and function.
62-15. Office of executive director; public staff, structure and function.
62-16. [Repealed.]
62-17. Annual reports; monthly or quarterly release of certain information; publication of procedural orders and decisions.
62-18. Records of receipts and disbursements; payment into treasury.
62-19. Public record of proceedings; chief clerk; seal.
62-20. Participation by Attorney General in Commission proceedings.
62-21. [Repealed.]
62-22. Utilities Commission and Department of Revenue to coordinate facilities for rate making and taxation purposes.
62-23. Commission as an administrative board or agency.
62-24 through 62-29. [Reserved.]

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Powers and Duties of Utilities Commission.

62-30. General powers of Commission.
62-31. Power to make and enforce rules and regulations for public utilities.
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62-40. To hear and determine controversies submitted.
62-41. To investigate accidents involving public utilities; to promote general safety program.
62-42. Compelling efficient service, extensions of services and facilities, additions and improvements.
62-43. Fixing standards, classifications, etc.; testing service.
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62-51. To inspect books and records of corporations affiliated with public utilities.
62-52. Interruption of service.
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62-55 through 62-59. [Reserved.]

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62-60. Commission acting in judicial capacity; administering oaths and hearing evidence; decisions; quorum.
62-60.1. Commission to sit in panels of three.

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62-61. Witnesses; production of papers; contempt.
62-62. Issuance and service of subpoenas.
62-63. Service of process and notices.
62-64. Bonds.
62-65. Rules of evidence; judicial notice.
62-66. Depositions.
62-67. [Repealed.]
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62-70. Ex parte communications.
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62-72. Commission may make rules of practice and procedure.
62-73. Complaints against public utilities.
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62-74. Complaints by public utilities.
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62-77. Recommended decision of panel of three commissioners, single commissioner or examiner.
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62-95. Relief pending review on appeal.
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Siting of Transmission Lines.

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62-101. Certificate to construct transmission line.
62-102. Application for certificate.
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62-104. Hearings.
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Rates of Public Utilities.

62-130. Commission to make rates for public utilities.

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62-132. Rates established under this Chapter deemed just and reasonable; remedy for collection of unjust or unreasonable rates.
62-133. How rates fixed.
62-133.1. Small water and sewer utility rates.
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62-133.3. [Repealed.]
62-133.4. Gas cost adjustment for natural gas local distribution companies.
62-133.5. Alternative regulation, tariffing, and deregulation of telecommunications utilities.
62-133.6. Environmental compliance costs recovery.
62-133.7. Customer usage tracking rate adjustment mechanisms for natural gas local distribution company rates.
62-133.8. Renewable Energy and Energy Efficiency Portfolio Standard (REPS).
62-133.9. Cost recovery for demand-side management and energy efficiency measures.
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62-134. Change of rates; notice; suspension and investigation.
62-135. Temporary rates under bond.
62-136. Investigation of existing rates; changing unreasonable rates; certain refunds to be distributed to customers.
62-137. Scope of rate case.
62-138. Utilities to file rates, service regulations and service contracts with Commission; publication; certain telephone service prohibited.
62-139. Rates varying from schedule prohibited; refunding overcharge; penalty.
62-140. Discrimination prohibited.
62-141. Long and short hauls.
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62-145. Rates between points connected by more than one route.
62-146. Rates and service of motor common carriers of property.
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62-147. [Repealed.]
62-148. Rates on leased or controlled utility.
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62-152. [Repealed.]
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62-153. Contracts of public utilities with certain companies and for services.
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62-157. Telecommunications relay service.
62-158. Natural gas expansion.
62-159. Additional funding for natural gas expansion.
62-159.1. Debt collection practices.
62-159.2 through 62-159.5. [Reserved.]

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62-160. Permission to pledge assets.
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62-171. Commission may act jointly with agency of another state where public utility operates.
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Article 9.

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62-180. Use of railroads and public highways.
62-181. Electric and hydroelectric power companies may appropriate highways; conditions.
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62-182.1. Access to dedicated public right-of-way.
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62-184. Dwelling house of owner, etc., may be taken under certain cases.
62-185. Exercise of right of eminent domain; parties' interests only taken; no survey required.
62-186. [Repealed.]
62-187. Proceedings as under eminent domain.
62-188. [Repealed.]
62-189. Powers granted corporations under Chapter exercisable by persons, firms or copartnerships.
62-190. Right of eminent domain conferred upon pipeline companies; other rights.
62-191. Flume companies exercising right of eminent domain become common carriers.
62-192. [Repealed.]
62-193 through 62-199. [Reserved.]

Article 10.

Transportation in General.

62-200. Duty to transport household goods within a reasonable time.
62-201. Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same.
62-202. Baggage and freight to be carefully handled.
62-203. Claims for loss or damage to goods; filing and adjustment.
62-204. Notice of claims, statute of limitations for loss, damage or injury to property.
62-205. Joinder of causes of action.
62-206. Carrier's right against prior carrier.
62-207. [Repealed.]
62-208. Common carriers to settle promptly for cash-on-delivery shipments; penalty.
62-209. Sale of unclaimed baggage or household goods; notice; sale of rejected property; escheat.
62-210. Discrimination between connecting lines.
62-211. [Repealed.]
62-212. Indemnity agreements in motor carrier transportation contracts.
62-213 through 62-219. [Reserved.]

Article 11.

Railroads.

62-220. [Recodified.]
62-221, 62-222. [Repealed.]
62-223 through 62-226. [Recodified.]
62-227 through 62-235. [Repealed.]
62-236, 62-237. [Recodified.]
62-238, 62-239. [Repealed.]
62-240. [Recodified.]
62-241 through 62-247. [Repealed.]

Sec.
62-248 through 62-258. [Reserved.]

Article 12.

Motor Carriers.

62-259. Additional declaration of policy for motor carriers.
62-259.1. Specific declaration of policy for bus companies.
62-260. Exemptions from regulations.
62-261. Additional powers and duties of Commission applicable to motor vehicles.
62-262. Applications and hearings other than for bus companies.
62-262.1. Certificates of authority for passenger operations by bus companies.
62-262.2. Discontinuance or reduction in service.
62-263. Application for broker's license.
62-264. [Repealed.]
62-265. Emergency operating authority.
62-266. [Repealed.]
62-267. Deviation from regular route operations.
62-268. Security for protection of public; liability insurance.
62-269. Accounts, records and reports.
62-270. Orders, notices, and service of process.
62-271. Collection of rates and charges of motor carriers of household goods.
62-272. Allowance to shippers for transportation services.
62-273. Embezzlement of C.O.D. shipments.
62-274. Evidence; joinder of surety.
62-275. [Repealed.]
62-276. Construction of Article.
62-277. [Repealed.]
62-278. Revocation of license plates by Utilities Commission.
62-279. Injunction for unlawful operations.
62-280. [Reserved.]
62-281. [Repealed.]
62-282 through 62-289. [Reserved.]

Article 12A.

Human Service Transportation.

62-289.1. Short title.
62-289.2. Purpose.
62-289.3. Definitions.
62-289.4. Classification of transportation.
62-289.5. Inapplicable laws and regulations.
62-289.6. Insurance for volunteers.
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Article 13.

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62-290. Corporations whose property and franchises sold under order of court or execution.

Sec.
62-291. New owners to meet and organize; special rule for railroads.
62-292. Certificate to be filed with Secretary of State.
62-293. Effect on liens and other rights.
62-294 through 62-299. [Reserved.]

Article 14.

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62-300. Particular fees and charges fixed; payment.
62-301. [Repealed.]
62-302. Regulatory fee.
62-303 through 62-309. [Reserved.]

Article 15.

Penalties and Actions.

62-310. Public utility violating any provision of Chapter, rules or orders; penalty; enforcement by injunction.
62-311. Willful acts of employees deemed those of public utility.
62-312. Actions to recover penalties.
62-313. Refusal to permit Commission to inspect records made misdemeanor.
62-314. Violating rules, with injury to others.
62-315. Failure to make report; obstructing Commission.
62-316. Disclosure of information by employee of Commission unlawful.
62-317. Remedies for injuries cumulative.

Sec.
62-318. Allowing or accepting rebates a misdemeanor.
62-319. Riding on train unlawfully; venue.
62-320. [Repealed.]
62-321. Penalty for nondelivery of intrastate telegraph message.
62-322. Unauthorized manufacture or sale of switch-lock keys a misdemeanor.
62-323. Willful injury to property of public utility a misdemeanor.
62-324. Disclosure of information as to shipments unlawful.
62-325. Unlawful motor carrier operations.
62-326. Furnishing false information to the Commission; withholding information from the Commission.
62-327. Gifts to members of Commission, Commission employees, or public staff.
62-328. Unauthorized use of Citizens Band equipment.
62-329 through 62-332. [Reserved.]

Article 16.

Security Provisions.

62-333. Screening employment applications.
62-334 through 62-349. [Reserved.]

Article 17.

Miscellaneous Provisions.

62-350. (See Editor's note) Regulation of pole attachments.

ARTICLE 1.

General Provisions.

§ 62-1. Short title.

This Chapter shall be known and may be cited as the Public Utilities Act. (1963, c. 1165, s. 1.)

Editor's Note. — Session Laws 1963, c. 1165, amended, revised and rewrote Chapters 56, 60, and 62 of the General Statutes and recodified them as Chapter 62 and Chapter 74A.

Chapter 74A was repealed by Session Laws 1991 (Regular Session, 1992), c. 1043, s. 8, effective July 25, 1992. For present provisions pertaining to the subject matter of repealed Chapter 74A, see Chapter 74E.

Session Laws 1997-40, ss. 1 through 4, as amended by Session Laws 1999-122, s. 1, Session Laws 2000-53, s. 1, and Session Laws 2000-181, s. 2.1, provide in part that the Study Commission on the Future of Electric Service in North Carolina is created and the Commission shall consist of 30 voting members. The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each designate a cochair from the General Assembly membership serving on the Commission. The Commission shall examine the cost, adequacy, availability, and pricing of electric rates and service in North Carolina to determine whether legislation is necessary to assure an adequate and reliable source of electricity and economical, fair, and equitable rates for all consumers of electricity in North Carolina. The Commission shall gather data and other information as may be necessary to accomplish the purposes of the Commission, and shall seek input and advice from the Attorney General, the North Carolina Utilities Commission, and the Public Staff of the Utilities Commission and shall also obtain guidance by reviewing electric utility restructuring experiments conducted in other states. The Commission, while in the discharge of official duties, may exercise all the powers provided under the provisions of G.S. 120-19 through G.S. 120-19.4, including the power to request all officers, agents, agencies, and departments of the State to provide any information, data, or documents within their possession, ascertainable from their records, or otherwise available to them, and the power to subpoena witnesses. The Commission shall make a report to the 1998 Regular Session of the 1997 General Assembly, which may contain recommendations, and shall report the results of its study and its recommendations to the 1999 General Assembly. The Commission is to report periodically thereafter and is to terminate June 30, 2006.

Session Laws 2002-167, ss. 6(a) through (c), provide: "(a) The North Carolina Utilities Commission shall include the following additional items in the study it is presently conducting for the Commission on the Future of Electronic Service in North Carolina referred to as 'Investigation of Green Power and Public Benefit Fund Voluntary Check-Off Programs':

"(1) Identification of funding mechanisms in addition to voluntary purchase of green power blocks that would stimulate green power production in the State.

"(2) Identification of incentives in addition to funding mechanisms that would stimulate green power production in the State.

"(3) Identification of barriers that would impede green power production in the State and strategies to address those barriers.

"(4) Identification of appropriate methods of promoting the purchase of green power by the various electric customer groups.

"(5) Identification of methods whereby the State can provide incentives and resources that would stimulate the production and use of green power that would protect water quality; promote water conservation and water reuse; protect air quality; protect public health, safety, welfare, and the environment; and provide for the safe and efficient disposal of animal waste in the State.

"(b) In making recommendations to address the additional items listed in subsection (a) of this section, the North Carolina Utilities Commission shall consider the impact of its recommendations on residential, commercial, and industrial consumers of electricity in the State.

"(c) The North Carolina Utilities Commission shall make its final report on its investigation of green power and public benefit fund voluntary check-off programs, including the additional items set forth in subsection (a) of this section, to the Commission on the Future of Electric Service in North Carolina and the Environmental Review Commission not later than 15 March 2003. The delivery of this report shall not preclude either of the receiving commissions from asking for additional information or reports on these subjects."

Legal Periodicals. — For case law survey on public utilities, see 41 N.C.L. Rev. 498 (1963).

CASE NOTES

Editor's Note. — *Cases construing provisions of former Chapter 62 have been placed in the annotations under appropriate sections of Chapters 62 and 74E.*

Scope of Authority of Utilities Commission. — The Utilities Commission, being an administrative agency created by statute, has no regulatory authority except such as is conferred upon it by this Chapter, and the Commission may not, by its order, require or authorize a rule or practice by a public utility company which is forbidden by statute, or authorize such company to refuse to perform a duty imposed upon it by statute, unless this Chapter has conferred such authority upon the Commission. State ex rel. Utils. Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

As to the jurisdiction of the utilities commission to require rail carrier to open drainage ditches along its tracks and to keep its drainage ditches open, see State ex rel. Utils. Comm'n v. Seaboard C.L.R.R., 62 N.C. App. 631, 303 S.E.2d 549, cert. denied and appeal dismissed, 309 N.C. 324, 307 S.E.2d 168 (1983).

Findings Concerning Company Debt Ratios. — Conclusion of the Utilities Commission's that a natural gas company's capital structure should include a short-term debt ratio of 4.02%, based on a short-term debt equal to stored gas inventory rather than "the daily average balance amount of short-term debt for the most recent twelve month period," was supported by substantial evidence and satisfied requirements of this chapter. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

Applied in S & R Auto & Truck Serv., Inc. v. City of Charlotte, 268 N.C. 374, 150 S.E.2d 743 (1966).

Cited in North Carolina Utils. Comm'n v. United States, 253 F. Supp. 930 (E.D.N.C.

1966); State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986); Shepard v. Bonita Vista Props., L.P., 191 N.C. App. 614, 664 S.E.2d 388, 2008 N.C. App. LEXIS 1489 (2008).

§ 62-2. Declaration of policy.

(a) Upon investigation, it has been determined that the rates, services and operations of public utilities as defined herein, are affected with the public interest and that the availability of an adequate and reliable supply of electric power and natural gas to the people, economy and government of North Carolina is a matter of public policy. It is hereby declared to be the policy of the State of North Carolina:

(1) To provide fair regulation of public utilities in the interest of the public;

(2) To promote the inherent advantage of regulated public utilities;

(3) To promote adequate, reliable and economical utility service to all of the citizens and residents of the State;

(3a) To assure that resources necessary to meet future growth through the provision of adequate, reliable utility service include use of the entire spectrum of demand-side options, including but not limited to conservation, load management and efficiency programs, as additional sources of energy supply and/or energy demand reductions. To that end, to require energy planning and fixing of rates in a manner to result in the least cost mix of generation and demand-reduction measures which is achievable, including consideration of appropriate rewards to utilities for efficiency and conservation which decrease utility bills;

(4) To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices and consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy;

(4a) To assure that facilities necessary to meet future growth can be financed by the utilities operating in this State on terms which are reasonable and fair to both the customers and existing investors of such utilities; and to that end to authorize fixing of rates in such a manner as to result in lower costs of new facilities and lower rates over the operating lives of such new facilities by making provisions in the rate-making process for the investment of public utilities in plants under construction;

(5) To encourage and promote harmony between public utilities, their users and the environment;

(6) To foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the level of energy needed for the protection of public health and safety and for the promotion of the general welfare as expressed in the State energy policy;

(7) To seek to adjust the rate of growth of regulated energy supply facilities serving the State to the policy requirements of statewide development;

(8) To cooperate with other states and with the federal government in promoting and coordinating interstate and intrastate public utility service and reliability of public utility energy supply;

(9) To facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare throughout the State and to that end to authorize the creation of expansion funds for natural gas local distribution companies or gas

districts to be administered under the supervision of the North Carolina Utilities Commission; and

(10) To promote the development of renewable energy and energy efficiency through the implementation of a Renewable Energy and Energy Efficiency Portfolio Standard (REPS) that will do all of the following:

a. Diversify the resources used to reliably meet the energy needs of consumers in the State.

b. Provide greater energy security through the use of indigenous energy resources available within the State.

c. Encourage private investment in renewable energy and energy efficiency.

d. Provide improved air quality and other benefits to energy consumers and citizens of the State.

(b) To these ends, therefore, authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth in this Chapter. Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission.

Because of technological changes in the equipment and facilities now available and needed to provide telephone and telecommunications services, changes in regulatory policies by the federal government, and changes resulting from the court-ordered divestiture of the American Telephone and Telegraph Company, competitive offerings of certain types of telephone and telecommunications services may be in the public interest. Consequently, authority shall be vested in the North Carolina Utilities Commission to allow competitive offerings of local exchange, exchange access, and long distance services by public utilities defined in G.S. 62-3(23)a.6. and certified in accordance with the provisions of G.S. 62-110, and the Commission is further authorized after notice to affected parties and hearing to deregulate or to exempt from regulation under any or all provisions of this Chapter: (i) a service provided by any public utility as defined in G.S. 62-3(23)a.6. upon a finding that such service is competitive and that such deregulation or exemption from regulation is in the public interest; or (ii) a public utility as defined in G.S. 62-3(23)a.6., or a portion of the business of such public utility, upon a finding that the service or business of such public utility is competitive and that such deregulation or exemption from regulation is in the public interest.

Notwithstanding the provisions of G.S. 62-110(b) and G.S. 62-134(h), the following services provided by public utilities defined in G.S. 62-3(23)a.6. are sufficiently competitive and shall no longer be regulated by the Commission: (i) intraLATA long distance service; (ii) interLATA long distance service; and (iii) long distance operator services. A public utility providing such services shall be permitted, at its own election, to file and maintain tariffs for such services with the Commission up to and including September 1, 2003. Nothing in this subsection shall limit the Commission's authority regarding certification of providers of such services or its authority to hear and resolve complaints against providers of such services alleged to have made changes to the services of customers or imposed charges without appropriate authorization. For purposes of this subsection, and notwithstanding G.S. 62-110(b), "long distance services" shall not include existing or future extended area service, local measured service, or other local calling arrangements, and any future extended area service shall be implemented consistent with Commission rules governing extended area service existing as of May 1, 2003.

The North Carolina Utilities Commission may develop regulatory policies to govern the provision of telecommunications services to the public which promote efficiency, technological innovation, economic growth, and permit telecommunications utilities a reasonable opportunity to compete in an emerging competitive environment, giving due regard to consumers, stockholders, and maintenance of reasonably affordable local exchange service and long distance service.

(b1) Broadband service provided by public utilities as defined in G.S. 62-3(23)a.6. is sufficiently competitive and shall not be regulated by the Commission.

(c) The policy and authority stated in this section shall be applicable to common carriers of passengers by motor vehicle and their regulation by the North Carolina Utilities Commission only to the extent that they are consistent with the provisions of the Bus Regulatory Reform Act of 1985. (1963, c. 1165, s. 1; 1975, c. 877, s. 2; 1977, c. 691, s. 1; 1983 (Reg. Sess., 1984), c. 1043, s. 1; 1985, c. 676, s. 3; 1987, c. 354; 1989, c. 112, s. 1; 1991, c. 598, s. 1; 1995, c. 27, s. 1; 1995 (Reg. Sess., 1996), c. 742, ss. 29-32; 1998-132, s. 18; 2003-91, s. 1; 2005-95, s. 1; 2007-397, s. 1.)

Editor's Note. — See Editor's note under G.S. 62-133.5 regarding Session Laws 1995, c. 27, s. 6.1.

Session Laws 2007-397, s. 15 contains a severability clause.

Session Laws 2009-574, ss. 50.1-50.4, provide: "SECTION 50.1. There is established the Study Commission on North Carolina's Energy Future.

"SECTION 50.2. The Commission shall be composed of 19 members as follows:

"(1) Five members of the Senate appointed by the President Pro Tempore of the Senate.

"(2) Five members of the House of Representatives appointed by the Speaker of the House of Representatives.

"(3) The Chief Executive Officers of Progress Energy, Duke Energy, NCEMC, and ElectriCities, or their designees.

"(4) One residential customer, appointed by the Speaker of the House of Representatives.

"(5) One commercial customer, appointed by the President Pro Tempore of the Senate.

"(6) One industrial customer, appointed by the President Pro Tempore of the Senate.

"(7) One 'Green energy' advocate, appointed by the Governor.

"(8) One environmental advocate, appointed by the Speaker of the House of Representatives.

"Public members shall be residents of the State. Vacancies on the Commission shall be filled by the appointing authority. The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each designate a co-chair, who shall be a member of the General Assembly. A quorum of the Commission shall be 10 members.

"The Commission, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and G. S. 120-19.1 through G.S. 120-19.4. The Commission may meet at any time upon call of the chairs. The Commission may meet in the Legislative Building or the Legislative Office Building. The Commission may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02.

"The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Commission in its work. The House of Representatives' and Senate's Directors of Legislative Assistants shall assign clerical staff to the Commission, and the expenses relating to the clerical employees shall be borne by the Commission. Members of the Commission shall receive subsistence and travel expenses at the rates set forth in G.S. 120-3.1, 138-5, or 138-6, as appropriate.

"SECTION 50.3. The Commission may examine issues related to:

"(1) Ensuring the State has appropriate statutes and regulations in place to respond to any federal requirement for renewable energy or carbon reduction.

"(2) Examining the cost, availability and pricing of electric service to ensure an adequate, reliable and affordable source of energy to all consumers in North Carolina, including, but not limited to examination of fuel mix, impact of conservation on load, and impact of renewable energy on price and reliability.

"(3) Examining utility access to capital finance markets and recommend to the General Assembly necessary changes to the traditional rate-case method of financing major utility capital projects.

"SECTION 50.4. The Commission may make an interim report to the General Assembly by May 1, 2010, and a final report, including any proposed legislation, to the 2011 General Assembly upon its convening. The Commission shall terminate upon filing its final report or upon the convening of the 2011 General Assembly, whichever is earlier."

Session Laws 2009-574, s. 52.1, provides: "For legislative studies authorized by this act, out-of-state travel must be authorized by the President Pro Tempore of the Senate or the Speaker of the House of Representatives, as appropriate."

Effect of Amendments. — Session Laws 2007-397, s. 1, effective January 1, 2008, substituted "Commission; and" for "Commission," at the end of subdivision (a)(9); added subdivision (a)(10); and made a minor stylistic change.

Legal Periodicals. — For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

CASE NOTES

Rate Scheme Held Unconstitutional Burden on United States. — The state regulatory scheme by which the Utilities Commission sets rates for franchised carriers to charge the U.S. Army in transportation of household goods violates the national procurement policy and is an unconstitutional burden on the United States in the exercise of its constitutional powers. United States v. North Carolina Utils. Comm'n, 352 F. Supp. 274 (E.D.N.C. 1972).

Delegation of Authority to Commission Constitutional. — The standard of public convenience and necessity and the policies of the State were sufficient to guide the North Carolina Utilities Commission in deciding a certificate of public convenience and necessity case, and the legislature's delegation of this authority to the Commission was not unconstitutional. State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993), cert. denied, 335 N.C. 564, 441 S.E.2d 125 (1994).

The expansion fund legislation is a proper delegation of legislative authority to an administrative agency and is not unconstitutional. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

As an administrative agency created by the legislature, the Commission has not been given jurisdiction to determine the constitutionality of legislative enactments, specifically subdivision (a)(9) of this section or G.S. 62-158. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

Purpose of Chapter. — The clear purpose of this Chapter is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in G.S. 62-133. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

The primary purpose of this Chapter is not to guarantee to the stockholders of a public utility constant growth in the value of and in the dividend yield from their investment, but is to assure the public of adequate service at a reasonable charge. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

The provisions of this Chapter, such as G.S. 62-133, designed to assure the utility of adequate revenues, are in the nature of corollaries to the basic proposition that the public is entitled to adequate service at reasonable rates and safeguards against administrative action which would violate constitutional protections by confiscation of the utility's property. Without such assurance, the owners of capital would not invest it in the utility's bonds or stock and the utility could not provide the plant necessary for the rendering of adequate service. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

This section declares the policy of the State, which it is the purpose of this Chapter to put into effect. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The purpose of the Public Utilities Act is to put the policies enumerated in this section into effect. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Commission to Be Guided by Public Interest. — While the Utilities Commission seeks to establish the lowest possible rates, that is not the polar star by which the Commission conducts its business; rather, the Commission is guided by considerations of the public interest. State ex rel. Utils. Comm'n v. Piedmont Natural Gas Co., 346 N.C. 558, 488 S.E.2d 591 (1997).

The entire Chapter is a single, integrated plan. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

The status of an entity as a public utility, entitled to the rights conferred by statute and subject to the jurisdiction of the Commission, does not depend upon whether it has secured a certificate of public convenience and necessity, pursuant to G.S. 62-110, but is determined instead according to whether it is, in fact, operating a business defined by the Legislature as a public utility. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

If an entity is, in fact, operating as a public utility, it is subject to the regulatory powers of the Commission, notwithstanding the fact that it has failed to comply with G.S. 62-110 before beginning its operation. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

The Commission, not the courts, has been given the authority to regulate the rates of public utilities. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

And the Court Must Affirm. — The General Assembly has given the North Carolina Utilities Commission, not the courts, the authority to regulate the operations of the public utilities; therefore, if the findings and conclusions of the Commission are supported by competent, substantial and material evidence, the Court must affirm the decision even if it may have reached a different determination upon the evidence. State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 123 N.C. App. 43, 472 S.E.2d 193 (1996).

The Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 through a rule making procedure rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

This section does not require the Utilities Commission to adopt a rule of the Interstate Commerce Commission; the Commission must make its own independent investigations, determinations and findings of fact based upon the evidence presented to it. State ex rel. Utilities Comm'n v. Associated Petro. Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972), cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

This section does not confer an exclusive emolument or privilege by creating a private benefit only for those residents of unserved areas in violation of N.C. Const., Art. I, § 32. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

Only Unfair or Destructive Competition Condemned. — There is no public policy condemning competition as such in the field of public utilities; the public policy only condemns unfair or destructive competition. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Prerogative to Recognize Private Agreements. — The authority to regulate includes the prerogative to recognize private agreements that may have been entered into between parties with respect to the operation of a public utility, as such agreements may be 'in the interest of the public'. Ocean Glen Townhouse Condominium Owners Ass'n Phase I v. State ex rel. N.C. Utils. Comm'n, 126 N.C. App. 495, 486 S.E.2d 223 (1997), cert. denied, 347 N.C. 136, 492 S.E.2d 36 (1997).

Transportation of passengers by motor carriers for compensation is a business affected with a public interest. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

All who ship goods with common carriers are required to be treated equally with respect to the same category of service. State ex rel. Utils. Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838, rev'd on other grounds, 302 N.C. 14, 273 S.E.2d 232 (1980).

Interconnection with Competitor Cannot Be Required. — There is no provision in this Chapter which requires, or authorizes the Commission to require, a utility, with large investments in its own plant and facilities, to permit interconnection with such plant and facilities by a competitor in order to increase the competitor's opportunity to take away its customers or prospective customers. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Contractual obligation to provide water service to a recreational subdivision, as well as the actual delivery thereof, directly affect a utility's ability to function as a utility. State ex rel. Utils. Comm'n v. Carolina Forest Utils., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Authority to Allow Use of Availability Charge. — The Utilities Commission has jurisdiction and authority to allow the use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utils. Comm'n v. Carolina Forest Utils., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Landowners in a recreational subdivision who pay availability charges are "consumers" or stand in a consumer-like relationship to the utility providing water service. State ex rel. Utils. Comm'n v. Carolina Forest Utils., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Jurisdiction over Rates and Service of Duke Power Company. — The Utilities Commission has general and supervisory jurisdiction over the retail electric rates and service of Duke Power Company pursuant to this Chapter. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774, cert. denied, 285 N.C. 661, 207 S.E.2d 752 (1974).

North Carolina rates may not be structured by external system usage. Such action is outside the intended scope of the Commission's authority under this section. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

Recovery of Reasonable Cost of Approved Gas Exploration Projects. — The Commission, in ordering that the reasonable costs of approved exploration projects were to be recoverable through tracking rate increases, acted within its acknowledged duty and authority to compel adequate and efficient utility service to the citizens of this State, where it was clear from the Commission's findings that, without additional gas supplies, the gas utilities would be unable to render adequate service to their customers, that exploration programs were the most feasible means for obtaining these additional supplies, and that the utilities were unable, through traditional methods of financing, to fund sufficient exploration projects to obtain these supplies. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Order prescribing different Private Line Service rates for AT&T's nonreseller (end user) customers and its reseller customers upon its face was discriminatory, and absent legally adequate reasons in the order why it was not unjustly discriminatory within the meaning of subdivision (4) of this section, the order would be vacated and the cause remanded to the Commission for further proceedings. State ex rel. Utils. Comm'n v. A T & T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

The capture of supplier refunds for the purpose of funding the expansion fund does not constitute a taking without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the "law of the land" clause of N.C. Const., Art. I, § 19. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

Plan for Compensation to Local Exchange Companies for Lost Revenues During Transition — Not Invalid. — Plan requiring compensation to local exchange companies for lost revenues during transition period did not violate the equal protection clause or the commerce clause, nor conflict with federal antitrust and communications objectives. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Federal Jurisdiction over Disputes Arising Under This Statute. — The district court erred in asserting federal jurisdiction under 47 U.S.C. § 252(e)(6) over disputes involving contract administration, interpretation and enforcement; the interconnection agreements at the core of those disputes were submitted to the NCUC and approved by it, and no judicial review was sought from these State commission determinations pursuant to this section. Bellsouth Telecomms. v. North Carolina Utils. Comm'n, 240 F.3d 270, 2001 U.S. App. LEXIS 2159 (4th Cir. 2001).

Same — Not a Penalty or Damages. — Plan requiring compensation to local exchange companies for lost revenues during transition period did not impose a "penalty" or constitute money damages, and could more appropriately be considered as a prerequisite to receiving a certificate. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Same — Statutorily Authorized. — Plan requiring compensation to local exchange companies for lost revenues during transition period was reasonably calculated to provide protection for the local exchanges which provided needed services to local exchange customers, and was a proper "term" or "condition" of certification which was consistent with the public interest. The plan was therefore statutorily authorized. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Applied in State ex rel. Utils. Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975); State ex rel. Utils. Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983); State ex rel. Utils. Comm'n v. NUI Corp., 154 N.C. App. 258, 572 S.E.2d 176, 2002 N.C. App. LEXIS 1470 (2002).

Cited in State ex rel. Utils. Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968); State ex rel. Utils. Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973); State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982); State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. Carolina Utils. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989); State ex rel. Utils. Comm'n v. North Carolina Elec. Membership Corp., 105 N.C. App. 136, 412 S.E.2d 166 (1992); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 123 N.C. App. 623, 473 S.E.2d 661 (1996); State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999); State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005).

§ 62-3. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

(1) "Broadband service" means any service that consists of or includes a high-speed access capability to transmit at a rate of not less than 200 kilobits per second in either the upstream or downstream direction and either (i) is used to provide access to the Internet, or (ii) provides computer processing, information storage, information content, or protocol conversion, including any service applications or information service provided over such high-speed access service. "Broadband service" does not include intrastate service that was tariffed by the Commission and in effect as of the effective date of this subdivision.

(1a) "Broker," with regard to motor carriers of passengers, means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, who or which as principal or agent engages in the business of selling or offering for sale any transportation of passengers by motor carrier, or negotiates for or holds himself, or itself, out by solicitation, advertisements, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation for compensation, either directly or indirectly.

(1b) "Bus company" means any common carrier by motor vehicle which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of passengers over fixed routes or in charter operations, or both, except as exempted in G.S. 62-260.

(2) "Certificate" means a certificate of public convenience and necessity issued by the Commission to a public utility or a certificate of authority issued by the Commission to a bus company.

(3) "Certified mail" means such mail only when a return receipt is requested.

(4) "Charter operations" with regard to bus companies means the transportation of a group of persons for sightseeing purposes, pleasure tours, and other types of special operations, or the transportation of a group of persons who, pursuant to a common purpose and under a single contract, and for a fixed charge for the vehicle, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartered group after having left the place of origin.

(5) "Commission" means the North Carolina Utilities Commission.

(6) "Common carrier" means any person, other than a carrier by rail, which holds itself out to the general public to engage in transportation of persons or household goods for compensation, including transportation by bus, truck, boat or other conveyance, except as exempted in G.S. 62-260.

(7) "Common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of persons or household goods or any class or classes thereof for compensation, whether over regular or irregular routes, or in charter operations, except as exempted in G.S. 62-260.

(7a) "Competing local provider" means any person applying for a certificate to provide local exchange or exchange access services in competition with a local exchange company.

(8), (9) Repealed by Session Laws 1995, c. 523, s. 1.

(9a) "Fixed route" means the specific highway or highways over which a bus company is authorized to operate between fixed termini.

(10) "Foreign commerce" means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country.

(11) "Franchise" means the grant of authority by the Commission to any person to engage in business as a public utility, whether or not exclusive or shared with others or restricted as to terms and conditions and whether described by area or territory or not, and includes certificates, and all other forms of licenses or orders and decisions granting such authority.

(12) "Highway" means any road or street in this State used by the public or dedicated or appropriated to public use.

(13) "Industrial plant" means any plant, mill, or factory engaged in the business of manufacturing.

(14) "Interstate commerce" means commerce between any place in a state and any place in another state or between places in the same state through another state.

(15) "Intrastate commerce" means commerce between points and over a route or within a territory wholly within this State, which commerce is not a part of a prior or subsequent movement to or from points outside of this State in interstate or foreign commerce, and includes all transportation within this State for compensation in interstate or foreign commerce which has been exempted by Congress from federal regulation.

(16) "Intrastate operations" means the transportation of persons or household goods for compensation in intrastate commerce.

(16a) "Local exchange company" means a person holding, on January 1, 1995, a certificate to provide local exchange services or exchange access services.

(17) "Motor carrier" means a common carrier by motor vehicle.

(18) "Motor vehicle" means any vehicle, machine, tractor, semi-trailer, or any combination thereof, which is propelled or drawn by mechanical power and used upon the highways within the State.

(19) "Municipality" means any incorporated community, whether designated in its charter as a city, town, or village.

(20) Repealed by Session Laws 1995, c. 523, s. 1.

(21) "Person" means a corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, lessee, or personal representative thereof.

(22) "Private carrier" means any person, other than a carrier by rail, not included in the definitions of common carrier, which transports in intrastate commerce in its own vehicle or vehicles property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or when such transportation is purely an incidental adjunct to some other established private business owned and operated by such person other than the transportation of household goods for compensation.

(23) a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:

1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; provided, however, that the term "public utility" shall not include persons who construct or operate an

electric generating facility, the primary purpose of which facility is for such person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation;

2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation, or operating a public sewerage system for compensation; provided, however, that the term "public utility" shall not include any person or company whose sole operation consists of selling water to less than 15 residential customers, except that any person or company which constructs a water system in a subdivision with plans for 15 or more lots and which holds itself out by contracts or other means at the time of said construction to serve an area containing more than 15 residential building lots shall be a public utility at the time of such planning or holding out to serve such 15 or more building lots, without regard to the number of actual customers connected;
3. Transporting persons or household goods by street, suburban or interurban bus for the public for compensation;
4. Transporting persons or household goods by motor vehicles or any other form of transportation for the public for compensation, except motor carriers exempted in G.S. 62-260, carriers by rail, and carriers by air;
5. Transporting or conveying gas, crude oil or other fluid substance by pipeline for the public for compensation;
6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation.

b. The term "public utility" shall for rate-making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

c. The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or subsidiary corporation as defined in G.S. 55-2 to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.

d. The term "public utility," except as otherwise expressly provided in this Chapter, shall not include a municipality, an authority organized under the North Carolina Water and Sewer Authorities Act, electric or telephone membership corporation; or any person not otherwise a public utility who furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others; provided, however, that any person other than a nonprofit organization serving only its members, who distributes or provides utility service to his employees or tenants by individual meters or by other coin-operated devices with a charge for metered or coin-operated utility service shall be a public utility within the definition and meaning of this Chapter with respect to the regulation of rates and provisions of service rendered through such meter or coin-operated device imposing such separate metered utility charge. If any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions of this Chapter. A water or sewer system owned by a homeowners' association that provides water or sewer service only to members or leaseholds of members is not subject to the provisions of this Chapter.

e. The term "public utility" shall include the University of North Carolina insofar as said University supplies telephone service, electricity or water to the public for compensation from the University Enterprises defined in G.S. 116-41.1(9).

f. The term "public utility" shall include the Town of Pineville insofar as said town supplies telephone services to the public for compensation. The territory to be served by the Town of Pineville in furnishing telephone services, subject to the Public Utilities Act, shall include the town limits as they exist on May 8, 1973, and shall also include the area proposed to be annexed under the town's ordinance adopted May 3, 1971, until January 1, 1975.

g. The term "public utility" shall not include a hotel, motel, time share or condominium complex operated primarily to serve transient occupants, which imposes charges to occupants for local, long-distance, or wide area telecommunication services when such calls are completed through the use of facilities provided by a public utility, and provided further that the local services received are rated in accordance with the provisions of G.S. 62-110(d) and the applicable charges for telephone calls are prominently displayed in each area where occupant rooms are located.

h. The term "public utility" shall not include the resale of electricity by (i) a campground operated primarily to serve transient occupants, or (ii) a marina; provided that (i) the campground or marina charges no more than the actual cost of the electricity supplied to it, (ii) the amount of electricity used by each campsite or marina slip occupant is measured by an individual metering device, (iii) the applicable rates are prominently displayed at or near each campsite or marina slip, and (iv) the campground or marina only resells electricity to campsite or marina slip occupants.

i. The term "public utility" shall not include the State, the Office of Information Technology Services, or the Microelectronics Center of North Carolina in the provision or sharing of switched broadband telecommunications services with non-State entities or organizations of the kind or type set forth in G.S. 143B-426.39.

j. The term "public utility" shall not include any person, not otherwise a public utility, conveying or transmitting messages or communications by mobile radio communications service. Mobile radio communications service includes one-way or two-way radio service provided to mobile or fixed stations or receivers using mobile radio service frequencies.

k. The term "public utility" shall not include a regional natural gas district organized and operated pursuant to Article 28 of Chapter 160A of the General Statutes.

(24) "Rate" means every compensation, charge, fare, tariff, schedule, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, tariff, schedule, toll, rental or classification.

(25) "Route" means the course or way which is traveled; the road or highway over which motor vehicles operate.

(26) "Securities" means stock, stock certificates, bonds, notes, debentures, or other evidences of ownership or of indebtedness, and any assumption or guaranty thereof.

(27) "Service" means any service furnished by a public utility, including any commodity furnished as a part of such service and any ancillary service or facility used in connection with such service.

(27a) "Small power producer" means a person or corporation owning or operating an electrical power production facility with a power production capacity which, together with any other facilities located at the same site, does not exceed 80 megawatts of electricity and which depends upon renewable resources for its primary source of energy. For the purposes of this section, renewable resources shall mean: hydroelectric power. A small power producer shall not include persons primarily engaged in the generation or sale of electricity from other than small power production facilities.

(28) The word "State" means the State of North Carolina; "state" means any state.

(29) "Town" means any unincorporated community or collection of people having a geographical name by which it may be generally known and is so generally designated.

(30) "Panel" means a panel of three commissioners, a division of the Utilities Commission authorized for the purpose of carrying out certain functions of the Commission. (1913, c. 127, s. 7; C.S., s. 1112(b); 1933, c. 134, ss. 3, 8; c. 307, s. 1; 1937, c. 108, s. 2; 1941, cc. 59, 97; 1947, c. 1008, s. 3; 1949, c. 1132, s. 4; 1953, c. 1140, s. 1; 1957, c. 1152, s. 13; 1959, c. 639, ss. 12, 13; 1963, c. 1165, s. 1; 1967, c. 1094, ss. 1, 2; 1971, c. 553; c. 634, s. 1; cc. 894, 895; 1973, c. 372, s. 1; 1975, c. 243, s. 2; cc. 254, 415; 1979, c. 652, s. 1; 1979, 2nd Sess., c. 1219, s. 1; 1981 (Reg. Sess., 1982), c. 1186, s. 2; 1985, c. 676, s. 4; 1987, c. 445, s. 2; 1989, c. 110; 1993, c. 349, s. 1; 1993 (Reg. Sess., 1994), c. 777, s. 1(b); 1995, c. 27, ss. 2, 3; c. 509, s. 34; c. 523, s. 1; 1997-426, s. 8; 1997-437, s. 1; 1998-128, ss. 1-3; 2004-199, s. 1; 2004-203, s. 37(a); 2005-95, s. 2.)

Cross References. — For provision making small power producers as defined in subdivision (27a) of this section subject to the provisions of Part 3 of Article 21 of Chapter 143, the Dam Safety Law, even though certified by the North Carolina Utilities Commission, see G.S. 143-215.25A.

Editor's Note. — Chapter 55, referred to in subdivision (23)c of this section, was rewritten, effective July 1, 1990. For definitions applicable to that chapter, see now G.S. 55-1-40.

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

CASE NOTES

Definitions Not Controlling Where Terms Are Used Elsewhere. — The definitions of "public utility" and "franchise" contained in this section are not controlling in determining whether an agreement of a municipality constitutes a franchise or a license, since the definitions of the statute do not purport to be authoritative definitions of those terms as used elsewhere. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

The term "franchise," as used by the courts and by text writers, is not limited to a special right granted to a public utility, as it is defined in this section. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

Applicability of Article 8. — The General Assembly intended Article 8 to apply to all public utilities doing business in this State, whether they be foreign or domestic corporations, and even though they are also engaged in interstate commerce. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

There is nothing in the language of Article 8 or of the Public Utilities Act generally to support the contention that Article 8 is not applicable to a multistate foreign corporation engaged in interstate commerce. State ex rel.

Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

"Public" means the whole body politic, the body of the people at large, the people as a whole. State ex rel. Utils. Comm'n v. Edmisten, 40 N.C. App. 109, 252 S.E.2d 516 (1979), aff'd in part, rev'd on other grounds, 299 N.C. 432, 263 S.E.2d 583 (1980).

What Is the "Public" Dependent on Regulatory Circumstances. — Whether any given enterprise is a public utility within the meaning of a regulatory scheme does not depend on some abstract, formulistic definition of "public" to be thereafter universally applied. What is the "public" in any given case depends rather on the regulatory circumstances of that case. Some of these circumstances are: (1) the nature of the industry sought to be regulated; (2) the type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) the effect of nonregulation or exemption from regulation of one or more persons engaged in the industry. The meaning of "public" must, in the final analysis, be such as will, in the context of the regulatory circumstances, accomplish the legislature's purpose and comport with its public policy. State ex rel. Utils. Comm'n v. Simpson, 295 N.C. 519, 246 S.E.2d 753 (1978).

In determining the scope of the Commission's authority, the emphasis should be placed on the public utility function rather than a literal reading of the statutory definition of "public utility," and the statutory definition should not be read so narrowly as to preclude commission's jurisdiction over a function which is required to provide adequate service to the subscribers. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Definition of "Public Utility" Cannot Be Expanded. — Neither the Commission nor the Supreme Court has authority to add to the types of business defined by the legislature as public utilities. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 93 N.C. App. 260, 377 S.E.2d 772 (1989).

Test of System as Public Utility. — One test to determine whether a plant or system is a public utility is whether the public may enjoy it by right or by permission only. It is immaterial that the service is limited to a specified area and that the facilities are limited in capacity. State ex rel. Utils. Comm'n v. Edmisten, 40 N.C. App. 109, 252 S.E.2d 516 (1979), aff'd in part, rev'd on other grounds, 299 N.C. 432, 263 S.E.2d 583 (1980).

Service Up to Capacity as Service to "Public". — One offers service to the "public" within the meaning of subparagraph 6 of paragraph a of subdivision (23) when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in this connection, that his service is limited to a specified area and his facilities are limited in capacity. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Sewage Treatment System Is Public Utility. — The operation of a sewage treatment system for compensation is a public utility within the meaning of the Public Utilities Act. Ocean Glen Townhouse Condominium Owners Ass'n Phase I v. State ex rel. N.C. Utils. Comm'n, 126 N.C. App. 495, 486 S.E.2d 223 (1997), cert. denied, 347 N.C. 136, 492 S.E.2d 36 (1997).

As to "service" rendered in contemplation of former statute, see State v. Andrews, 191 N.C. 545, 132 S.E. 568 (1926).

Status of the grantee was a material factor in determining the validity of a grant of a franchise under the authority of former G.S. 160-2, for that statute authorized municipal corporations to grant franchises only to "public utilities," though it did not necessarily follow that such grantee had to be the operator of a business within the definition of "public utility" contained in this section. Kornegay v. City of Raleigh, 269 N.C. 155, 152 S.E.2d 186 (1967).

If Applicant Is Not "Public Utility," Issuance of Certificate Is Nullity. — If an applicant's proposed service is not within the definition of "public utility" contained in subdivision (23) of this section, the issuance of a certificate of public convenience and necessity by the Commission to the applicant would be a nullity. It would not supply a basis for a further order conferring upon the applicant a right which may be granted only to a public utility. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Campground Not Within Exception. — Because owners of a campground charged occupants more than the actual cost of electricity supplied to the campground by an electric company, the owners were not excluded from the statutory definition of public utility under G.S. 62-3(23)(h). Shepard v. Bonita Vista Props., L.P., 191 N.C. App. 614, 664 S.E.2d 388, 2008 N.C. App. LEXIS 1489 (2008).

The fact that a corporation has the authority to, and does, engage in private business in addition to its public service does not deprive it of its status as a public service corporation. A public service (public utility) corporation having the power of eminent domain makes such corporation amenable to State control through the Utilities Commission. State ex rel. Utils. Comm'n v. Edmisten, 40 N.C. App. 109, 252 S.E.2d 516 (1979), aff'd in part, rev'd on other grounds, 299 N.C. 432, 263 S.E.2d 583 (1980).

A mobile radio service falls clearly within the definition of "public utility" in subparagraph 6 of paragraph a of subdivision (23). State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

A medical doctor whose communication service consisted of seven two-way radios, three "beeper" radio devices and one base station, who was providing service only to 10 other members of the County Medical Society, was engaged in the operation of a public utility within the meaning of G.S. 62-3(23)a6 and former 62-119(3). State ex rel. Utils. Comm'n v. Simpson, 32 N.C. App. 543, 232 S.E.2d 871 (1977), aff'd, 295 N.C. 519, 246 S.E.2d 753 (1978).

Telephone Answering or Message Relaying Service Not a "Public Utility". — Neither a telephone answering nor a message relaying service is a public utility within the purview of subdivision (23). State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Sand-Pit Company Not a "Public Utility." — Sand-pit company which did not own or operate any trucks to haul its sand was not a "public utility" as defined by this section. Gordon v. Garner, 127 N.C. App. 649, 493 S.E.2d 58 (1997), cert. denied, 347 N.C. 670, 500 S.E.2d 86 (1998).

Municipal corporations are specifically excluded from the definition of a "public utility" in subdivision (23) of this section. Dale v. City of Morgantown, 270 N.C. 567, 155 S.E.2d 136 (1967); State ex rel. Utils. Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972), aff'd, 17 N.C. App. 522, 195 S.E.2d 76 (1973); State ex rel. Utils. Comm'n v. Hunt Mfg. Co., 16 N.C. App. 335, 192 S.E.2d 16 (1972).

And Are Not Subject to Commission's Regulation. — A municipal corporation distributing and selling electric energy to its inhabitants, and to others in its vicinity, is not subject to regulation by the North Carolina Utilities Commission, and the provisions of this Chapter do not apply to it, except as otherwise expressly stated therein. Dale v. City of Morgantown, 270 N.C. 567, 155 S.E.2d 136 (1967); State ex rel. Utils. Comm'n v. Hunt Mfg. Co., 16 N.C. App. 335, 192 S.E.2d 16 (1972).

Where parties constructed water mains from end of municipal lines to their properties, permitting others to tap into the mains, and the municipality installed meters and furnished water to the others directly, parties were not public utilities within the Public Utilities Act of 1933 so as to give the Utilities Commission jurisdiction. State v. New Hope Rd. Water Co., 248 N.C. 27, 102 S.E.2d 377 (1958).

Appellate Court Had No Jurisdiction to Review Commission's Interlocutory Order. — Water and sewer processing facilities part-owner's appeal of interlocutory orders of the North Carolina Utilities Commission holding that the part-owner was a public utility under G.S. 62-3(23)a.2 and was subject to the Commission's jurisdiction was dismissed as the absence of any exceptions to G.S. 62-90 or 7A-29, allowing review of interlocutory orders of the Commission, required the appellate court to conclude that it had no jurisdiction to consider appeals of interlocutory orders of the Commission; further, the appellate court did not have authority under G.S. 7A-32(c) to review the part-owner's issues as there was no final order of the Commission. State ex rel. Utils. Comm'n v. Buck Island, Inc., 158 N.C. App. 536, 581 S.E.2d 122, 2003 N.C. App. LEXIS 1186 (2003).

The delivery of power by a Tennessee corporation domesticated to do business in this State to Tennessee Valley Authority and the distribution by TVA of that power under pooling and apportionment agreements to North Carolina utilities for distribution in North Carolina was the furnishing of electricity "to another person for distribution to or for the public for compensation" within the meaning of subdivision (23)b of this section. State ex rel. Utils. Comm'n v. Edmisten, 40 N.C. App. 109, 252 S.E.2d 516 (1979), aff'd in part, rev'd on other grounds, 299 N.C. 432, 263 S.E.2d 583 (1980).

The word "rate," as used in the Public Utilities Act, refers not only to the monetary amount which each customer must ultimately pay, but also to the published method or schedule by which that amount is figured. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Rate Formula Permissible. — The definition of "rate" contained in this section is worded in such a broad manner as to encompass the use of a formula, and the fact that the formula must be computed each month does not render it so imprecise as to be statutorily impermissible. State ex rel. Utils. Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975), aff'd, 291 N.C. 361, 230 S.E.2d 671 (1976).

Extension of Rate Increase Unauthorized. — The contention of the companies and the Commission that other provisions of this Chapter, including subdivision (24) of this section authorizing the Commission to fix reasonable and just rates for public utility service, permit the Commission to extend its previously authorized rate increases "based solely upon the increased cost of fuel" beyond Sept. 1, 1975, contrary to the mandate of G.S. 62-134(e) (now repealed), was utterly without merit. It is well established that when there are two statutes, one dealing specifically with the matter in issue and the other being in general terms which, nothing else appearing, would include the matter in question, the specific statute controls. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

A common carrier by motor vehicle may be defined as a person who is not exempted from regulation under the provisions of G.S. 62-260, and who holds himself out to the general public to engage in transportation of persons or property for compensation. State ex rel. Utils. Comm'n v. J.D. McCotter, Inc., 16 N.C. App. 475, 192 S.E.2d 629 (1972), aff'd, 283 N.C. 104, 194 S.E.2d 859 (1973).

Common carrier of petroleum products which commits part of its equipment to dedicated use should not be regarded as a matter of law as a contract carrier, since common carriers participating in the dedicated rate arrangement are also rendering service to the public generally and are providing service impartially to all persons requesting such service. State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

Whether Party Operating as Common Carrier Question of Law. — Whether under the undisputed facts a party is operating as a common carrier is a question of law for the court. State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

The "crucial test" in determining whether an entity is operating as a common carrier is whether it is holding itself out as such. State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

A common carrier generally is not authorized to act as a contract carrier. State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

A common carrier must charge all customers uniform rates for the same kind and degree of services; contract carriers, by contrast, are not subject to this requirement. State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

A "certificate" authorizes performance as a common carrier, while a "permit" authorizes performance as a contract carrier. State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

A contract carrier is not authorized to act as a common carrier; it may not offer its services to the general public. Indeed, it may serve at most a very limited number of shippers, and then only under a private individual contract with each shipper to be served. State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

As to what constitutes a contract carrier, see State ex rel. Utils. Comm'n v. Petroleum Transp., Inc., 2 N.C. App. 566, 163 S.E.2d 526 (1968).

A company which offers white-water rafting excursions is not a common carrier, because any "transportation" was merely incidental to primary purpose of outdoor adventure, camaraderie, excitement and thrills. Beavers v. Federal Ins. Co., 113 N.C. App. 254, 437 S.E.2d 881, cert. denied, 336 N.C. 602, 447 S.E.2d 384 (1994).

Requirements for Permit to Operate as Contract Carrier. — In addition to the statutory requirements of G.S. 62-262 and subdivision (8) of this section, an applicant for a permit to operate as a contract carrier in North Carolina must conform to the standards set forth by the Utilities Commission. State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970).

The definition of "contract carrier" includes charter service. State ex rel. Utils. Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Lessor of Vehicles Held Not Contract Carrier. — Where the owner of trucks leased them to another corporation under an agreement requiring lessor to carry insurance and maintain the vehicles and giving lessee control over the operation of the trucks with right to use same exclusively for the transportation and delivery of lessee's goods, the lessor was not a contract carrier within the meaning of the statute as it stood in 1949, since the lessor merely leased its vehicles and was not a carrier of any kind, and lessee was solely a private carrier; therefore, lessor was not liable for additional assessment at the "for hire" rates under the statute. Equipment Fin. Corp. v. Scheidt, 249 N.C. 334, 106 S.E.2d 555 (1959).

Former Definition of Contract Carrier Not Retroactive. — The definition of "contract carrier" in the Bus Act of 1949 (former G.S. 62-121.43 through 62-121.79) was definitive or regulatory and intended to be applied prospectively with respect to applications for permits as contract carriers under the general provisions of the act, and had no bearing on or relation to the grandfather rights confirmed in the act. To make these definitive and regulatory provisions retroactive, so as to place a limitation on the rights of a carrier under the grandfather clause contained in the act, would be in contravention of his constitutional rights and contrary to due process of law. Moreover, such a construction would completely nullify the grandfather clause and make it feckless. State ex rel. Utils. Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

For comparison of definitions in Federal Motor Carrier Act and Bus Act of 1949 (former G.S. 62-121.43 through 62-121.79), see State ex rel. Utils. Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Legislative Intent as to Water Systems. — By excluding from its definition of public utility those water systems serving fewer than

10 customers, the General Assembly manifested its clear intent that systems serving 10 or more customers serve a sufficient segment of the public to create a public interest in their regulation, so as to make certain that adequate service is provided at fair rates. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

Provision of Water and Sewage Service "To or for the Public". — By selling water to 18 customers and providing sewage disposal service to 19 customers at the time of hearing, individual provided water and sewage disposal service "to or for the public," where, since her acquisition of the water distribution and sewage disposal facilities, she had provided services to any resident of a house connected thereto who desired the services, and where although she had solicited no customers and had not extended her facilities to any residences not previously served, she had willingly provided service to new customers who moved into homes already connected to her facilities. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

Applied in City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947); State ex rel. Utilities Comm'n v. Chapel Hill Tel. Co., 12 N.C. App. 543, 183 S.E.2d 802 (1971); State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974); State ex rel. Utils. Comm'n v. Carolina Forest Utils., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974); State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974); State ex rel. Utils. Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979); State ex rel. Utils. Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 48 N.C. App. 115, 268 S.E.2d 851 (1980); State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982); State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397 (1985); State ex rel. Utils. Comm'n v. Edmisten, 314 N.C. 122, 333 S.E.2d 453 (1985); Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 173 F.3d 517 (4th Cir. 1999).

Cited in State ex rel. Utils. Comm'n v. A.C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966); State ex rel. Utils. Comm'n v. Kenan Transp. Co., 10 N.C. App. 626, 179 S.E.2d 799 (1971); State ex rel. Utils. Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973); Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976); State ex rel. N.C. Utils. Comm'n v. Transylvania Utils. Co., 30 N.C. App. 336, 226 S.E.2d 824 (1976); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 47 N.C. App. 418, 267 S.E.2d 688 (1980); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983); In re Lower Cape Fear Water & Sewer Auth., 329 N.C. 675, 407 S.E.2d 155 (1991); State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992); State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993); State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999); BellSouth Telecomms., Inc. v. City of Laurinburg, 168 N.C. App. 75, 606 S.E.2d 721, 2005 N.C. App. LEXIS 164.

OPINIONS OF ATTORNEY GENERAL

"Person" Includes Municipalities and Counties. — Municipalities and counties, bodies politic and corporate, are included in the definition of "person" under G.S. 62-3(21). See opinion of Attorney General to Mr. Robert H. Bennink, Jr., General Counsel and Hearing Examiner, North Carolina Utilities Commission, 55 N.C.A.G. 18 (1985).

The Department of Correction, as a State agency, is not a public utility and is not subject to the fee requirements of G.S. 62-302. See Opinion of Attorney General to LaVee Hamer, General Counsel, North Carolina Department of Correction, — N.C.A.G. — (October 17, 1994).

Western Carolina University (WCU) is not a public utility subject to supervision by the Commission, except that, pursuant to G.S. 116-35, sales to the public of excess power must be "at a rate or rates approved by the Utilities Commission." See opinion of Attorney General to Mr. Myron L. Coulter, Chancellor, Western Carolina University, 55 N.C.A.G. 55 (1985).

§ 62-4. Applicability of Chapter.

This Chapter shall not terminate the preexisting Commission or appointments thereto, or any certificates, permits, orders, rules or regulations issued by it or any other action taken by it, unless and until revoked by it, nor affect in any manner the existing franchises, territories, tariffs, rates, contracts, service regulations and other obligations and rights of public utilities, unless and until altered or modified by or in accordance with the provisions of this Chapter. (1963, c. 1165, s. 1.)

§§ **62-5 through 62-9:** Reserved for future codification purposes.

ARTICLE 2.

Organization of Utilities Commission.

§ 62-10. Number; appointment; terms; qualifications; chairman; vacancies; compensation; other employment prohibited.

(a) The North Carolina Utilities Commission shall consist of seven commissioners who shall be appointed by the Governor subject to confirmation by the General Assembly by joint resolution. The names of commissioners to be appointed by the Governor shall be submitted by the Governor to the General Assembly for confirmation by the General Assembly on or before May 1, of the year in which the terms for which the appointments are to be made are to expire. Upon failure of the Governor to submit names as herein provided, the Lieutenant Governor and Speaker of the House jointly shall submit the names of a like number of commissioners to the General Assembly on or before May 15 of the same year for confirmation by the General Assembly. Regardless of the way in which names of commissioners are submitted, confirmation of commissioners must be accomplished prior to adjournment of the then current session of the General Assembly. This subsection shall be subject to the provisions of subsection (c) of this section.

(b) The terms of the commissioners now serving shall expire at the conclusion of the term for which they were appointed which shall remain as before with two regular eight-year terms expiring on July 1 of each fourth year after July 1, 1965, and the fifth term expiring on July 1 of each eighth year after July 1, 1963. The terms of office of utilities commissioners thereafter shall be eight years commencing on July 1 of the year in which the predecessor terms expired, and ending on July 1 of the eighth year thereafter.

(c) In order to increase the number of commissioners to seven, the names of two additional commissioners shall be submitted to the General Assembly on or before May 27, 1975, for confirmation by the General Assembly as provided in G.S. 62-10(a). The commissioners so appointed and confirmed shall serve new terms commencing on July 1, 1975, one of which shall be for a period of two years (with the immediate successor serving for a period of six years), and one of which shall be for a period of two years.

Thereafter, the terms of office of the additional commissioners shall be for eight years as provided in G.S. 62-10(b).

(d) A commissioner in office shall continue to serve until his successor is duly confirmed and qualified but such holdover shall not affect the expiration date of such succeeding term.

(e) On July 1, 1965, and every four years thereafter, one of the commissioners shall be designated by the Governor to serve as chairman of the Commission for the succeeding four years and until his successor is duly confirmed and qualifies. Upon death or resignation of the commissioner appointed as chairman, the Governor shall designate the chairman from the remaining commissioners and appoint a successor as hereinafter provided to fill the vacancy on the Commission.

(f) In case of death, incapacity, resignation or vacancy for any other reason in the office of any commissioner prior to the expiration of his term of office, the name of his successor shall be submitted by the Governor within four weeks after the vacancy arises to the General Assembly for confirmation by the General Assembly. Upon failure of the Governor to submit the name of the successor, the Lieutenant Governor and Speaker of the House jointly shall submit the name of a successor to the General Assembly within six weeks after the vacancy arises. Regardless of the way in which names of commissioners are submitted, confirmation of commissioners must be accomplished prior to the adjournment of the then current session of the General Assembly.

(g) If a vacancy arises or exists pursuant to either subsection (a) or (c) or (f) of this section when the General Assembly is not in session, and the appointment is deemed urgent by the Governor, the commissioner may be appointed and serve on an interim basis pending confirmation by the General Assembly.

(h) The salary of each commissioner and that of the commissioner designated as chairman shall be set by the General Assembly in the Current Operations Appropriations Act. In lieu of merit and other increment raises paid to regular State employees, each commissioner, including the commissioner designated as chairman, shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. "Service" means service as a member of the Utilities Commission.

(h1) In addition to compensation for their services, each member of the Commission who lives at least 50 miles from the City of Raleigh shall be paid a weekly travel allowance for each week the member travels to the City of Raleigh from the member's home for business of the Commission. The allowance shall be calculated for each member by multiplying the actual round-trip mileage from that member's home to the City of Raleigh by the rate-per-mile which is the business standard mileage rate set by the Internal Revenue Service in Rev. Proc. 93-51, December 27, 1993.

(i) The standards of judicial conduct provided for judges in Article 30 Chapter 7A of the General Statutes shall apply to members of the Commission. Members of the Commission shall be liable to impeachment for the causes and in the manner provided for judges of the General Court of Justice in Chapter 123 of the General Statutes. Members of the Commission shall not engage in any other employment, business, profession, or vocation while in office.

(j) Except as provided in subsection (h1) of this section, members of the Commission shall be reimbursed for travel and subsistence expenses at the rates allowed to State officers and employees by G.S. 138-6(a). (1941, c. 97, s. 2; 1949, c. 1009, s. 1; 1959, c. 1319; 1963, c. 1165, s. 1; 1967, c. 1238; 1975, c. 243, s. 3; c. 867, ss. 1, 2; 1977, c. 468, s. 1; c. 913, s. 2; 1983 (Reg. Sess., 1984), c. 1116, s. 91; 1989, c. 781, s. 41.2; 1993 (Reg. Sess., 1994), c. 769, s. 7.4(b); 1996, 2nd Ex. Sess., c. 18, s. 28.2(b); 1997-443, s. 33.5; 1999-237, s. 28.21(a), (b).)

Editor's Note. — Session Laws 2009-446, s. 10, provides: "The Secretary of Commerce and the Chair of the Utilities Commission shall jointly prepare a report examining the respective duties and functions of the Utilities Commission and the Energy Policy Council and shall recommend changes to address any duplicative activities and responsibilities. This report shall be submitted to the Governor no later than January 31, 2010."

State Government Reorganization. — The Utilities Commission was transferred to the Department of Commerce by former G.S. 143A-174.

CASE NOTES

Applied in State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

§ 62-11. Oath of office.

Each utilities commissioner before entering upon the duties of his office shall file with the Secretary of State his oath of office to support the Constitution and laws of the United States and the Constitution and laws of the State of North Carolina, and to well and truly perform the duties of his said office as utilities commissioner, and that he is not the agent or attorney of any public utility, or an employee thereof, and that he has no interest in any public utility. (1933, c. 134, s. 5; 1935, c. 280; 1939, c. 404; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-12. Organization of Commission; adoption of rules and regulations therefor.

To facilitate the work of the Commission and for administrative purposes, the chairman of the Commission, with the consent and approval of the Commission, may organize the work of the Commission in several hearing divisions and operating departments and may designate a member of the Commission as the head of any division or divisions and assign to members of the Commission various duties in connection therewith. Subject to the provisions of the State Personnel Act (Article 2 of Chapter 143 of the General Statutes), the Commission shall prepare and adopt rules and regulations governing the personnel, departments or divisions and all internal affairs and business of the Commission. (1941, c. 97, s. 3; 1949, c. 1009, s. 2; 1957, c. 1062, s. 1; 1963, c. 1165, s. 1.)

Editor's Note. — Article 2, Chapter 143, referred to in this section, was repealed by Session Laws 1965, c. 640, s. 1. For present provisions as to State Personnel System, see G.S. 126-1 through 126-12.

§ 62-13. Chairman to direct Commission.

(a) The chairman shall be the chief executive and administrative officer of the Commission.

(b) The chairman shall determine whether matters pending before the Commission shall be considered or heard initially by the full Commission, a panel of three commissioners, a hearing commissioner, or a hearing examiner. Subject to the rules of the Commission, the chairman shall assign members of the Commission to proceedings and shall assign members to preside at proceedings before the full Commission or a panel of three commissioners.

(c) The chairman, the presiding commissioner, hearing commissioner, or hearing examiner shall hear and determine procedural motions or petitions not determinative of the merits of the proceedings and made prior to hearing; and at hearing shall make all rulings on motions and objections.

(d) The chairman acting alone, or any three commissioners, may initiate investigations, complaints, or any other proceedings within the jurisdiction of the Commission. (1941, c. 97, s. 4; 1957, c. 1062, s. 2; 1963, c. 1165, s. 1; 1975, c. 243, ss. 9, 10; 1977, c. 468, s. 2; c. 913, s. 2.)

§ 62-14. Commission staff; structure and function.

(a) The Commission is authorized and empowered to employ hearing examiners; court reporters; a chief clerk and deputy clerk; a commission attorney and assistant commission attorney; transportation and pipeline safety inspectors; and such other professional, administrative, technical, and clerical personnel as the Commission may determine to be necessary in the proper discharge of the Commission's duty and responsibility as provided by law. The chairman shall organize and direct the work of the Commission staff.

(b) The salaries and compensation of all such personnel shall be fixed in the manner provided by law for fixing and regulating salaries and compensation by other State agencies.

(c) The chairman, within allowed budgetary limits and as allowed by law, shall authorize and approve travel, subsistence and related expenses of such personnel, incurred while traveling on official business. (1963, c. 1165, s. 1; 1977, c. 468, s. 3.)

§ 62-15. Office of executive director; public staff, structure and function.

(a) There is established in the Commission the office of executive director, whose salary and longevity pay shall be the same as that fixed for members of the Commission. "Service" for purposes of longevity pay means service as executive director of the public staff. The executive director shall be appointed by the Governor subject to confirmation by the General Assembly by joint resolution. The name of the executive director appointed by the Governor shall be submitted to the General Assembly on or before May 1 of the year in which the term of his office begins. The term of office for the executive director shall be six years, and the initial term shall begin July 1, 1977. The executive director may be removed from office by the Governor in the event of his incapacity to serve; and the executive director shall be removed from office by the Governor upon the affirmative recommendation of a majority of the Commission, after consultation with the Joint Legislative Utility Review Committee of the General Assembly. In case of a vacancy in the office of executive director for any reason prior to the expiration of his term of office, the name of his successor shall be submitted by the Governor to the General Assembly, not later than four weeks after the vacancy arises. If a vacancy arises in the office when the General Assembly is not in session, the executive director shall be appointed by the Governor to serve on an interim basis pending confirmation by the General Assembly.

(b) There is established in the Commission a public staff. The public staff shall consist of the executive director and such other professional, administrative, technical, and clerical personnel as may be necessary in order for the public staff to represent the using and consuming public, as hereinafter provided. All such personnel shall be appointed, supervised, and directed by the executive director. The public staff shall not be subject to the supervision, direction, or control of the Commission, the chairman, or members of the Commission.

(c) Except for the executive director, the salaries and compensation of all such personnel shall be fixed in the manner provided by law for fixing and regulating salaries and compensation by other State agencies.

(d) It shall be the duty and responsibility of the public staff to:

(1) Review, investigate, and make appropriate recommendations to the Commission with respect to the reasonableness of rates charged or proposed to be charged by any public utility and with respect to the consistency of such rates with the public policy of assuring an energy

supply adequate to protect the public health and safety and to promote the general welfare;

(2) Review, investigate, and make appropriate recommendations to the Commission with respect to the service furnished, or proposed to be furnished by any public utility;

(3) Intervene on behalf of the using and consuming public, in all Commission proceedings affecting the rates or service of any public utility;

(4) When deemed necessary by the executive director in the interest of the using and consuming public, petition the Commission to initiate proceedings to review, investigate, and take appropriate action with respect to the rates or service of public utilities;

(5) Intervene on behalf of the using and consuming public in all certificate applications filed pursuant to the provisions of G.S. 62-110.1, and provide assistance to the Commission in making the analysis and plans required pursuant to the provisions of G.S. 62-110.1 and 62-155;

(6) Intervene on behalf of the using and consuming public in all proceedings wherein any public utility proposes to reduce or abandon service to the public;

(7) Investigate complaints affecting the using and consuming public generally which are directed to the Commission, members of the Commission, or the public staff and where appropriate make recommendations to the Commission with respect to such complaints;

(8) Make studies and recommendations to the Commission with respect to standards, regulations, practices, or service of any public utility pursuant to the provisions of G.S. 62-43; provided, however, that the public staff shall have no duty, responsibility, or authority with respect to the enforcement of natural gas pipeline safety laws, rules, or regulations;

(9) When deemed necessary by the executive director, in the interest of the using and consuming public, intervene in Commission proceedings with respect to transfers of franchises, mergers, consolidations, and combinations of public utilities pursuant to the provisions of G.S. 62-111;

(10) Investigate and make appropriate recommendations to the Commission with respect to applications for certificates by radio common carriers, pursuant to the provisions of Article 6A of this Chapter;

(11) Review, investigate, and make appropriate recommendations to the Commission with respect to contracts of public utilities with affiliates or subsidiaries, pursuant to the provisions of G.S. 62-153;

(12) When deemed necessary by the executive director, in the interest of the using and consuming public, advise the Commission with respect to securities, regulations, and transactions, pursuant to the provisions of Article 8 of this Chapter.

(e) The public staff shall have no duty, responsibility, or authority with respect to the laws, rules or regulations pertaining to the physical facilities or equipment of common, contract and exempt carriers, the registration of vehicles or of insurance coverage of vehicles of common, contract and exempt carriers; the licensing, training, or qualifications of drivers or other persons employed by common, contract and exempt carriers, or the operation of motor vehicle equipment by common, contract and exempt carriers in the State.

(f) The executive director representing the public staff shall have the same rights of appeal from Commission orders or decisions as other parties to Commission proceedings.

(g) Upon request, the executive director shall employ the resources of the public staff to furnish to the Commission, its members, or the Attorney General, such information and reports or conduct such investigations and provide such other assistance as may reasonably be required in order to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation.

(h) The executive director is authorized to employ, subject to approval by the State Budget Officer, expert witnesses and such other professional expertise as the executive director may deem necessary from time to time to assist the public staff in its participation in Commission proceedings, and the compensation and expenses therefor shall be paid by the utility or utilities participating in said proceedings. Such compensation and expenses shall be treated by the Commission, for rate-making purposes, in a manner generally consistent with its treatment of similar expenditures incurred by utilities in the presentation of their cases before the Commission. An accounting of such compensation and expenses shall be reported annually to the Joint Legislative Utility Review Committee and to the Speaker of the House of Representatives and the President Pro Tempore of the Senate.

(i) The executive director, within established budgetary limits, and as allowed by law, shall authorize and approve travel, subsistence, and related necessary expenses of the executive director or members of the public staff, incurred while traveling on official business. (1949, c. 1009, s. 3; 1963, c. 1165, s. 1; 1977, c. 468, s. 4; 1981, c. 475; 1983, c. 717, s. 12.1; 1985, c. 499, s. 4; 1989, c. 781, s. 41.3; 1989 (Reg. Sess., 1990), c. 1024, s. 13; 1999-237, s. 28.21A.)

Legal Periodicals. — For brief comment on this section, see 27 N.C.L. Rev. 489 (1949).

For survey of 1977 law on common carriers, see 56 N.C.L. Rev. 853 (1978).

CASE NOTES

Public staff represented all of a utility's rate-paying customers in an investigation of regularities in the way in which the utility reported its regulated income to the North Carolina Utilities Commission and the Commission's order approving a settlement agreement resulting from that investigation. Therefore, a utility customers association and a customer could not properly intervene in the investigation and the order as the public staff represented their interests. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 163 N.C. App. 1, 592 S.E.2d 277, 2004 N.C. App. LEXIS 261 (2004), appeal dismissed sub nom. Utils. Comm. v. Carolina Util., — N.C. —, 602 S.E.2d 683 (2004), appeal dismissed sub nom. Utils. Comm. v. Carolina Util., — N.C. —, 602 S.E.2d 684 (2004), cert. denied, appeal dismissed, 358 N.C. 739, 602 S.E.2d 683 (2004), cert. dismissed, 358 N.C. 739, 602 S.E.2d 684, 602 S.E.2d 685 (2004).

Applied in State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982); State ex rel. Utils. Comm'n v. Seaboard C.L.R.R., 62 N.C. App. 631, 303 S.E.2d 549 (1983).

Cited in State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 57 N.C. App. 489, 291 S.E.2d 789 (1982).

§ 62-16: Repealed by Session Laws 1977, c. 468, s. 5.

Cross References. — For present provisions relating to Commission staff, see G.S. 62-14.

§ 62-17. Annual reports; monthly or quarterly release of certain information; publication of procedural orders and decisions.

(a) It shall be the duty of the Commission to make and publish annual reports to the Governor of Commission activities, including copies of its general orders and regulations, comparative statistical data on the operation of the various public utilities in the State, comparisons of rates in North

Carolina with rates elsewhere, a detailed report of its investigative division, a review of significant developments in the fields of utility law, economics and planning, a report of pending matters before the Commission, and a digest of the principal decisions of the Commission and the North Carolina courts affecting public utilities. A monthly or quarterly release of such information shall be made if the Commission deems it advisable or if the Governor shall so request.

(a1) The public staff of the Commission shall make and publish annual reports to the General Assembly on its activities in the interest of the using and consuming public.

(b) The Commission shall publish in a separate volume at least once each year its final decisions made on the merits in formal proceedings before the Commission, and may include significant procedural orders and decisions. (1899, c. 164, s. 27; Rev., s. 1117; 1911, c. 211, s. 9; 1913, c. 10, s. 1; C.S., s. 1065; 1933, c. 134, s. 8; 1941, c. 97; 1955, c. 981; 1957, c. 1152, s. 1; 1963, c. 1165, s. 1; 1977, c. 468, s. 6.)

CASE NOTES

Matters of Public Record. — Reports of the Corporation Commission (now Utilities Commission) of North Carolina are matters of public record, of which the courts therein will take judicial notice. Staton v. Atlantic C.L.R.R., 144 N.C. 135, 56 S.E. 794 (1907), decided under former statutory provisions.

§ 62-18. Records of receipts and disbursements; payment into treasury.

(a) The Commission shall keep a record showing in detail all receipts and disbursements.

(b) Except as provided in G.S. 62-110.3, all license fees and seal taxes, all money received from fines and penalties, and all other fees paid into the office of the Utilities Commission shall be turned in to the State treasury. (1899, c. 164, ss. 26, 33, 34; Rev., ss. 1114, 1115; C.S., ss. 1063, 1064; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1987, c. 490, s. 1.)

§ 62-19. Public record of proceedings; chief clerk; seal.

(a) The Commission shall keep in the office of the chief clerk at all times a record of its official acts, rulings, orders, decisions, and transactions, and a current calendar of its scheduled activities and hearings, which shall be public records of the State of North Carolina.

(b) Upon receipt by the Commission, the chief clerk shall furnish to the executive director copies of all rates, tariffs, contracts, applications, petitions, pleadings, complaints, and all other documents filed with the Commission and shall furnish to the executive director copies of all orders and decisions entered by the Commission.

(c) The Commission shall have and adopt a seal with the words "North Carolina Utilities Commission" and such other design as it may prescribe engraved thereon by which it shall authenticate its proceedings and of which the courts shall take judicial notice. Where an exemplified copy of Commission records and proceedings is required for full faith and credit outside of the State, such records and proceedings shall be attested by the chief clerk, or deputy clerk, and the seal of the Commission annexed, and there shall be affixed a certificate of a member of the Commission that the said attestation is in proper form. Such exemplification shall constitute an authenticated or exemplified copy of an official record of a court of record of the State of North

Carolina. (1933, c. 134, ss. 13, 15; 1941, c. 97; 1963, c. 1165, s. 1; 1977, c. 468, s. 7.)

§ 62-20. Participation by Attorney General in Commission proceedings.

The Attorney General may intervene, when he deems it to be advisable in the public interest, in proceedings before the Commission on behalf of the using and consuming public, including utility users generally and agencies of the State. The Attorney General may institute and originate proceedings before the Commission in the name of the State, its agencies or citizens, in matters within the jurisdiction of the Commission. The Attorney General may appear before such State and federal courts and agencies as he deems it advisable in matters affecting public utility services. In the performance of his responsibilities under this section, the Attorney General shall have the right to employ expert witnesses, and the compensation and expenses therefor shall be paid from the Contingency and Emergency Fund. The Commission shall furnish the Attorney General with copies of all applications, petitions, pleadings, order and decisions filed with or entered by the Commission. The Attorney General shall have access to all books, papers, studies, reports and other documents filed with the Commission. (1949, c. 989, s. 1; c. 1029, s. 3; 1959, c. 400; 1963, c. 1165, s. 1; 1977, c. 468, s. 8.)

Legal Periodicals. — For brief comment on earlier section, see 27 N.C.L. Rev. 489 (1949).

CASE NOTES

Applied in State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982); Bailey v. North Carolina Dep't of Revenue, 353 N.C. 142, 540 S.E.2d 313, 2000 N.C. LEXIS 896 (2000).

Cited in State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972); State ex rel. Utils. Comm'n v. United Tel. Co., 15 N.C. App. 740, 190 S.E.2d 656 (1972).

§ 62-21: Repealed by Session Laws 1977, c. 468, s. 9.

Cross References. — For present provisions relating to Commission staff, see G.S. 62-14.

§ 62-22. Utilities Commission and Department of Revenue to coordinate facilities for rate making and taxation purposes.

The Commission, at the request of the Department of Revenue, shall make available to the Department of Revenue the services of such of the personnel of the Commission as may be desired and required for the purpose of furnishing to the Department of Revenue advice and information as to the value of properties of public utilities, the valuations of which for ad valorem taxation are required by law to be determined by the Department of Revenue. It shall be the duty of the Commission and the Department of Revenue, with regard to the assessment and valuation of properties of public utilities doing business in North Carolina, to coordinate the activities of said agencies so that each of them shall receive the benefit of the exchange of information gathered by them with respect to the valuations of public utilities property for rate making and taxation purposes, and the facilities of each of said agencies shall be made fully available to both of them. (1949, c. 1029, s. 3; 1963, c. 1165, s. 1; 1973, c. 476, s. 193.)

§ 62-23. Commission as an administrative board or agency.

The Commission is hereby declared to be an administrative board or agency of the General Assembly created for the principal purpose of carrying out the administration and enforcement of this Chapter, and for the promulgation of rules and regulations and fixing utility rates pursuant to such administration; and in carrying out such purpose, the Commission shall assume the initiative in performing its duties and responsibilities in securing to the people of the State an efficient and economic system of public utilities in the same manner as commissions and administrative boards generally. In proceedings in which the Commission is exercising functions judicial in nature, it shall act in a judicial capacity as provided in G.S. 62-60. The Commission shall separate its administrative or executive functions, its rule making functions, and its functions judicial in nature to such extent as it deems practical and advisable in the public interest. (1963, c. 1165, s. 1.)

CASE NOTES

The rate making activities of the Commission are a legislative function. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Rule making is an exercise of the delegated legislative authority of the Commission, under G.S. 62-30 and 62-31, to supervise and control the public utilities of this State and to make reasonable rules and regulations to accomplish that end. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Benefits of 1986 Tax Reform Act to Ratepayers Through Rule Making Procedure. — The Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 through a rule making procedure rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

Administrative Rule Making Not Res Judicata. — Actions of an administrative agency which involve the exercise of a legislative rather than a judicial function are not res judicata. Exercises of the Commission's rule making power, therefore, are not governed by the principles of res judicata and are reviewable by the Supreme Court in later appeals of closely related matters. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Policy Making. — Where the North Carolina Utilities Commission enacted a policy which assigned gain or loss to shareholders within an adjudicative proceeding, the action did not constitute an abuse of discretion. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 123 N.C. App. 623, 473 S.E.2d 661 (1996).

§§ 62-24 through 62-29: Reserved for future codification purposes.

ARTICLE 3.

Powers and Duties of Utilities Commission.

§ 62-30. General powers of Commission.

The Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties. (1933, c. 134, s. 2; 1941, c. 97; 1963, c. 1165, s. 1.)

Legal Periodicals. — For comment, see 12 N.C.L. Rev. 292 (1934).

CASE NOTES

Power of Legislature Through Agencies to Establish Reasonable Regulations. — Power of the legislature, either directly or through appropriate agencies, to establish reasonable regulations for public service corporations in matters affecting the public interests is now universally recognized, and the principle has been approved in well considered decisions dealing directly with the question. SCC v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904), aff'd, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907); SCC v. Railroad, 140 N.C. 239, 52 S.E. 941 (1905); Atlantic C.L.R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), aff'd, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914); Southern Pub. Utils. Co. v. City of Charlotte, 179 N.C. 151, 101 S.E. 619 (1919). See also, Atlantic Express Co. v. Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393, 32 Am. St. R. 805 (1892); Corporation Comm'n v. Seaboard Air Line Sys., 127 N.C. 283, 37 S.E. 266 (1900).

The reason for strict regulation of public utilities is that they are either monopolies by nature or given the security of monopolistic authority for better service to the public. The public is best served in many circumstances where destructive competition has been removed and the utility is a regulated monopoly. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Commission Has No Authority Other Than Granted by Legislature. — The Utilities Commission was created by the General Assembly. In fixing rates to be charged by utilities, it exercises a legislative function and has no authority other than that given to it by the legislature. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983).

General Power and Authority. — Through this section and G.S. 62-32 the legislature has granted the Utilities Commission such general power and authority to supervise and control public utilities of the State as may be necessary. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

Under G.S. 62-42(a)(5) the Commission has the authority to order the utility to take action necessary to secure reasonably adequate service for the public's need and convenience. Undoubtedly yellow pages could fall within this provision. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

If the Commission may refuse to accept the uncontradicted evidence presented to it by a utility, it most certainly may reject the utility's evidence in favor of evidence presented by other witnesses. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

Regulatory Condition was Authorized. — Where G.S. 62-30 and 62-32(b) gave the Utility Commission "all powers necessary" to regulate public utilities to ensure the citizens of North Carolina were provided with reasonable service, a regulatory condition was authorized because the regulation's purpose was to ensure the supply of electricity to retail customers. State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 174 N.C. App. 681, 622 S.E.2d 169, 2005 N.C. App. LEXIS 2590 (2005).

The Commission has no jurisdiction over parties unless they are public utilities within the meaning of the statute. State ex rel. N.C. Utils. Comm'n v. New Hope Rd. Water Co., 248 N.C. 27, 102 S.E.2d 377 (1958); State ex rel. Utils. Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

The rate making activities of the Commission are a legislative function. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Rule making is an exercise of the delegated legislative authority of the Commission, under this section and G.S. 62-31, to supervise and control the public utilities of this State and to make reasonable rules and regulations to accomplish that end. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Benefits of 1986 Tax Reform Act to Ratepayers Through Rule Making Procedure. — The Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 through a rule making procedure rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

Commission, Not Courts, Is to Determine Fair Rate of Return. — The Commission, not the courts, is authorized by the legislature to determine what is a fair rate of return. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

Court's Review of Commission's Determination of Fair Rate of Return. — In reviewing the Commission's determination of fair rate of return, the court will only review the record and evidence to determine if the Commission's order is supported by competent evidence. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

Commission's Rule Making Not Res Judicata. — Actions of an administrative agency which involve the exercise of a legislative rather than a judicial function are not res judicata. Exercising of the Commission's rule-making power, therefore, are not governed by the principles of res judicata and are reviewable by the Supreme Court in later appeals of closely related matters. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Yellow Page Revenue and Expenses Included When Utility Applies for Rate Increase. — Yellow page revenue and expenses should be included in the revenues and expenses of the company when it applies for a rate increase. This is clearly the majority rule. State ex rel. Utils. Comm'n v. Central Tel. Co., 60 N.C. App. 393, 299 S.E.2d 264 (1983).

Telephone utility enjoys a great advantage over all competitors in the field of directory advertising. In addition, this preferred position with all its benefits and revenues is directly related to and a result of the company's public utility function. Therefore, the Utilities Commission does have the authority to include the expenses, revenues and investments related to directory advertising in its rate making proceedings. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

Incorrect Telephone Number Listings. — The Utilities Commission had jurisdiction over complaints concerning incorrect telephone number listings in the telephone directory even when the regulated utility had delegated to another company the public utility function of publishing its directory which also included paid advertising. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Proper Listings in Advertisements in Yellow Pages. — If a utility elects to include yellow pages advertising in the directory which it is required to publish, then clearly proper listings in the advertisements in the yellow pages become a part of the utility's "function of providing adequate service" to the public. The public is not well served by listings in the yellow pages or the white pages of the directory which are incorrect or confusing to the consuming public. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Providing a correct telephone listing in the yellow pages as well as in the white pages of the directory is a utility function, and the Commission properly has jurisdiction over complaints which arise from this function. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Whether there shall be competition in any given field and to what extent is largely a matter of policy committed to the sound judgment and discretion of the Commission. The Commission must maintain a reasonable balance to see that the public is adequately served and at the same time to see that the public and the public utilities involved are not prejudiced by the effects which flow from excessive competition brought about by excessive services. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Authority of Commission to Authorize Sale of Facilities of Power Company to Municipality. — A power company, with the consent and approval of the Commission, has the right to sell its facilities to a city, and thereby permit the city to assume the obligation for meeting the public convenience and necessity for the service theretofore rendered by the power company. The Commission has not only the authority but the duty to pass upon such a contract and to determine whether or not it is in the public interest to permit its consummation. State ex rel. N.C. Utils. Comm'n v. Casey, 245 N.C. 297, 96 S.E.2d 8 (1957); Duke Power Co. v. Blue Ridge Elec. Membership Corp., 253 N.C. 596, 117 S.E.2d 812 (1961).

As to the piercing of the corporate veil between corporation and its wholly-owned public utility subsidiary to establish refund obligation, see State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, probable jurisdiction noted, 474 U.S. 1018, 106 S. Ct. 565, 88 L. Ed. 2d 550 (1985), rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

Propriety of Order Requiring Continued Operation of Utilities. — An order of the Commission, based upon proper findings and conclusions, requiring appellant to continue operation of her utilities would not violate constitutional prohibitions against involuntary servitude. Appellant voluntarily put her land and equipment to a public use and collected compensation for the services which she provided, and having done so, the Commission could require that she continue to use them in the service to which she voluntarily dedicated them, so long as she was justly compensated for such service. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

Former Railroad Commission did not interfere with interstate commerce, being concerned solely in domestic affairs and trade. State ex rel. Caldwell v. Wilson, 121 N.C. 425, 121 N.C. 480, 28 S.E. 554, 28 S.E. 554 (1897).

Applied in City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947); State ex rel. Utils. Comm'n v. Southern Bell Tel.

& Tel. Co., 57 N.C. App. 489, 291 S.E.2d 789 (1982).

Cited in State ex rel. Utils. Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968); State ex rel. Utils. Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973); State ex rel. Utils. Comm'n v. Estes Express Lines, 33 N.C. App. 99, 234 S.E.2d 628 (1977); State ex rel. Utils. Comm'n v. Simpson, 295 N.C. 519, 246 S.E.2d 753 (1978); State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999); State ex rel. Utils. Comm'n v. Thrifty Call, Inc., 154 N.C. App. 58, 571 S.E.2d 622, 2002 N.C. App. LEXIS 1412 (2002); State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005).

§ 62-31. Power to make and enforce rules and regulations for public utilities.

The Commission shall have and exercise full power and authority to administer and enforce the provisions of this Chapter, and to make and enforce reasonable and necessary rules and regulations to that end. (1907, c. 469, s. 1a; 1913, c. 127, s. 2; C.S., s. 1037; 1933, c. 134, s. 8; 1941, c. 97; 1947, c. 1008, s. 2; 1949, c. 1132, s. 3; 1963, c. 1165, s. 1.)

Editor's Note. — Session Laws 2001-430, s. 18, as amended by Session Laws 2001-487, s. 119, provides: "Pursuant to G.S. 62-31 and G.S. 62-32, the Utilities Commission must lower the rates set for telecommunications service to reflect the repeal of G.S. 105-120 and the resulting liability of local telecommunications companies for the tax imposed under G.S. 105-122."

CASE NOTES

The rate making activities of the Commission are a legislative function. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Rule making is an exercise of the delegated legislative authority of the Commission, under G.S. 62-30 and this section, to supervise and control the public utilities of this State and to make reasonable rules and regulations to accomplish that end. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Tax Reform Benefits Passed on to Ratepayers by Rule Making Rather Than Rate Making Procedure. — Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 (TRA-86) through a rule making procedure rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

Commission's Rule Making Not Res Judicata. — Actions of an administrative agency which involve the exercise of a legislative rather than a judicial function are not res judicata. Exercises of the Commission's rule making power, therefore, are not governed by the principles of res judicata and are reviewable by the Supreme Court in later appeals of closely related matters. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Authority to determine adequacy of public utility's service and rates to be charged therefor has been given to the Utilities Commission, not to the Supreme Court or the Court of Appeals. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 24 N.C. App. 327, 210 S.E.2d 543 (1975), vacated and appeal dismissed, 289 N.C. 286, 221 S.E.2d 322 (1976).

Finding That Rule Is Reasonable and Necessary Not Required. — In adopting a rule pursuant to this section, the Utilities Commission need not make a finding of fact that the rule is reasonable and necessary in order for it to administer and enforce the provisions of the Public Utilities Act. State ex rel. Utilities Comm'n v. Associated Petro. Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972), cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

Jurisdiction of Commission to Investigate. — The Commission had the jurisdiction to investigate, upon complaint or upon its own initiative without complaint, to determine whether any motor carrier was operating in violation of the provisions of the Bus Act of 1949 (former G.S. 62-121.43 through 62-121.-79). State ex rel. N.C. Utils. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Rule Denying Rights Under Grandfather Clause. — The Utilities Commission did not have the power to promulgate a rule and then to interpret or enforce the rule in such manner as to deny the exercise of rights which the legislature in clear and express terms preserved to all motor vehicle carriers of property who were in bona fide operation on January 1, 1947, and who met the additional requirements contained in the Bus Act of 1949 (former G.S. 62-121.43 through 62-121.79). State ex rel. Utils. Comm'n v. Fox, 239 N.C. 253, 79 S.E.2d 391 (1954).

Supervisory Powers of Former Corporation Commission. — There was no intent to give a schedule of the thousands of appliances used in handling the business of common carriers, nor to enumerate the countless dealings between them and their patrons which the former Corporation Commission should supervise. The clearly declared purpose was to put the control and supervision of the whole matter in the hands of an impartial commission, with power to make reasonable rules and orders, subject to the right of appeal by either party, the shipper or the carrier, to the courts, instead of leaving such dealing to the unrestricted will of the carrier. Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905).

The former Corporation Commission was given the power to make orders and regulations for the safety, etc., of shippers or patrons of any public service corporation. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

Applied in State ex rel. Utils. Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975); State ex rel. Utils. Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979).

Cited in State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964); State ex rel. Utils. Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968); State ex rel. Utils. Comm'n v. Kenan Transp. Co., 10 N.C. App. 626, 179 S.E.2d 799 (1971); State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. J.D. McCotter, Inc., 16 N.C. App. 475, 192 S.E.2d 629 (1972); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 48 N.C. App. 115, 268 S.E.2d 851 (1980); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 47 N.C. App. 418, 267 S.E.2d 488 (1980); State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993); State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

§ 62-32. Supervisory powers; rates and service.

(a) Under the rules herein prescribed and subject to the limitations hereinafter set forth, the Commission shall have general supervision over the rates charged and service rendered by all public utilities in this State.

(b) Except as provided in this Chapter for bus companies, the Commission is hereby vested with all power necessary to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made for such service. (1913, c. 127, s. 7; C.S., s. 1112(b); 1933, c. 134, s. 3; 1937, c. 108, s. 2; 1941, cc. 59, 97; 1959, c. 639, s. 12; 1963, c. 1165, s. 1; 1985, c. 676, s. 5.)

Cross References. — As to report from municipality operating own utilities, see G.S. 62-47.

Editor's Note. — Session Laws 2001-430, s. 18, as amended by Session Laws 2001-487, s. 119, provides: "Pursuant to G.S. 62-31 and G.S. 62-32, the Utilities Commission must lower the rates set for telecommunications service to reflect the repeal of G.S. 105-120 and the resulting liability of local telecommunications companies for the tax imposed under G.S. 105-122."

Legal Periodicals. — For note on control of public utilities through zoning ordinances, see 42 N.C.L. Rev. 761 (1964).

For article on antitrust and unfair trade practice law in North Carolina, comparing federal law, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Editor's Note. — *This section is similar to former G.S. 1035 of the Consolidated Statutes. Many of the following cases dated prior to 1963 were decided under that section and are given as an aid in construing the present law, but should be considered in light of the former law.*

Right of State to Regulate. — The right of the State to establish regulations for public service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is firmly established. Efland v. Southern Ry., 146 N.C. 135, 59 S.E. 355 (1907).

See also Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N.C. 52, 175 S.E. 698 (1934).

Railroad companies, due to the public nature of the business carried on by them and the interest which the public has in their operation, are subject as to their State business to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

Purpose of Regulation. — An uncontrolled legal monopoly in an essential service leads, normally and naturally, to poor service and exorbitant charges. To prevent such result, the legislature has conferred upon the Utilities Commission the power to police the operations of the utility company so as to require it to render service of good quality at charges which are reasonable. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

With public utilities the State has undertaken to protect the public from the customary consequences of monopoly, by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Regulatory Condition Authorized. — Where G.S. 62-30 and 62-32(b) gave the Utility Commission "all powers necessary" to regulate public utilities to ensure the citizens of North Carolina were provided with reasonable service, a regulatory condition was authorized because the regulation's purpose was to ensure the supply of electricity to retail customers. State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 174 N.C. App. 681, 622 S.E.2d 169, 2005 N.C. App. LEXIS 2590 (2005).

Rate Fixing Power May Be Delegated. — The General Assembly has the power to establish a commission to supervise and regulate the rates of common carriers. Atlantic Express Co. v. Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393 (1892); SCC v. Seaboard Air Line Sys., 127 N.C. 283, 37 S.E. 266 (1900); SCC v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904), aff'd, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907); SCC v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905); Corporation Comm'n v. Railroad, 140 N.C. 239, 52 S.E. 941 (1905).

Scope of Power Delegated to Commission Not a Federal Question. — Whether a regulation of a state railroad commission otherwise legal is arbitrary and unreasonable because beyond the scope of the power delegated to the commission is not a federal question. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

General Power and Authority of Commission. — Through G.S. 62-30 and this section the legislature has granted the Utilities Commission such general power and authority to supervise and control public utilities of the State as may be necessary. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

Under G.S. 62-42(a)(5) the Commission has the authority to order the utility to take action necessary to secure reasonably adequate service for the public's need and convenience. Undoubtedly yellow pages could fall within this provision. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

If the Commission may refuse to accept the uncontradicted evidence presented to it by a utility, it most certainly may reject the utility's evidence in favor of evidence presented by other witnesses. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

Because G.S. 62-32 and 62-42 authorized the North Carolina Utilities Commission to compel utility companies to render adequate service and to set reasonable rates, the Commission was the proper body to hear a dispute between a power company and the town. Although the town could have granted a variance to its ordinance that would have allowed the company to build the proposed new line, the ordinance was not consistent with state law, and the town cited no statutory authority or precedent that required the company to seek such a variance where an administrative agency specifically designed to handle such disputes had jurisdiction. State ex rel. Utils. Comm'n v. Town of Kill Devil Hills, — N.C. App. —, 670 S.E.2d 341, 2009 N.C. App. LEXIS 4 (2009).

Authority of Commission to Regulate Service and Rates. — Under this section and G.S. 62-42, the Utilities Commission is given the power and the duty to compel utility companies to render adequate service and to set reasonable rates for such service. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

The Utilities Commission is the administrative agency charged with the duty of regulating the intrastate retail rates of public utilities within this State. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

Authority to determine adequacy of public utility's service and rates to be charged therefor has been given to the Utilities Commission, not to the Supreme Court or to the Court of Appeals. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 24 N.C. App. 327, 210 S.E.2d 543 (1975), vacated and appeal dismissed, 289 N.C. 286, 221 S.E.2d 322 (1976).

The Commission, not the courts, is authorized by the legislature to determine what is a fair rate of return. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

In reviewing the Commission's determination of fair rate of return, the court will only review the record and evidence to determine if the Commission's order is supported by competent evidence. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

Commission's Regulatory Powers Limited. — Notwithstanding the authority of the Commission to regulate its services and rates and other matters incidental thereto, the property of the utility is private property and the business is private business. Except as otherwise provided, expressly or by reasonable implication, in this Chapter, a utility is free to manage its property and business as it sees fit and the Commission may not restrict or control the discretion of the board of directors in the acquisition of property, or in the price paid for it. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Arbitrary Exercise of Regulatory Power. — The public power to regulate railroads and the private right of ownership of such property coexist, and the one does not destroy the other; and where the power to regulate is so arbitrarily exercised as to infringe the rights of ownership, the exertion is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

As to intrastate or domestic matters, the General Assembly has the right to establish regulations for public service corporations and for business enterprises in which the owners have devoted their property to public use, and to apply these regulations to certain classes of pursuits and occupations, imposing these requirements equally on all members of a given class, the limitation of this right of classification being that the same must be on some reasonable ground that bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Efland v. Southern Ry., 146 N.C. 135, 59 S.E. 355 (1907).

Recovery of Reasonable Cost of Approved Gas Exploration Projects. — The Commission, in ordering that the reasonable costs of approved exploration projects were to be recoverable through tracking rate increases, acted within its acknowledged duty and authority to compel adequate and efficient utility service to the citizens of this State, where it was clear from the Commission's findings that, without additional gas supplies, the gas utilities would be unable to render adequate service to their customers, that exploration programs were the most feasible means for obtaining these additional supplies, and that the utilities were unable, through traditional methods of financing, to fund sufficient exploration projects to obtain these supplies. State ex rel. Utils. Comm'n Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Contractual obligation to provide water service to a recreational subdivision, as well as the actual delivery thereof, directly affect a utility's ability to function as a utility. State ex rel. Utils. Comm'n v. Carolina Forest Utils., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Authority to Allow Use of Availability Charge. — The Utilities Commission has jurisdiction and authority to allow the use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utils. Comm'n v. Carolina Forest Utils., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Landowners in a recreational subdivision who pay availability charges are "consumers" or stand in a consumer-like relationship to the utility providing water service. State ex rel. Utils. Comm'n v. Carolina Forest Utils., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Fees and Charges Made by Municipality. — The North Carolina Utilities Commission has no jurisdiction to fix or supervise the fees and charges to be made by a municipality for connections with a city sewerage system, either within or without its corporate limits. Atlantic Constr. Co. v. City of Raleigh, 230 N.C. 365, 53 S.E.2d 165 (1949). See also Town of Grimesland v. City of Washington, 234 N.C. 117, 66 S.E.2d 794 (1951).

A rider approved by the Commission, which provided that the utility involved in a rate hearing would meter the protesting municipalities separately for purchases by the municipalities for normal resale and purchases by the municipalities for resale to industrial users, but which contained a provision that the municipalities were free to contract in respect to the price they would require the industrial users to pay, did not fix the rate at which the municipalities would be required to sell to industrial users in violation of the statute. State ex rel. N.C. Utils. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

A sanitary district which, as a part of its functions, furnishes drinking water to the public and also filters water for industrial consumers is a quasi-municipal corporation, and is not under the control and supervision of the North Carolina Utilities Commission as to services or rates. Halifax Paper Co. v. Roanoke Rapids San. Dist., 232 N.C. 421, 61 S.E.2d 378 (1950).

Former Corporation Commission had

general control and supervision of all railroad corporations. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

But No Power to Appraise and Assess. — The former Corporation Commission was not clothed with the power of appraising and assessing railroad property. Southern Ry. v. North Carolina Corp. Comm'n, 97 F. 513 (E.D.N.C. 1899), aff'd on rehearing, 99 F. 162 (E.D.N.C. 1900).

The State has power to compel a railroad company to perform a particular and specified duty necessary for the convenience of the public, even though it may entail some pecuniary loss. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

Commerce Between States. — The power of Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except by such statutes as are passed by the states for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid federal legislation. Morris-Scarboro-Moffitt Co. v. Southern Express Co., 146 N.C. 167, 59 S.E. 667 (1907).

As to when a telegram is not interstate commerce, see State ex rel. R.R. Comm'rs v. Western Union Tel. Co., 113 N.C. 213, 18 S.E. 389 (1893), appeal dismissed, 17 S. Ct. 1002, 41 L. Ed. 1187 (1897); Leavell v. Western Union Tel. Co., 116 N.C. 211, 21 S.E. 391 (1895), appeal dismissed, 17 S. Ct. 1002, 41 L. Ed. 1187 (1897).

Telephone Company Subject to State Control. — A telephone company, acting under a quasi-public franchise, is properly classified among the public service corporations, and as such is subject to public regulation and reasonable control. Leavell v. Western Union Tel. Co., 116 N.C. 211, 21 S.E. 391 (1895), appeal dismissed, 17 S. Ct. 1002, 41 L. Ed. 1187 (1897); Godwin v. Telephone Co., 136 N.C. 479, 48 S.E. 813 (1904); Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co., 159 N.C. 9, 74 S.E. 636 (1912).

A local telephone company having an arrangement for the transmission of long distance messages over the lines of another company for pay is a public service corporation and comes within the provisions of this section. Horton v. Interstate Tel. & Tel. Co., 202 N.C. 610, 163 S.E. 694 (1932).

Statute giving general control of telephone companies to former Corporation Commission did not oust court of its jurisdiction to compel the company to perform a public duty it owed to an individual. Walls v. Strickland, 174 N.C. 298, 93 S.E. 857 (1917).

Yellow page revenue and expenses should be included in the revenues and expenses of the company when it applies for a rate increase. This is clearly the majority rule. State ex rel. Utils. Comm'n v. Central Tel. Co., 60 N.C. App. 393, 299 S.E.2d 264 (1983).

Classified Directory Advertising Revenues. — In making judgment that telephone company's classified directory was an essential aspect of telephone service generally Commission was clearly acting within its authority under G.S. 62-30 and this section, and the Commission correctly concluded that the classified directory advertising revenues should continue to be accounted for in establishing just and reasonable rates for the company in this State. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 57 N.C. App. 489, 291 S.E.2d 789 (1982), modified, 307 N.C. 541, 299 S.E.2d 763 (1983).

Telephone utility enjoys a great advantage over all competitors in the field of directory advertising. In addition, this preferred position with all its benefits and revenues is directly related to and a result of the company's public utility function. Therefore, the Utilities Commission does have the authority to include the expenses, revenues and investments related to directory advertising in its rate making proceedings. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

Propriety of Order Requiring Continued Operation of Utilities. — An order of the Commission, based upon proper findings and conclusions, requiring appellant to continue operation of her utilities would not violate constitutional prohibitions against involuntary servitude. Appellant voluntarily put her land and equipment to a public use and collected compensation for the services which she provided, and having done so, the Commission may require that she continue to use it in the service to which she voluntarily dedicated it so long as she is justly compensated for such service. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

When the Utilities Commission found that natural gas corporation had received payments in lieu of what it would have received under a service contract and that the customers of the company were bearing the company's contract costs, it was within the power of the Commission under subsection (b) of this section and G.S. 62-130(a) and (d) to take these payments into account in setting a reasonable rate. State ex rel. Utils. Comm'n v. North Carolina Natural Gas Corp., 76 N.C. App. 330, 332 S.E.2d 755, cert. denied, 314 N.C. 675, 336 S.E.2d 405 (1985).

Applied in City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947);

Fulghum v. Town of Selma, 238 N.C. 100, 76 S.E.2d 368 (1953); State ex rel. N.C. Utils. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960); State ex rel. Utils. Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975); State ex rel. Utils. Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Cited in State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968); State ex rel. Utils. Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968); State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970); State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999); State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005).

§ 62-33. Commission to keep informed as to utilities.

The Commission shall at all times keep informed as to the public utilities, their rates and charges for service, and the service supplied and the purposes for which it is supplied. (1933, c. 134, s. 16; 1937, c. 165; 1939, c. 365, ss. 1, 2; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005).

§ 62-34. To investigate companies under its control; visitation and inspection.

(a) The Commission shall from time to time visit the places of business and investigate the books and papers of all public utilities to ascertain if all the orders, rules and regulations of the Commission have been complied with, and shall have full power and authority to examine all officers, agents and employees of such public utilities, and all other persons, under oath or otherwise, and to compel the production of papers and the attendance of witnesses to obtain the information necessary for carrying into effect and otherwise enforcing the provisions of this Chapter.

(b) Members of the Commission, Commission staff, and public staff may during all reasonable hours enter upon any premises occupied by any public utility, for the purpose of making the examinations and tests and exercising any power provided for in this Article, and may set up and use on such premises any apparatus and appliances necessary therefor. Such public utility shall have the right to be represented at the making of such examinations, tests and inspections. (1899, c. 164, s. 1; Rev., s. 1064; 1913, c. 127, ss. 1, 2, 7; 1917, c. 194; C.S., s. 1060; 1933, c. 134, s. 8; c. 307, s. 14; 1941, c. 97; 1963, c. 1165, s. 1; 1977, c. 468, s. 10.)

§ 62-35. System of accounts.

(a) The Commission may establish a system of accounts to be kept by the public utilities under its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and prescribe the manner of keeping such accounts.

(b) The Commission may require any public utility under its jurisdiction to keep separate or allocate the revenue from and the cost of doing interstate and intrastate business in North Carolina.

(c) The Commission may ascertain, determine, and prescribe what are proper and adequate charges for depreciation of the several classes of property for each public utility. The Commission may prescribe such changes in such charges for depreciation as it finds necessary. (Ex. Sess. 1913, c. 20, s. 14; C.S., s. 1088; 1931, c. 455; 1933, c. 134, s. 8; c. 307, s. 13; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

Review of Annual Charge to Operating Expenses on Account of Depreciation. — If a reasonably close relationship between the reserve for depreciation and the actual accumulated depreciation is not present, the Utilities Commission may and should review and make appropriate changes in the annual charge to operating expenses on account of depreciation. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-36. Reports by utilities; canceling certificates for failure to file.

The Commission may require any public utility to file annual reports in such form and of such content as the Commission may require and special reports concerning any matter about which the Commission is authorized to inquire or to keep informed, or which it is required to enforce. All reports shall be under oath when required by the Commission. The Commission may issue an order, without notice or hearing, canceling or suspending any certificate of convenience and necessity or any certificate of authority 30 days after the date of service of the order for failing to file the required annual report at the time it was due. In the event the report is filed during the 30-day period, the order of cancellation or suspension shall be null and void. (1931, c. 455; 1933, c. 134, s. 8; c. 307, s. 15; 1941, c. 97; 1959, c. 639, ss. 7, 8; 1963, c. 1165, s. 1; 1985, c. 676, s. 6.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

§ 62-36A. Natural gas planning.

(a) The Commission shall require each franchised natural gas local distribution company to file reports with the Commission detailing its plans for providing natural gas service in areas of its franchise territory in which natural gas service is not available. Commission rules shall require that each local distribution company shall update its report at least every two years.

(b) The Commission shall develop rules to carry out the intent of subsection (a) of this section, and to produce an orderly system for reviewing current levels of natural gas service and planning the orderly expansion of natural gas service to areas not served. These rules shall provide for expansion of service by each franchised natural gas local distribution company to all areas of its franchise territory by July 1, 1998 or within three years of the time the franchise territory is awarded, whichever is later, and shall provide that any local distribution company that the Commission determines is not providing adequate service to at least some portion of each county within its franchise territory by July 1, 1998 or within three years of the time the franchise territory is awarded, whichever is later, shall forfeit its exclusive franchise rights to that portion of its territory not being served.

(b1) The Commission shall issue a certificate of public convenience and necessity in accordance with the provisions of Article 6 of this Chapter for natural gas service for all areas of the State for which certificates have not been issued. Issuance of certificates shall be completed by January 1, 1997, and shall be made after a hearing process in which any person capable of providing natural gas service to an area of the State for which no certificate has been issued or for which no application has been made by July 1, 1995, may apply to the Commission to be considered for the issuance of a certificate under the provisions of this subsection. In issuing a certificate for any unfranchised area of the State, the Commission shall consider the timeliness with which each applicant could begin providing adequate, reliable, and economical service to that area, as well as any other criteria the Commission finds to be relevant, and the Commission may issue a certificate covering less than the total area applied for by an applicant. If the Commission issues a certificate covering less than the total area applied for by the applicant, the applicant may refuse the certificate. In the event that the Commission receives no application for issuance of a certificate for service to a particular area of the State, or in the event a certificate for service to a particular area is not awarded for any reason, the Commission shall issue a certificate for that area to a person or persons to whom a certificate has already been issued.

(c) Within 180 days after all local distribution companies have filed their initial or biennial update reports, the Commission and the Public Staff shall independently provide analyses and summaries of those reports, together with status reports of natural gas service in the State, to the Joint Legislative Utility Review Committee. (1989, c. 338, s. 1; 1993 (Reg. Sess., 1994), c. 560, s. 1; 1995, c. 216, s. 1; c. 271, s. 1.)

Local Modification. — Camden, Currituck, Dare and Tyrrell: 1998-8.

Cross References. — As to current provisions relating to natural gas expansion, see G.S. 62-158. As to current provisions relating to gas cost adjustment for natural gas local distribution companies, see G.S. 62-133.4.

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994); State ex rel. Utils. Comm'n v. North Carolina Gas Serv., 128 N.C. App. 288, 494 S.E.2d 621 (1998).

§ 62-36B. Regulation of natural gas service agreements.

Whenever the Commission, after notice and hearing, finds that additional natural gas service agreements (including "backhaul" agreements) with interstate or intrastate pipelines will provide increased competition in North Carolina's natural gas industry and (i) will likely result in lower costs to consumers without substantially increasing the risks of service interruptions to customers, or (ii) will substantially reduce the risks of service interruptions without unduly increasing costs to consumers, the Commission may enter and serve an order directing the franchised natural gas local distribution company to negotiate in good faith to enter into such service agreements within a reasonable time. In considering costs to consumers under this section, the Commission may consider both short-term and long-term costs. (1989 (Reg. Sess., 1990), c. 962, s. 5.)

§ 62-37. Investigations.

(a) The Commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or of any particular public utility. In conducting such investigation the Commission may proceed either with or without a hearing as it may deem best, but shall make no order without affording the parties affected thereby notice and hearing.

(b) If after such an investigation, or investigation and hearing, the Commission, in its discretion, is of the opinion that the public interest shall be served by an appraisal of any properties in question, the investigation of any particular construction, the audit of any accounts or books, the investigation of any contracts, or the practices, contracts or other relations between the public utility in question and any holding or finance agency with which such public utility may be affiliated, it shall be the duty of the Commission to report its findings and recommendation to the Governor and Council of State with request for an allotment from the Contingency and Emergency Fund to defray the expense thereof, which may be granted as provided by law for expenditures from such fund or may be denied. Provided, however, that the Commission is authorized to order any such appraisal, investigations, or audit to be undertaken by a competent, qualified, and independent firm selected by the Commission, the cost of such appraisal, investigation or audit to be borne by the public utility in question. Notwithstanding any other provisions of this Chapter, the Commission is authorized to initiate a full and complete management audit of any public utility company once every five years, by a competent, qualified, and independent firm, such audit to thoroughly examine the efficiency and effectiveness of management decisions among other factors as directed by the Commission. The cost of such audit is to be borne by the particular public utility subject to the audit; provided, however, that carriers subject to regulation by and auditing of the Interstate Commerce Commission shall not be required to bear the expense of additional audit of accounts or management audit required hereunder. (1931, c. 455; 1933, c. 134, s. 8; c. 307, s. 16; 1941, c. 97; 1963, c. 1165, s. 1; 1975, c. 867, s. 4.)

CASE NOTES

Parties Affected. — Decision of the North Carolina Utilities Commission to recognize a utility customers association and a customer as interveners in a settlement proceeding resulting from an investigation that was conducted, pursuant to G.S. 62-37, of accounting irregularities in the way in which a utility reported its regulated income to the Commission was an abuse of the Commission's discretion; the association and the customer were not parties affected by the Commission's order approving the settlement, within the meaning of G.S. 62-37, and as such had no standing to appeal the Commission's approval of the settlement agreement. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 163 N.C. App. 1, 592 S.E.2d 277, 2004 N.C. App. LEXIS 261 (2004), appeal dismissed sub nom. Utils. Comm. v. Carolina Util., — N.C. —, 602 S.E.2d 683 (2004), appeal dismissed sub nom. Utils. Comm. v. Carolina Util., — N.C. —, 602 S.E.2d 684 (2004), cert. denied, appeal dismissed, 358 N.C. 739, 602 S.E.2d 683 (2004), cert. dismissed, 358 N.C. 739, 602 S.E.2d 684, 602 S.E.2d 685 (2004).

Applied in State ex rel. Utils. Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Cited in State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

OPINIONS OF ATTORNEY GENERAL

Issuance of Order Requiring Auditor to Be Hired at Public Utility's Expense. — Where the Utilities Commission issues an order requiring an auditor to be hired at a public utility's expense, neither Article 3 (Purchases and Contracts) of Chapter 143, G.S. 143-48 et seq., nor the rule promulgated thereunder, 1 N.C.A.C. 5B.0301, applies, as there is no expenditure of state funds to purchase contractual services. See opinion of Attorney General to Mr. Robert H. Bennink, Jr., General Counsel, Utilities Commission, 2001 N.C. AG LEXIS 41 (10/11/01).

§ 62-38. Power to regulate public utilities in municipalities.

The Commission shall have the same power and authority to regulate the operation of privately owned public utilities within municipalities as it has to regulate such public utilities operating outside of municipalities, with the exception of the rights of such municipalities to grant franchises for such operation under G.S. 160A-319, and such public utilities shall be subject to the provisions of this Chapter in the same manner as public utilities operating outside municipalities. (1917, c. 136, subch. 3, s. 3; C.S., ss. 2783, 2784, 2785; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1989, c. 770, s. 11.)

CASE NOTES

Power of Commission to Regulate Privately Owned Public Utilities Within Cities. — The Utilities Commission has the same power and responsibility to regulate the operation of privately owned public utilities within cities as it does their operation outside of cities. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774, cert. denied, 285 N.C. 661, 207 S.E.2d 752 (1974).

The power of a municipality to grant franchises to public utilities for the use of its streets, and to provide service to its citizens, must yield to the paramount right of the State to regulate, through the Utilities Commission, public utilities even when they are operated within the corporate boundaries of a municipality. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774, cert. denied, 285 N.C. 661, 207 S.E.2d 752 (1974).

Municipal Charter Subject to State Powers. — The power conferred by a city charter "to provide water and lights and to contract for same" is subject to the police power of the State with respect to rates to be charged by a public service corporation under such contract as the city may make under its charter. Corporation Comm'n v. Henderson Water Co., 190 N.C. 70, 128 S.E. 465 (1925).

Although the rate to be charged for water is stipulated by contract between city and water company, this may be changed by the Commission if it appears that the rate contracted for is too low, and the one fixed by the Commission is just. The burden of proof is on the one alleging that the rate fixed by the Commission is unreasonable. Corporation Comm'n v. Henderson Water Co., 190 N.C. 70, 128 S.E. 465 (1925).

Corporation Held Not Entitled to Injunction Against Commission. — A public service corporation having a contract with a city, applying to the Commission for the increase of the rate contracted for with the city and obtaining partial relief, would not be granted an injunction by the federal court against the Commission on the grounds that the rate was confiscatory, for such increase as was allowed by the Commission was that much more than could have been received under the contract with the city had the Commission refused to act. Henderson Water Co. v. Corporation Comm'n, 269 U.S. 278, 46 S. Ct. 112, 70 L. Ed. 273 (1925).

Consent of Customer or Commission Necessary Before Service May Be Abandoned. — Power company may not abandon service to any customer, subject to the customer's paying his bill, without the consent of the customer or authorization of the Utilities Commission. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774, cert. denied, 285 N.C. 661, 207 S.E.2d 752 (1974).

§ 62-39. To regulate crossings of telephone, telegraph, electric power lines and pipelines and rights-of-way of railroads and other utilities by another utility.

(a) The Commission, upon its own motion or upon petition of any public utility or upon petition of the North Carolina Rural Electrification Authority on behalf of any electric membership corporation, shall have the power and authority, after notice and hearing, to order that the lines and right-of-way of any public utility or electric membership corporation may be crossed by any other public utility or electric membership corporation. The Commission, in all such cases, may require any such crossings to be constructed and maintained in a safe manner and in accord with accepted and approved standards of safety and may prescribe the manner in which such construction shall be done.

(b) The Commission shall also have the power and authority to discontinue and prohibit such crossings where they are unnecessary and can reasonably be avoided and to order changes in existing crossings when deemed necessary.

(c) In all cases in which the Commission orders such crossings to be made or changed and when the parties affected cannot agree upon the cost of the construction of such crossings or the damages to be paid to one of the parties for the privilege of crossing the lines of such party, it shall be the duty of the Commission to apportion the cost of such construction and to fix the damage, if any, to be paid and to apportion the damages, if any, among the parties in such manner as may be just and equitable.

(d) This section shall not be construed to limit the right of eminent domain conferred upon public utilities and electric membership corporations by the laws of this State or to limit the right and duty conferred by law with respect to crossing of railroads and highways or railroads crossing railroads, but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. Any party shall have the right of appeal from any final order or decision or determination of the Commission as provided by law for appeals from orders or decisions or final determinations of the Commission. (1913, c. 130, s. 1; C.S., s. 1052; 1933, c. 134, s. 8; 1941, c. 97; 1949, c. 1029, s. 1; 1963, c. 1165, s. 1.)

Local Modification. — Ashe: 1929, c. 101.

§ 62-40. To hear and determine controversies submitted.

When a public utility embraced in this Chapter has a controversy with another person and all the parties to such controversy agree in writing to submit such controversy to the Commission as arbitrator, the Commission shall act as such, and after due notice to all parties interested shall proceed to hear the same, and its award shall be final. Such award in cases where land or an interest in land is concerned shall immediately be certified to the clerk of the superior court of the county or counties in which said land, or any part thereof, is situated, and shall by such clerk be docketed in the judgment docket for such county, and from such docketing shall have the same effect as a judgment of the superior court for such county. Parties may appear in person or by attorney before such arbitrator. (1899, c. 164, s. 25; Rev., s. 1073; C.S., s. 1059; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross References. — As to power of Utilities Commission to settle dispute between railroad and drainage district, see G.S. 156-91.

§ 62-41. To investigate accidents involving public utilities; to promote general safety program.

The Commission may conduct a program of accident prevention and public safety covering all public utilities with special emphasis on highway safety and transport safety and may investigate the causes of any accident on a highway involving a public utility. Any information obtained upon such investigation shall be reduced to writing and a report thereof filed in the office of the Commission, which shall be subject to public inspection but such report shall not be admissible in evidence in any civil or criminal proceeding arising from such accident. The Commission may adopt reasonable rules and regulations for the safety of the public as affected by public utilities and the safety of public utility employees. The Commission shall cooperate with and coordinate its activities for public utilities with similar programs of the Division of Motor Vehicles, the Insurance Department, the Industrial Commission and other organizations engaged in the promotion of highway safety and employee safety. (1899, c. 164, s. 24; Rev., s. 1065; C.S., s. 1061; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1975, c. 716, s. 5; 1995 (Reg. Sess., 1996), c. 673, s. 2.)

§ 62-42. Compelling efficient service, extensions of services and facilities, additions and improvements.

(a) Except as otherwise limited in this Chapter, whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds:

(1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory, or

(2) That persons are not served who may reasonably be served, or

(3) That additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, of any two or more public utilities ought reasonably to be made, or

(4) That it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public, or

(5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity,

the Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or affected within a reasonable time prescribed in the order. This section shall not apply to terminal or terminal facilities of motor carriers of property.

(b) If such order is directed to two or more public utilities, the utilities so designated shall be given such reasonable time as the Commission may grant within which to agree upon the portion or division of the cost of such additions, extensions, repairs, improvements or changes which each shall bear. If at the expiration of the time limited in the order of the Commission, the utility or utilities named in the order shall fail to file with the Commission a statement that an agreement has been made for division or apportionment of the cost or expense, the Commission shall have the authority, after further hearing in the same proceeding, to make an order fixing the portion of such cost or expense to be borne by each public utility affected and the manner in which the same shall be paid or secured.

(c) For the purpose of this section, "public utility" shall include any electric membership corporation operating within this State. (1933, c. 307, s. 10; 1949, c. 1029, s. 2; 1963, c. 1165, s. 1; 1965, c. 287, s. 6; 1985, c. 676, s. 7.)

CASE NOTES

Purpose of Regulation. — With public utilities the State has undertaken to protect the public from the customary consequences of monopoly, by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Power and Duties of Commission. — This Chapter confers upon the Utilities Commission the power and the duty to compel a public utility to render adequate service, and it also confers upon the Commission the duty to fix reasonable rates for the rendering of adequate service. State ex rel. Utils. Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974).

Under G.S. 62-32 and this section, the Utilities Commission is given the power and the duty to compel utility companies to render adequate service and to set reasonable rates for such service. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Under subdivision (a)(5) of this section the Commission has the authority to order the utility to take action necessary to secure reasonably adequate service for the public's need and convenience. Undoubtedly yellow pages could fall within this provision. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

As to the jurisdiction of the Utilities Commission to require rail carrier to open drainage ditches along its tracks and to keep its drainage ditches open, see State ex rel. Utils. Comm'n v.

Seaboard C.L.R.R., 62 N.C. App. 631, 303 S.E.2d 549, cert. denied and appeal dismissed, 309 N.C. 324, 307 S.E.2d 168 (1983).

North Carolina Utilities Commission's conclusion that it had jurisdiction to review, prior to execution, proposed wholesale electric energy contracts granting native load priority supplied from a utility to retail ratepayers and to take appropriate action to protect reliable service to retail customers in North Carolina by obtaining written notice prior to the execution of any wholesale electric energy contracts in interstate commerce for its consent was vacated as the matter was preempted by the Federal Power Act, 16 U.S.C.S. § 791 et seq. State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 161 N.C. App. 199, 588 S.E.2d 77, 2003 N.C. App. LEXIS 2052 (2003).

There was no conflict between G.S. 62-106 and 62-42 because they served different purposes and were reconcilable; the provisions of G.S. 62-100 through G.S. 62-107 dealt with the siting of certain large transmission lines and were not applicable to the case, and G.S. 62-42 was much broader in scope, dealing with compelling any type of needed improvement to a public utility system. The siting of lines of at least 161 kV was often controversial and the legislature's decision to require specialized procedures for the siting of these lines was logical. State ex rel. Utils. Comm'n v. Town of Kill Devil Hills, — N.C. App. —, 670 S.E.2d 341, 2009 N.C. App. LEXIS 4 (2009).

Town's ordinances, as applied to a power company's proposed transmission line, were invalid given the North Carolina Utilities Commission's G.S. 62-42 authority and duty to compel a power company to complete certain improvements in accordance with the purposes of the Public Utilities Act. The Commission appropriately placed the burden of proof as to the validity of the ordinances on the power company; once the Commission became aware of hazardous conditions affecting a public utility or its service to the public, the Commission was obligated to remedy the situation. State ex rel. Utils. Comm'n v. Town of Kill Devil Hills, — N.C. App. —, 670 S.E.2d 341, 2009 N.C. App. LEXIS 4 (2009).

Because G.S. 62-32 and 62-42 authorized the North Carolina Utilities Commission to compel utility companies to render adequate service and to set reasonable rates, the Commission was the proper body to hear a dispute between a power company and the town. Although the town could have granted a variance to its ordinance that would have allowed the company to build the proposed new line, the ordinance was not consistent with state law, and the town cited no statutory authority or precedent that required the company to seek such a variance where an administrative agency specifically designed to handle such disputes had jurisdiction. State ex rel. Utils. Comm'n v. Town of Kill Devil Hills, — N.C. App. —, 670 S.E.2d 341, 2009 N.C. App. LEXIS 4 (2009).

The Commission, not the courts, is authorized by the legislature to determine what is a fair rate of return. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

In reviewing the Commission's determination of fair rate of return, the court will only review the record and evidence to determine if the Commission's order is supported by competent evidence. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983).

This section must be construed in connection with G.S. 62-110, which requires the issuance of a certificate of public convenience and necessity to construct new facilities except where such construction is into territory contiguous to that already occupied and not receiving similar service from another public utility. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27, cert. denied, 285 N.C. 596, 205 S.E.2d 726 (1974).

Thus, Commission Is Without Authority to Compel Duplicate Telephone Service. — A reading of this section in pari materia with G.S. 62-110 results in the determination that the Commission does not have the authority to compel a public utility to provide local exchange service to an area which is already receiving such service from another public utility. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27, cert. denied, 285 N.C. 596, 205 S.E.2d 726 (1974).

To order a telephone company to render service to an area already occupied by another telephone company would foster duplication, wastefulness, and unwarranted competition, all of which are repugnant to the avowed policy of the public utility law. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27, cert. denied, 285 N.C. 596, 205 S.E.2d 726 (1974).

Proposed Siting of Electrical Transmission Line. — North Carolina Utilities Commission had jurisdiction to hear and resolve dispute arising from the proposed siting of an electrical transmission line against electric membership corporations. State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992), aff'd per curiam, 334 N.C. 681, 435 S.E.2d 71 (1993). Decided prior to effective date of § 62-100, et seq.

Duty of Utility to Render Reasonably Adequate Service. — Having been granted a monopoly in its franchise area, the utility is under a duty to render reasonably adequate service. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Utility Must Accept Responsibility. — A public utility which has been allowed to charge rates sufficient to enable it to maintain its properties, in addition to the earning of a fair return thereon, and which nevertheless permits its properties to fall into such a poor state of maintenance as to impair the quality of its service, must accept responsibility for its resulting inability to render adequate service to its patrons. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Providing a correct telephone listing is part of providing "reasonably adequate service" as required by subdivision (a)(5) of this section. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Providing a correct telephone listing in the yellow pages as well as in the white pages of the directory is a utility function, and the Commission properly has jurisdiction over complaints which arise from this function. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Incorrect Telephone Number Listings. — The Utilities Commission had jurisdiction over complaints concerning incorrect telephone number listings in the telephone directory even when the regulated utility had delegated to another company the public utility function of publishing its directory which also included paid advertising. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Proper Listings in Advertisements in Yellow Pages. — If a utility elects to include yellow pages advertising in the directory which it is required to publish, then clearly proper listings in the advertisements in the yellow pages become a part of the utility's "function of providing adequate service" to the public. The public is not well served by listings in the yellow pages or the white pages of the directory which are incorrect or confusing to the consuming public. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

As to reduction of fair value of utilities' property where service is inadequate, see State ex rel. Utils. Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974).

Recovery of Reasonable Cost of Approved Gas Exploration Projects. — The Commission, in ordering that the reasonable costs of approved exploration projects were to be recoverable through tracking rate increases, acted within its acknowledged duty and authority to compel adequate and efficient utility service to the citizens of this State, where it was clear from the Commission's findings that, without additional gas supplies, the gas utilities would be unable to render adequate service to their customers, that exploration programs were the most feasible means for obtaining these additional supplies, and that the utilities were unable, through traditional methods of financing, to fund sufficient exploration projects to obtain these supplies. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Protest by City Not Notice. — A protest filed by a city in a proceeding by a power company for an increased cash fare on its city buses was not sufficient to constitute such notice as is required by this section so as to authorize the Commission to consider whether or not the service rendered by the power company was adequate or inadequate. State ex rel. Utils. Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956).

Cited in State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968); State ex rel. Utils. Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968); State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397 (1985); State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994); State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005).

§ 62-43. Fixing standards, classifications, etc.; testing service.

(a) The Commission may, after notice and hearing, had upon its own motion or upon complaint, ascertain and fix just and reasonable standards, classifications, regulations, practices, or service to be furnished, imposed, observed or followed by any or all public utilities; ascertain and fix adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the supply of the product, commodity or service furnished or rendered by any and all public utilities; prescribe reasonable regulations for the examination and testing of such product, commodity or service and for the measurement thereof; establish or approve reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any product, commodity or service of any public utility.

(b) The Commission shall fix, establish and promulgate standards of quality and safety for gas furnished by a public utility and prescribe rules and regulations for the enforcement of and obedience to the same. (1919, c. 32; C.S., s. 1055; 1933, c. 134, s. 8; c. 307, s. 11; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

For case holding notice adequate under this section, see State ex rel. Utilities Comm'n v. Associated Petro. Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972), cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

§ 62-44. Commission may require continuous telephone lines.

The Commission may, upon its own motion or upon written complaint by any person, after notice and hearing, require any two or more telephone or telegraph utilities to establish and maintain through lines within the State between two or more localities, which cannot be communicated with or reached by the lines of either utility alone, where the lines or wires of such utilities form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of equipment, or the transfer of messages at common points. The rate for such service shall be just and reasonable and the Commission shall have power to establish the same, and declare the portion thereof to which each utility affected thereby is entitled and the manner in which the same must be secured and paid. All necessary construction, maintenance and equipment in order to establish such service shall be constructed and maintained in such manner and under such rules, with such divisions of expense and labor, as may be required by the Commission. (1933, c. 307, s. 9; 1963, c. 1165, s. 1.)

CASE NOTES

Statutes Requiring Interconnection with Competitor Should Not Be Extended Beyond Plain Meaning. — The power to require the proprietor of a business to interconnect its facilities with those of a competitor is a drastic power. Statutes conferring it should not be extended beyond their plain meaning. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

When Interconnection of Lines May Be Required. — This section authorizes the Commission to require a connection of the lines of two telephone companies, but only when they serve localities which cannot be communicated with by the lines of one of them alone. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

There is no provision in this Chapter which requires, or authorizes the Commission to require, a utility, with large investments in its own plant and facilities, to permit interconnection with such plant and facilities by a competitor in order to increase the competitor's opportunity to take away its customers or prospective customers. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Section Does Not Authorize Commission to Compel Telephone Company to Interconnect with Radio Company Serving Same Area. — This section may not reasonably be extended by construction to authorize the Commission to compel a telephone company to interconnect its system with the system of a radio company serving the identical area which the telephone company, itself, serves or desires to serve. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Mobile Radio Service Company Is Not "Telephone or Telegraph Utility". — Even if the record is sufficient to support an order granting an applicant a certificate of public convenience and necessity to act as a common carrier of communications providing mobile radio service, the Commission has no statutory authority to require a telephone utility to interconnect applicant's radio communications system with the utility's land telephone system. If permitted to render such service, the applicant would not be a "telephone or telegraph utility." State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

§ 62-45. Determination of cost and value of utility property.

The Commission, after notice and hearing, may ascertain and fix the cost or value, or both, of the whole or any part of the property of any public utility insofar as the same is material to the exercise of the jurisdiction of the Commission, make revaluations from time to time, and ascertain the cost of all new construction, extensions and additions to the property of every public utility. (1933, c. 307, s. 12; 1963, c. 1165, s. 1.)

§ 62-46. Water gauging stations.

The Commission may require the location, establishment, maintenance and operation of any water gauging station which it finds is needed in the State over and above those required by federal agencies, and the Commission may cooperate with federal and other State agencies as to the location, construction and reports and the results of operation of such station. (1933, c. 307, s. 33; 1963, c. 1165, s. 1.)

§ 62-47. Reports from municipalities operating own utilities.

Every municipality furnishing gas, electricity or telephone service shall make an annual report to the Commission, verified by the oath of the general manager or superintendent thereof, on the same forms as provided for reports of public utilities, giving the same information as required of public utilities. (1933, c. 307, s. 34; 1963, c. 1165, s. 1.)

Cross References. — As to admissibility of records in utility rate hearing, see G.S. 62-65.

§ 62-48. Appearance before courts and agencies.

(a) The Commission is authorized and empowered to initiate or appear in such proceedings before federal and State courts and agencies as in its opinion may be necessary to secure for the users of public utility service in this State just and reasonable rates and service; provided, however, that the Commission shall not appear in any State appellate court in support of any order or decision of the Commission entered in a proceeding in which a public utility had the burden of proof.

(b) The Commission may, when appearing before federal courts and agencies on behalf of the using and consuming public in matters relating to the wholesale rates and supply of natural gas, employ, subject to the approval of the Governor, private legal counsel and be reimbursed for any resulting legal fees and costs from past and future refunds received by the North Carolina natural gas distribution companies, and may establish procedures for those natural gas distribution companies to set aside reasonable amounts of those refunds for this purpose. The Commission is also authorized to establish procedures whereby the State may be reimbursed from past and future refunds received by the North Carolina natural gas distribution companies for travel expenses incurred by staff members of the Commission and Public Staff designated to provide assistance to the Commission's private legal counsel in natural gas matters before federal courts and agencies. (1899, c. 164, s. 14; Rev., s. 1110; 1907, c. 469, s. 5; C.S., s. 1075; 1929, c. 235; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1977, c. 468, s. 11; 1985, c. 312, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 233.)

§ 62-49. Publication of utilities laws.

The Commission is authorized and directed to secure publication of all North Carolina laws affecting public utilities, together with the Commission rules and regulations, in an annotated edition, and the Commission may adopt rules for distribution of said publication, and shall publish biennial supplements to said utilities laws containing all amendments and additions thereto, and may republish said laws at such times as may be reasonable and necessary. (1963, c. 1165, s. 1; 1967, c. 1133.)

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Petroleum Transp., Inc., 2 N.C. App. 566, 163 S.E.2d 526 (1968); State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

§ 62-50. Safety standards for gas pipeline facilities.

(a) The Commission may promulgate and adopt safety standards for the operation of natural gas pipeline facilities in North Carolina. These safety standards shall apply to the pipeline facilities of gas utilities and pipeline carriers under franchise from the Utilities Commission and to pipeline facilities of other gas operators, as defined in subsection (g) of this section. The Commission shall require that all gas operators file with the Commission reports of all accidents occurring in connection with the operation of their gas pipeline facilities located in North Carolina. The Commission may require that all gas operators file with the Commission copies of their construction, operation, and maintenance standards and procedures, and any amendments thereto, and such other information as may be necessary to show compliance with the safety standards promulgated by the Commission. Where the Commission has reason to believe that any gas operator is not in compliance with the Commission's safety standards, the Commission may, after notice and hearing, order that gas operator to take such measures as may be necessary to comply with the standards. The Commission may require all gas operators to furnish engineering reports showing that their pipeline facilities are in safe operating condition and are being operated in conformity with the Commission's safety standards.

(b) The Commission is hereby authorized to enter into agreements with the United States Department of Transportation and other federal agencies and with other states or public utilities commissions of other states for the regulation of natural gas pipelines located within the State of North Carolina and upon the execution of such cooperative agreements, the Commission is authorized to utilize Commission personnel for inspection, investigation, and regulation of safety standards for interstate and intrastate natural gas pipelines in North Carolina, and to share in the cost of such regulation with other agencies having duties with respect to the regulation of said natural gas pipelines, and to receive funds from the United States Department of Transportation for such regulation. The Commission may use Commission personnel to inspect and investigate all gas incidents, facilities, and records kept pursuant to the provisions of 49 Code of Federal Regulations, Parts 191, 192, and 193, and to cooperate with other state and federal agencies in determining the probable cause or causes of gas incidents. Any information obtained during an investigation of a gas incident shall be reduced to writing and a report containing that information shall be filed with the Chief Clerk of the Commission and the report shall be subject to public inspection but the report shall not be admissible in evidence in any civil or criminal proceeding arising from the incident.

(c) The Utilities Commission is hereby authorized to enter into cooperative agreements for inspection of all natural gas pipelines of North Carolina to the end that the Utilities Commission may enter into agreements with the United States Department of Transportation or other federal or state agencies to regulate and inspect the safety standards for all natural gas pipelines in the State of North Carolina, including interstate natural gas pipelines.

(d) Any person who violates any provision of this section, or any regulation of the Utilities Commission issued thereunder, shall be subject to a civil penalty for each violation for each day that the violation continues. The maximum penalty for each day of a violation and for all the days of a continuing violation may not exceed the maximum penalties that would apply if the penalties had been imposed under 49 U.S.C. Appx. § 1679a(a) by the Secretary of the United States Department of Transportation. Penalties assessed under this subsection shall be credited to the General Fund as nontax revenue.

(e) Any action for civil penalty or any claim for said penalty may be compromised by the Utilities Commission and settled for an agreed amount. In determining the amount of the penalty imposed in civil action, or the amount agreed upon in compromise, the amount of the penalty shall be considered in relation to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after any prior notification of a violation. The amount of the penalty, when finally determined in a civil action, or the amount agreed upon in compromise, may be deducted from any sums owing by the State to the person charged, or may be collected as in the case of any judgment in a civil action in the State courts.

(f) The General Court of Justice of North Carolina is authorized to issue court orders, restraining orders, injunctions and other processes of the court in actions by the Utilities Commission to enforce the provisions of this Chapter relating to gas pipeline safety, and the Commission is authorized to bring actions in said court, including actions for mandatory injunctions, restraining orders, temporary restraining orders, penalties, damages and such other relief as may be necessary to secure compliance with the provisions of this section and regulations of the Commission duly enacted and adopted hereunder relating to gas pipeline safety. This provision is in addition to other powers of the Commission and the courts in relation to the enforcement of provisions of this Chapter in the courts, and shall not limit the present powers of the Commission in bringing actions in the courts for enforcement of other provisions of this Chapter.

(g) For the purpose of this section, "gas operators" include gas utilities and gas pipeline carriers operating under a franchise from the Utilities Commission, municipal corporations operating municipally owned gas distribution systems, regional natural gas districts organized and operated pursuant to Article 28 of Chapter 160A of the General Statutes, and public housing authorities and any person operating apartment complexes or mobile home parks that distribute or submeter natural gas to their tenants. This section does not confer any other jurisdiction over municipally owned gas distribution systems, regional natural gas districts, public housing authorities or persons operating apartment complexes or mobile home parks. (1967, c. 1134, s. 1; 1969, c. 646; 1971, cc. 549, 1145; 1979, c. 269, s. 1; 1989, c. 481, ss. 1, 2; 1993, c. 189, s. 1; 1997-426, s. 9.)

§ 62-51. To inspect books and records of corporations affiliated with public utilities.

Members of the Commission, Commission staff, and public staff are hereby authorized to inspect the books and records of corporations affiliated with public utilities regulated by the Utilities Commission under the provisions of this Chapter, including parent corporations and subsidiaries of parent corporations. This authorization shall extend to all reasonably necessary inspection of all books and records of account and agreements and transactions between public utilities doing business in North Carolina and their affiliated corporations where such records relate either directly or indirectly to the provision of intrastate service by the utility. The right to inspect such books and records shall apply both to books and records in the State of North Carolina and such books and records located outside of the State of North Carolina. If any such affiliated corporation shall refuse to permit such inspection of its books and records and its transactions with public utilities doing business in North Carolina, the Utilities Commission is empowered to order the public utility regulated in North Carolina to show cause why it should not secure from its affiliated corporation such books and records for inspection in North Carolina or why their franchise to operate as a public utility in North Carolina should not be cancelled. (1969, c. 764, s. 1; 1977, c. 468, s. 12.)

CASE NOTES

Broad Authority to Inspect and Investigate. — Within its proper rate-making authority, the Commission is expressly authorized to inspect the books and records of affiliated companies and to investigate contracts and practices between the petitioning utility and its affiliated companies, including parent corporations and subsidiaries of parent corporations. The authority of the Commission to inspect books and records and to make investigations into transactions between affiliates, as conferred by this section, is quite broad. State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

This section cannot give the Utilities Commission jurisdiction over Bellsouth Advertising and Publishing Company. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 93 N.C. App. 260, 377 S.E.2d 772 (1989), rev'd on other grounds, 326 N.C. 522, 391 S.E.2d 487 (1990).

Applied in State ex rel. Utils. Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Cited in State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981).

§ 62-52. Interruption of service.

The Utilities Commission may adopt appropriate rules and regulations which would allow public utilities to temporarily interrupt service when a structure is moved by the owner of such structure (or by a licensed mover authorized and acting on behalf of the owner) over or along public roads or streets and there are public utility facilities in place which would impede the movement of such structure. Such rules and regulations shall require:

(1) The owner to demonstrate that the public health and safety of the utility's customers and that of the general public will not be affected by the interruption of such service,
(2) That the inconvenience to said customers and the general public can be fully anticipated and reduced to a minimum,
(3) The utility cooperate with the owner in furnishing information relative to (1) and (2), and
(4) An initial application fee be paid the utility toward its cost to be incurred in investigating and planning.

Should the owner and the public utility be unable to agree on a practical procedure and/or the direction to follow in overcoming the impeding facilities in order that the public health and safety of the utility's customers and that of the general public will not be affected, then and in such event the owner may petition the Utilities Commission to require the utility to temporarily interrupt its service to its customers by disconnecting the impeding facilities, provided the owner can demonstrate to the satisfaction of the Commission that the public health and safety of the utility's customers and that of the general public will not be affected by such interruption of service and that the public utility was unreasonable in the procedure, direction and cost proposed to the owner to overcome the impeding facility.

In any event, the owner of said structure shall reimburse the utility its full cost involved in such disconnection and reconnection including but not limited to planning, engineering, notification and administrative costs, labor, material and equipment. Should the impeding facility be overcome other than by disconnection, the owner shall nevertheless reimburse the utility its full cost related thereto. (1981 (Reg. Sess., 1982), c. 1186, s. 1.)

§ 62-53. Electric membership corporation subsidiaries.

In addition to any other authority granted to the Commission in this Chapter, the Commission shall have the authority to regulate electric membership corporations as provided in G.S. 117-18.1. (1999-180, s. 4.)

§ 62-54. Notification of opportunity to object to telephone solicitation.

The Commission shall require each local exchange company and each competing local provider certified to do business in North Carolina to notify all telephone subscribers who subscribe to residential service from that company of the provisions of Article 4 of Chapter 75 of the General Statutes and of the federal laws and regulations allowing consumers to object to receiving telephone solicitations. The notification shall be drafted pursuant to G.S. 75-102(m), shall be distributed at least annually, and shall be distributed by one of the following methods: bill insert or bill message, direct mail, or e-mail when the subscriber has affirmatively selected e-mail as a means of notification. The Commission shall also ensure that this information is printed in a clear, conspicuous manner in the consumer information pages of each telephone directory distributed to residential customers. (2000-161, s. 3; 2003-411, s. 5; 2009-122, s. 2.)

Cross References. — As to increased consumer protections from unwanted telephone solicitations, see G.S. 75-100 et seq.

Editor's Note. — Session Laws 2000-161, s. 3, enacted this section as G.S. 62-53. It was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2003-411, s. 5, effective October 1, 2003, and applicable to all telephone directories printed on or after January 1, 2004, rewrote the section.

Session Laws 2003-411, s. 6, provides: "Should one or more of the terms or provisions of this act or any application thereof be held or declared unenforceable or invalid to any extent, the remainder of this act, and the applications thereof that have not been held or declared unenforceable or invalid, shall remain in effect. In the specific event that the provisions of G.S. 75-102, 75-103, 75-104, or 75-105 as enacted in Section 3 of this act, are declared to be preempted or otherwise unenforceable in relation to interstate telephone calls, those provisions shall remain in force and effect with respect to intrastate telephone calls."

Session Laws 2003-411, s. 7, provides: "Consistent with protected speech rights of businesses that engage in telephone solicitations, the provisions of this act shall be given broad construction so as to protect telephone subscribers from unwanted telephone solicitations and from problematic sales techniques and payment procedures often associated with these solicitations."

Effect of Amendments. — Session Laws 2009-122, s. 1, effective October 1, 2009, substituted "The notification shall be drafted pursuant to G.S. 75-102(m), shall be distributed at least annually, and shall be distributed by one of the following methods: bill insert or bill message, direct mail, or e-mail when the subscriber has affirmatively selected e-mail as a means of notification" for "by enclosing a bill insert, drafted pursuant to G.S. 75-102(m), at least annually, in at least one telephone bill mailed to every residential customer" near the middle.

§§ 62-55 through 62-59: Reserved for future codification purposes.

ARTICLE 4.

Procedure before the Commission.

§ 62-60. Commission acting in judicial capacity; administering oaths and hearing evidence; decisions; quorum.

For the purpose of conducting hearings, making decisions and issuing orders, and in formal investigations where a record is made of testimony under oath, the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law. The commissioners and members of the Commission's staff designated and assigned as examiners shall have full power to administer oaths and to hear and take evidence. The Commission shall render its decisions upon questions of law and of fact in the same manner as a court of record. A majority of the commissioners shall constitute a quorum, and any order or decision of a majority of the commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this Chapter. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

This section does not give the Commission the authority to determine the constitutionality of the legislation. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

Commission Is Administrative Agency with Powers of a Dual Nature. — The Utilities Commission, a creature of the General Assembly, is an administrative agency of the State, with such powers and duties as are given it by this Chapter. These powers and duties are of a dual nature — supervisory or regulatory, and judicial. State ex rel. N.C. Utils. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944); Utilities Comm'n v. Atlantic Greyhound Corp., 224 N.C. 672, 32 S.E.2d 23 (1944).

The rate making activities of the Commission are a legislative function. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Rule Making Is a Legislative Function. — Rule making is an exercise of the delegated legislative authority of the Commission, under G.S. 62-30 and 62-31, to supervise and control the public utilities of this State and to make reasonable rules and regulations to accomplish that end. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

When the Commission is conducting a hearing, it is acting in a judicial capacity and shall render its decision upon questions of law and of fact in the same manner as a court of record. State ex rel. Utils. Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972).

As to Commission's having powers of court of general jurisdiction as to certain matters, see State ex rel. N.C. Utils. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944); Utilities Comm'n v. Atlantic Greyhound Corp., 224 N.C. 672, 32 S.E.2d 23 (1944).

Commission Is Without Inherent Powers of Appellate Court. — The North Carolina Utilities Commission is a court of general jurisdiction only as to subjects embraced within this Chapter. It is a court of original jurisdiction and does not possess the inherent powers of an appellate court. State ex rel. N.C. Utils. Comm'n v. Norfolk S. Ry., 224 N.C. 762, 32 S.E.2d 346 (1944).

Liberality and informality are essential to the workings of the Commission. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Ordinarily, the procedure before the Commission is more or less informal, and is not as strict as in superior court, nor is it confined by technical rules. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); State ex rel. N.C. Utils. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 48 N.C. App. 115, 268 S.E.2d 851 (1980).

The Commission is required by G.S. 62-65 (a) in deciding on an application for a certificate of public convenience and necessity to apply the rules of evidence applicable in civil actions in the superior court "insofar as practicable." This section provides that the Commission shall render its decision "in the same manner as a court of record." The procedure before the Commission is, however, not as formal as that in litigation conducted in the superior court. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Since the regulation of public utilities is a continuing and continuous process as to each utility, procedure before the Commission must be more or less informal and not confined by technical rules, in order that regulation may be consistent with changing conditions. State ex rel. Utilities Comm'n v. Associated Petro. Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972), cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

Great liberality is indulged in pleadings in proceedings before the Commission, and the technical and strict rules of pleading applicable in ordinary court proceedings do not apply. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Substance and not form is controlling. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); State ex rel. N.C. Utils. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

Commission may enlarge or restrict the inquiry before it unless a party is clearly prejudiced thereby. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); State ex rel. Utilities Comm'n v. Associated Petro. Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972), cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

Issues of Fact Not to Be Decided Before All Evidence Is Offered. — It is erroneous if controverted questions of fact, or issues of fact, are decided by the Commission before all of the competent evidence of the parties is offered with respect thereto. State ex rel. Utils. Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972).

Findings Must Be Supported by Competent Evidence. — Since the Commission is required to render its decisions upon questions of law and of fact in the same manner as a court of record, its findings must be, as a matter of law, supported by competent evidence. State ex rel. Utils. Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

Finding May Be Based on "Late" Exhibits. — The statutes prescribing the procedure for hearings before the Commission do not forbid it to make a finding, as to the capacity and ability of an applicant for a certificate of public convenience and necessity to serve, upon the basis of facts arising between the conclusion of the hearing and the entry of the order, when those facts are shown by "late" exhibits, otherwise competent, and when the adverse party has had adequate notice that such exhibits have been filed with the Commission for inclusion in the record. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Findings of Fact Not Disagreed with in Other Opinions as Those of Commission. — Where neither of the two concurring opinions nor the two dissenting opinions indicated any disagreement with any of the findings of fact stated in the opinion of another commissioner, and the opinion of no other commissioner suggested any other findings of fact, the findings of fact so stated in the opinion of the commissioner were, therefore, concurred in by a majority, if not all of the members of the Commission, and were, therefore, the findings of the Commission. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Different Reasons Given by Concurring Commissioners Are Not Grounds for Reversal. — When this section and G.S. 62-79(a) are construed together, as they must be, it is apparent that the General Assembly did not intend that an order of the Commission concurred in by the majority of its members, based upon findings of fact concurred in by a majority of its members, might be reversed solely because the members of the concurring majority chose different rules, or supposed rules, of law as support for their decision and order. The diversity of the reasons given by the three commissioners who join in an ultimate decision and order are not a sufficient ground for its reversal. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Order in Opinion Concurred in by Majority Is Order of Commission. — Where a majority of the commissioners concurred in the order set forth in the opinion by one of them, it was the order of the Commission. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

If three commissioners concur, the order entered by them constitutes the order of the Commission. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

But all commissioners concurring must have heard evidence. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

It seems inconceivable that the General Assembly intended that when a matter was heard by a hearing division, if "as many as three commissioners hearing the case approved the recommended order," as provided by G.S. 62-76, the order should become a final order, but that the Commission, when a matter was heard before it, could issue a final order when only one of the commissioners who heard the case approved the order. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

Order Approved by Only One Commissioner Not Final. — An order was held to be a recommended order and not a final order where only one of the three commissioners who had heard the evidence in a hearing before the Commission participated in approving the order. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

Res Judicata. — Only specific questions actually heard and finally determined by the Commission in its judicial character are res judicata, and then only as to the parties to the hearing. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Actions of an administrative agency which involve the exercise of a legislative rather than a judicial function are not res judicata. Exercises of the Commission's rule making power, therefore, are not governed by the principles of res judicata and are reviewable by the Supreme Court in later appeals of closely related matters. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Deferring Use of Increased Rates Pending Investigation. — After rates for certain intrastate shipments had been duly established by the Utilities Commission, defendant sought to increase such rates by filing tariff schedules to that effect. The Commission, in a proceeding to which defendant was a party, by order of postponement, which was not objected to, deferred use of the new increased rates pending investigation, and also directed that the rates previously fixed should not be changed by subsequent tariffs or schedules until this investigation and suspension proceeding had been disposed of, continuing the investigation from time to time at the request of defendant. It was held that such action of the Commission was binding on defendant. However, defendant was entitled to a reasonable time to comply with the order before penalties might be invoked. State ex rel. N.C. Utils. Comm'n v. Atlantic C.L.R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

For cases construing § 1023 of the Consolidated Statutes, containing similar provisions, see State ex rel. Caldwell v. Wilson, 121 N.C. 425, 121 N.C. 480, 28 S.E. 554, 28 S.E. 554 (1897); State ex rel. N.C. Utils. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909); North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1917); State ex rel. Corp. Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923).

Cited in State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 123 N.C. App. 623, 473 S.E.2d 661 (1996); State ex rel. Utils. Comm'n v. Thrifty Call, Inc., 154 N.C. App. 58, 571 S.E.2d 622, 2002 N.C. App. LEXIS 1412 (2002); State ex rel. Utils. Comm'n v. Town of Kill Devil Hills, — N.C. App. —, 670 S.E.2d 341, 2009 N.C. App. LEXIS 4 (2009).

§ 62-60.1. Commission to sit in panels of three.

(a) The Utilities Commission shall sit in panels of three commissioners each unless the chairman by order shall set the proceeding for hearing by the full Commission.

(b) Any order or decision made unanimously by a panel of three commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this Chapter; provided, however, that upon motion of any three commissioners not sitting on the panel, made within 10 days of issuance of such order or decision of the panel, with notice to parties of record, the order or decision of the panel shall thereby be stayed and the full Commission shall review the order or decision of the panel and shall within 30 days of said motion either affirm or modify the order or decision of the panel or remand the matter to the panel for further proceedings; provided that the foregoing shall not limit the right of parties to seek review of such order or decision under G.S. 62-90.

(c) In the event an order or decision of the panel of three is not made unanimously, such order or decision shall be a recommended order only, subject to review by the full Commission, with all commissioners eligible to participate in the final arguments and decision. Review shall take place in accordance with the provisions of G.S. 62-78 and the Commission shall decide the matter in controversy and make appropriate order or decision thereon within 60 days of the date of the recommended order. If within the filing period specified by the panel no exception has been filed by a party, or if the Commission within the same period has not advised the parties that it will conduct a review upon its own motion, the recommended order or decision shall become the final order or decision of the Commission. Nothing in this section shall amend or repeal the provisions of G.S. 62-134.

(d) This section shall become effective July 1, 1975, and shall not affect the utilization of or the procedures outlined for utilization of a hearing commissioner or a hearing examiner as provided for elsewhere in Chapter 62. (1975, c. 243, s. 4; 1977, c. 468, s. 13.)

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

§ 62-61. Witnesses; production of papers; contempt.

The Commission shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, and punish for contempt, as by law is conferred upon the superior courts. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Cross References. — As to contempt, see G.S. 5A-11 et seq. As to attendance of witnesses, see G.S. 8-59 et seq.

§ 62-62. Issuance and service of subpoenas.

All subpoenas for witnesses to appear before the Commission, a division of the Commission or a hearing commissioner or examiner and notice to persons or corporations, shall be issued by the Commission or its chief clerk or a deputy clerk and be directed to any sheriff or other officer authorized by law to serve process issued out of the superior courts, who shall execute the same and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court. The Commission shall have the authority to require the applicant for a subpoena for persons and documents to make a reasonable showing that the evidence of such persons or documents will be material and relevant to the issue in the proceeding. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1995, c. 379, s. 14(c).)

§ 62-63. Service of process and notices.

The chief clerk, a deputy clerk, or any authorized agent of the Commission may serve any notice issued by it and his return thereof shall be evidence of said service; and it shall be the duty of the sheriffs and all officers authorized by law to serve process issuing out of the superior courts, to serve any process, subpoenas and notices issued by the Commission, and such officers shall be entitled to the same fees as are prescribed by law for serving similar papers issuing from the superior court. Service of notice of all hearings, investigations and proceedings by the Commission may be made upon any person upon whom a summons may be served in accordance with the provisions governing civil actions in the superior courts of this State, and may be made personally by an authorized agent of the Commission or by mailing in a sealed envelope, registered, with postage prepaid, or by certified mail. (1949, c. 989, s. 1; 1957, c. 1152, s. 2; 1963, c. 1165, s. 1.)

Cross References. — As to penalty imposed upon sheriff for failing to execute and return process, see G.S. 162-14.

§ 62-64. Bonds.

All bonds or undertakings required to be given by any of the provisions of this Chapter shall be payable to the State of North Carolina, and may be sued on as are other undertakings which are payable to the State. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-65. Rules of evidence; judicial notice.

(a) When acting as a court of record, the Commission shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable, but no decision or order of the Commission shall be made or entered in any such proceeding unless the same is supported by competent material and substantial evidence upon consideration of the whole record. Oral evidence shall be taken on oath or affirmation. The rules of privilege shall be effective to the same extent that they are now or hereafter recognized in civil actions in the superior court. The Commission may exclude incompetent, irrelevant, immaterial and unduly repetitious or cumulative evidence. All evidence, including records and documents in the possession of the Commission of which it desires to avail itself, shall be made a part of the record in the case by definite reference thereto at the hearing. Any party introducing any document or record in evidence by reference shall bear the expense of all copies required for the record in the event of an appeal from the Commission's order. Every party to a proceeding shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues, to impeach any witness regardless of which party first called such witness to testify and to rebut the evidence against him. If a party does not testify in his own behalf, he may be called and examined as if under cross-examination.

(b) The Commission may take judicial notice of its decisions, the annual reports of public utilities on file with the Commission, published reports of federal regulatory agencies, the decisions of State and federal courts, State and federal statutes, public information and data published by official State and federal agencies and reputable financial reporting services, generally recognized technical and scientific facts within the Commission's specialized knowledge, and such other facts and evidence as may be judicially noticed by justices and judges of the General Court of Justice. When any Commission decision relies upon such judicial notice of material facts not appearing in evidence, it shall be so stated with particularity in such decision and any party shall, upon petition filed within 10 days after service of the decision, be afforded an opportunity to contest the purported facts noticed or show to the contrary in a rehearing set with proper notice to all parties; but the Commission may notify the parties before or during the hearing of facts judicially noticed, and afford at the hearing a reasonable opportunity to contest the purported facts noticed, or show to the contrary. (1949, c. 989, s. 1; 1959, c. 639, s. 2; 1963, c. 1165, s. 1; 1973, c. 108, s. 21.)

Cross References. — As to rules of evidence generally, see G.S. 8C-1 et seq.

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Informality of Procedure. — The Commission is required by subsection (a) in deciding on an application for a certificate of public convenience and necessity to apply the rules of evidence applicable in civil actions in the superior court "insofar as practicable." Section 62-60 provides that the Commission shall render its decision "in the same manner as a court of record." The procedure before the Commission is, however, not as formal as that in litigation conducted in the superior court. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Procedure before the Commission in the trial of utilities matters, and particularly in the admission of evidence, is not so formal as litigation conducted in the superior court. State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

Admissibility of Annual Reports of Municipalities. — In a proceeding by a utility for an increase in rates, wherein municipalities engaged in resale of electrical energy purchased from the utility protested against the proposed schedules of the utility, copies of annual reports of the municipality to the Commission pursuant to statute, which showed profits made by the municipalities from resale of electrical energy, were admissible in evidence on the question of whether the proposed schedules were fair and equitable as between groups or classifications to be served under such schedules. State ex rel. N.C. Utils. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Admissibility of Evidence of Rates Charged by Another Utility. — In a proceeding by a utility for a rate increase, the Commission properly excluded evidence of rates charged by another utility in the same area as that involved in the proceeding, in the absence of evidence as to the relative cost conditions of the two utilities. State ex rel. N.C. Utils. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Evidence Held Sufficient. — The Commission heard ample evidence to support its finding that the introduction of natural gas facilities into unserved areas would assist in the economic development of those areas. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

Admission of Expert-Opinion Evidence. — In a rule making proceeding, the Utilities Commission did not err in admitting expert opinion evidence without a specific finding that the witness was an expert, since the admission of the evidence over objection and the denial of a motion to strike constituted the Commission's ruling that the witness was qualified as an expert. State ex rel. Utilities Comm'n v. Associated Petro. Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972), cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

Findings May Be Based on "Late" Exhibits. — The statutes prescribing the procedure for hearings before the Commission do not forbid it to make a finding, as to the capacity and ability of an applicant for a certificate of public convenience and necessity to serve, upon the basis of facts arising between the conclusion of the hearing and the entry of the order, when those facts are shown by "late" exhibits, otherwise competent, and when the adverse party has had adequate notice that such exhibits have been filed with the Commission for inclusion in the record. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Judicial Notice of Financial Data. — Although the record before the Commission did not include testimony or documentary evidence as to the earnings of the 24 electric utilities whose earnings were shown in Moody's Investment Service, subsection (b) expressly authorizes the Commission to take judicial notice of data published by reputable financial reporting services, so that there was no error in the consideration of this data by the Commission in determining a fair rate of return to be allowed the utility. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977).

Judicial Notice of Industry Trend. — The Utilities Commission did not act arbitrarily in judicially noticing the current restructuring trend in the electric utility industry, where the reality of this trend was not subject to reasonable dispute because it was generally known within the industry. State ex rel. Utils. Comm'n v. Carolina Indus. Group For Fair Util. Rates, 130 N.C. App. 636, 503 S.E.2d 697 (1998), cert. denied, 349 N.C. 377 (1998).

Burden of Proof. — In the hearing before the Utilities Commission, the burden was on the applicant to offer competent, material and substantial evidence in support of his application for modification of his existing franchise. State ex rel. Utils. Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943); State ex rel. Utils. Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953).

The "whole record test" set forth in this section requires the Commission's order to be affirmed if, upon consideration of the whole record as submitted, the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

"Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

Cited in State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966); State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 337 N.C. 236, 446 S.E.2d 348 (1994); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 500 S.E.2d 693 (1998); In re Petition of Utils., Inc., 147 N.C. App. 182, 555 S.E.2d 333, 2001 N.C. App. LEXIS 1141 (2001).

§ 62-66. Depositions.

The Commission or any party to a proceeding may take and use depositions of witnesses in the same manner as provided by law for the taking and use of depositions in civil actions in the superior court. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-67: Repealed by Session Laws 1981, c. 193, s. 1.

§ 62-68. Use of affidavits.

At any time, 10 or more days prior to a hearing or a continued hearing, any party or the Commission may send by registered or certified mail or deliver to the opposing parties a copy of any affidavit proposed to be used in evidence, together with the notice as herein provided. Unless an opposing party or the Commission at least five days prior to the hearing, if the affidavit and notice are received at least 20 days prior to such hearing, otherwise at any time prior to or during such hearing, sends by registered or certified mail or delivers to the proponent a request to cross-examine the affiant at the hearing, the right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant at the hearing is not afforded after request therefor is made as herein provided, the affidavit shall not be received in evidence. The notice accompanying the affidavit shall set forth the name and address of the affiant and shall contain a statement that the affiant will not be called to testify orally and will not be subject to cross-examination unless the opposing parties or the Commission demand the right of cross-examination by notice mailed or delivered to the proponent at least five days prior to the hearing if the notice and affidavit are received at least 20 days prior to such hearing, otherwise at any time prior to or during such hearing. (1949, c. 989, s. 1; 1957, c. 1152, s. 3; 1963, c. 1165, s. 1.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

§ 62-69. Stipulations and agreements; prehearing conference.

(a) In all contested proceedings the Commission, by prehearing conferences and in such other manner as it may deem expedient and in the public interest, shall encourage the parties and their counsel to make and enter stipulations of record for the following purposes:

(1) Eliminating the necessity of proof of all facts which may be admitted and the authenticity of documentary evidence,
(2) Facilitating the use of exhibits, and
(3) Clarifying the issues of fact and law.

The Commission may make informal disposition of any contested proceeding by stipulation, agreed settlement, consent order or default.

(b) Unless otherwise provided in the Commission's rules of practice and procedure, such prehearing conferences may be ordered by the Commission or requested by any party to a proceeding in substantially the same manner, and with substantially the same subsequent procedure, as provided by law for the conduct of pretrial hearings in the superior court. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

CASE NOTES

Adoption of Nonunanimous Stipulation. — The Utilities Commission may adopt the recommendations or provisions of a nonunanimous stipulation as long as the Commission sets forth its reasoning and makes its own independent conclusion supported by substantial evidence on the record that the proposal is just and reasonable to all parties in light of all the evidence presented. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 500 S.E.2d 693 (1998).

§ 62-70. Ex parte communications.

(a) In all matters and proceedings pending on the Commission's formal docket, with adversary parties of record, all communications or contact of any nature whatsoever between any party and the Commission or any of its members, or any hearing examiner assigned to such docket, whether verbal or written, formal or informal, which pertains to the merits of such matter or proceeding, shall be made only with full knowledge of, or notice to, all other parties of record. All parties shall have an opportunity to be informed fully as to the nature of such communication and to be present and heard with respect thereto. In all matters and proceedings which are judicial in nature, it is the specific intent of this section that all members of the Commission shall conduct all trials, hearings and proceedings before them in the manner and in accordance with the judicial standards applicable to judges of the General Court of Justice, as provided in Chapter 7A of the General Statutes, and upon the initiation of any such proceedings, and particularly during the trial or hearing thereof, there shall be no communications or contacts of any nature, including telephone communications, written correspondence, or direct office conferences, between any party or such party's attorney and any member of the Commission or any hearing examiner, without all other parties to such proceeding having full notice and opportunity to be present and heard with respect to any such contact or communication.

Any commissioner who knowingly receives any such communication or contact during such proceeding and who fails promptly to report the same to the Attorney General, or who otherwise violates any of the provisions of this subsection shall be liable to impeachment. Any examiner who knowingly receives any such communication or contact during such proceeding and who fails promptly to report the same to the Attorney General or who otherwise violates any of the provisions of this subsection shall be subject to dismissal from employment for cause.

(b) In the event any such communication or contact shall be received by the Commission or any commissioner or any hearing examiner assigned to such docket without such knowledge or notice to all other parties, the Commission shall immediately cause a formal record of such violation to be made in its docket and thereafter no ruling or decision shall be made in favor of such violating party until the aggrieved party shall waive such violation or the Commission shall find as a fact that such party was not prejudiced thereby or that any such prejudice, if present, has been removed.

(c) Any contacts or communications made in violation of this section which are not recorded by the Commission may be recorded by notice to the Commission by any aggrieved party and, unless the Commission shall find that such violation did not in fact occur, such recording shall have the same effect as if done by the Commission.

(d) In matters not under this section, the Commission may secure information and receive communications ex parte, it being the purpose of this section to protect adversary interests where they exist but not otherwise to restrict unduly the administrative and legislative functions of the Commission.

(e) This section shall not modify any notice required in the case of pleadings and proceedings which are subject to other requirements of notice to parties of record, whether by statute or by rule of the Commission, and the Commission may adopt reasonable rules to coordinate this section with such other requirements.

(f) In addition to the foregoing provisions regarding contacts with members of the Commission and hearing examiners, if any party of record, including the assistant attorney general when he is a party, confers with or otherwise contacts any staff personnel employed by the Commission regarding the merits of a pending proceeding, the staff employee shall promptly forward by regular mail a memorandum of the date and general subject matter of such contact to all other parties of record to the proceeding.

(g) Notwithstanding the foregoing, no communication by a public utility or by the public staff regarding the level of rates specifically proposed to be charged by a public utility shall be made or directed to the Commission, a member of the Commission, or hearing examiner, except in the form of written tariff, petition, application, pleading, written response, written recommendation, recorded conference, intervention, answer, pleading, sworn testimony and related exhibits, oral argument on the record, or brief. Willful violations of the provisions of this section on the part of any public utility shall subject such public utility to the penalties provided in G.S. 62-310(a). Willful violations of the provisions of this section by a member of the public staff shall subject such person to dismissal for cause. (1963, c. 1165, s. 1; 1977, c. 468, s. 14; 1979, c. 332, s. 2.)

CASE NOTES

Applied in State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990).

§ 62-71. Hearings to be public; record of proceedings.

(a) All formal hearings before the Commission, a panel of three commissioners, a commissioner or an examiner shall be public, and shall be conducted in accordance with such rules as the Commission may prescribe. A full and complete record shall be kept of all proceedings on any formal hearing, and all testimony shall be taken by a reporter appointed by the Commission. Any party to a proceeding shall be entitled to a copy of the record or any part thereof upon the payment of the reasonable cost thereof as determined by the Commission.

(b) The Commission in its discretion may approve stenographic or mechanical methods of recording testimony, or a combination of such methods, and a transcript of any such record shall be valid for all purposes, subject to protest and settlement by the Commission.

(c) The Commission is authorized to provide daily transcripts of testimony in cases of substantial public interest and in other cases where time is an important factor to the parties involved.

(d) The Commission shall have authority to contract with or employ on a temporary basis, when deemed necessary by the chairman of the Commission, court reporters in addition to those employed on a full-time basis by the Commission, for the purpose of recording and transcribing testimony given at hearings before the Commission involving any Class A or B utility. The Commission is authorized to charge the cost of employing such court reporters directly to the involved utility or utilities. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1975, c. 243, s. 9; 1981, c. 1022.)

CASE NOTES

Formal Hearing. — An informal conference between members of the Commission and representatives of the utility involved in a rate proceeding, which was called at the suggestion of the Commission, and which involved only a single question as to whether the protesting municipalities having industrial users could secure an industrial rate, and at which conference no testimony and no record was taken, was not a formal hearing within the meaning of this section. State ex rel. N.C. Utils. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

§ 62-72. Commission may make rules of practice and procedure.

Except as otherwise provided in this Chapter, the Commission is authorized to make and promulgate rules of practice and procedure for the Commission hearings. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

In the absence of statutory inhibition, the Commission may regulate its own procedure within broad limits, and may prescribe and adopt reasonable rules and regulations with respect thereto, provided such rules are consistent with the statutes governing its actions. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); State ex rel. N.C. Utils. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

Rules Must Not Be Contrary to Statutes. — While the power of the legislature to delegate authority to an administrative agency of the State to prescribe rules and regulations for the due and orderly performance of its public functions is unquestioned, this does not authorize the formulation of rules contrary to the statute. State ex rel. N.C. Utils. Comm'n v. Atlantic C.L.R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

Waiver or Suspension of Rules. — The Commission may adopt its own rules governing pleadings, and has the power to waive or suspend the rules. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

As to challenge to validity of rules by appeal under former law, see State ex rel. N.C. Utils. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944); Utilities Comm'n v. Atlantic Greyhound Corp., 224 N.C. 672, 32 S.E.2d 23 (1944).

Power to Grant Continuance or Extend Hearing. — The Commission may regulate its own procedure within broad limits and that it may suspend or waive its rules. Thus, the commission has the power, within its discretion, to grant a continuance or extend a hearing. State ex rel. Utils. Comm'n v. Conservation Council, 64 N.C. App. 266, 307 S.E.2d 375 (1983), modified on other grounds on rehearing, 66 N.C. App. 456, 311 S.E.2d 617, rev'd in part, 312 N.C. 59, 320 S.E.2d 679 (1984).

Cited in State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-73. Complaints against public utilities.

Complaints may be made by the Commission on its own motion or by any person having an interest, either direct or as a representative of any persons having a direct interest in the subject matter of such complaint by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation or rate heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable. Upon good cause shown and in compliance with the rules of the Commission, the Commission shall also allow any such person authorized to file a complaint, to intervene in any pending proceeding. The Commission, by rule, may prescribe the form of complaints filed under this section, and may in its discretion order two or more complaints dealing with the same subject matter to be joined in one hearing. Unless the Commission shall determine, upon consideration of the complaint or otherwise, and after notice to the complainant and opportunity to be heard, that no reasonable ground exists for an investigation of such complaint, the Commission shall fix a time and place for hearing, after reasonable notice to the complainant and the utility complained of, which notice shall be not less than 10 days before the time set for such hearing. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

CASE NOTES

In determining the scope of the Commission's authority, the emphasis should be placed on the public utility function rather than a literal reading of the statutory definition of "public utility," and the statutory definition should not be read so narrowly as to preclude commission jurisdiction over a function which is required to provide adequate service to the subscribers. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

In a complaint case the field of inquiry is limited to the comparatively narrow question of fair treatment to a group or to a class. State ex rel. Utils. Comm'n v. County of Harnett, 30 N.C. App. 24, 226 S.E.2d 515 (1976).

As to standing of manufacturer and distributor of plastic telephone directory covers to complain and appeal, see State ex rel. Utils. Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

Evidence of Actual Costs of Shipments by Protestant Not Required. — In a complaint proceeding to determine the reasonableness of proposed increased intrastate rates for the shipment of crude earth by rail, respondent railroads were not required to present evidence of actual costs of shipments by protestant brick company between its mine and its manufacturing plant, since the appropriate group or class for the Utilities Commission's consideration was not protestant as an individual shipper at a certain mileage level, but all present and future shippers of crude earth who would be affected by the scale of rates. State ex rel. Utils. Comm'n v. Boren Clay Prods. Co., 48 N.C. App.

263, 269 S.E.2d 234, cert. denied, 301 N.C. 531, 273 S.E.2d 461 (1980).

The Utilities Commission was without jurisdiction to require VEPCO to comply with regulations of the Roanoke Voyages Corridor Commission, or to effect and encourage restoration, preservation, and enhancement of the appearance and aesthetic quality of the U.S. Highway 64 and 264 travel corridor through Roanoke Island, to bear the additional expense of supplying electrical service through underground facilities. The Corridor Commission did not argue or allege inadequate service or unreasonable rates, so the complaint was properly dismissed. State ex rel. Utils. Comm'n v. Roanoke Voyages Corridor Comm'n, 76 N.C. App. 324, 332 S.E.2d 753 (1985).

Providing a correct telephone listing in the yellow pages as well as in the white pages of the directory is a utility function, and the Commission properly has jurisdiction over complaints which arise from this function. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Incorrect Telephone Number Listings. — The Utilities Commission had jurisdiction over complaints concerning incorrect telephone number listings in the telephone directory even when the regulated utility had delegated to another company the public utility function of publishing its directory which also included paid advertising. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Proper Listings in Advertisements in Yellow Pages. — If a utility elects to include yellow pages advertising in the directory which it is required to publish, then clearly proper listings in the advertisements in the yellow pages become a part of the utility's "function of providing adequate service" to the public. The public is not well served by listings in the yellow pages or the white pages of the directory which are incorrect or confusing to the consuming public. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Petition Properly Denied. — The Utilities Commission did not improperly resolve issues of fact without benefit of a hearing by denying petition where the Commission found that no reasonable ground existed for investigating the utility's rates. State ex rel. Utils. Comm'n v. Carolina Indus. Group For Fair Util. Rates, 130 N.C. App. 636, 503 S.E.2d 697 (1998), cert. denied, 349 N.C. 377 (1998).

Applied in State ex rel. Utils. Comm'n v. Public Serv. Co., 59 N.C. App. 448, 297 S.E.2d 119 (1982).

Cited in State ex rel. Utils. Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 93 N.C. App. 260, 377 S.E.2d 772 (1989); State ex rel. Utils. Comm'n v. North Carolina Elec. Membership Corp., 105 N.C. App. 136, 412 S.E.2d 166 (1992); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 500 S.E.2d 693 (1998).

§ 62-73.1. Complaints against providers of telephone services.

(a) A local exchange company or competing local provider that is unable to resolve a customer complaint shall (i) provide notice to the consumer of the consumer's right to contact the Public Staff of the Commission and (ii) provide to the consumer, in writing, contact information for the Public Staff, including both a toll-free telephone number and an electronic mail address.

(b) The Public Staff shall keep a record of all complaints received pertaining to the provider, including the nature of each complaint and the resolution thereof. If the Public Staff determines that it cannot reasonably resolve the matter, the matter shall be referred to the Commission. The standard for review by both the Public Staff and the Commission shall be whether the action or inaction of the provider is reasonable and appropriate. (2009-238, s. 5.)

Editor's Note. — Session Laws 2009-238, s. 7, made this section effective June 30, 2009.

The preamble to Session Laws 2009-238, provides: "Whereas, the technology used to provide communications services has evolved and continues to evolve at an ever-increasing pace; and

"Whereas, the resulting competition between traditional telephone service providers, cable companies offering communications services, Voice-over Internet Protocol (VoIP) providers, wireless communications service providers, and other communications service providers promotes and continues to promote additional consumer choices for these services; and

"Whereas, traditional telephone service providers remain subject to certain antiquated statutory and regulatory restrictions that do not apply to other communications service providers; and

"Whereas, this disparity may deprive consumers of traditional telephone companies of the full range of timely and competitive options and offerings that otherwise would be available to them; and

"Whereas, the General Assembly finds that relaxing certain restrictions for traditional telephone companies will relieve consumers of unnecessary costs and burdens, encourage investment, and promote timely deployment of more innovative offerings at more competitive prices for customers; and

"Whereas, in order to make the full range of competitive options and offerings available to consumers of communications services while maintaining inflation-based price controls for those existing customers who currently receive and wish to continue receiving only stand-alone basic residential lines from traditional telephone companies, the General Assembly hereby enacts the 'Consumer Choice and Investment Act of 2009'; Now, therefore,"

§ 62-74. Complaints by public utilities.

Any public utility shall have the right to complain on any of the grounds upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as in other cases, except that the complaint and notice of hearing shall be served by the Commission upon such interested persons as it may designate. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

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Cited in State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 93 N.C. App. 260, 377 S.E.2d 772 (1989).

§ 62-75. Burden of proof.

Except as otherwise limited in this Chapter, in all proceedings instituted by the Commission for the purpose of investigating any rate, service, classification, rule, regulation or practice, the burden of proof shall be upon the public utility whose rate, service, classification, rule, regulation or practice is under investigation to show that the same is just and reasonable. In all other proceedings the burden of proof shall be upon the complainant. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1985, c. 676, s. 8.)

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Burden upon Party Seeking Rate Increase. — The burden of proof is upon the utility seeking a rate increase to show the proposed rates are just and reasonable. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 24 N.C. App. 327, 210 S.E.2d 543 (1975), vacated and appeal dismissed, 289 N.C. 286, 221 S.E.2d 322 (1976).

The burden is upon carriers asking for an increase in rates to prove justification for the increase and that the proposed rate is just and reasonable. State ex rel. N.C. Utils. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210, modified, 268 N.C. 204, 150 S.E.2d 337 (1966).

And Not upon Shippers or Customers. — At a hearing on a proposed increase in charges for railroad services, the shippers and customers of the railroads have no burden of proving anything; the previous rates are presumed to be fair and reasonable and so are the orders of the Commission. State ex rel. N.C. Utils. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210, modified, 268 N.C. 204, 150 S.E.2d 337 (1966).

The burden of proving that dedicated service rate is discriminatory and preferential lies with protestants, the complaining parties. State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

The burden of proof is upon an applicant for a certificate of public convenience and necessity to show there is a public convenience and necessity for its proposed service. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Burden of Proof as to Counterclaim. — Where the challenge to the rate of return arose from protestants' counterclaim, the protestants were therefore complainants, and the burden was upon them. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Legality of Rule Placing Burden upon All Carriers as to All Rates. — This section uses the word "carrier" or "utility" in the singular. Therefore, when the Commission initiates an investigation of the entire rate structure of motor carriers, and places upon the carriers the burden of showing that the old rates, which have been in effect for a number of years with the approval of the Commission, are just and reasonable, a question arises as to whether the Commission has exceeded its legislative authority. See State ex rel. Utils. Comm'n v. North Carolina Motor Carriers Ass'n, 253 N.C. 432, 117 S.E.2d 271 (1960).

Plaintiff Must Prove Facts Essential to Relief. — This section imposes upon plaintiff the burden of proving the facts essential to its right to relief from the relationship of which it complains. State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Applied in State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972); State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utils. Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234 (1980); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 57 N.C. App. 489, 291 S.E.2d 789 (1982).

Cited in State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966); State ex rel. Utils. Comm'n v. Central Tel. Co., 60 N.C. App. 393, 299 S.E.2d 264 (1983).

§ 62-76. Hearings by Commission, panel of three commissioners, single commissioner, or examiner.

(a) Except as otherwise provided in this Chapter, any matter requiring a hearing shall be heard and decided by the Commission or shall be referred to a panel of three commissioners or one of the commissioners or a qualified member of the Commission staff as examiner for hearing, report and recommendation of an appropriate order or decision thereon. Subject to the limitations prescribed in this Article, a panel of three commissioners, hearing commissioner or examiner to whom a hearing has been referred by order of the chairman shall have all the rights, duties, powers and jurisdiction conferred by this Chapter upon the Commission. The chairman, in his discretion, may direct any hearing by the Commission or any panel, commissioner or examiner to be held in such place or places within the State as he may determine to be in the public interest and as will best serve the convenience of interested parties. Before any member of the Commission staff enters upon the performance of duties as an examiner, he shall first take, subscribe to and file with the Commission an oath similar to the oath required of members of the Commission.

(b) Repealed by Session Laws 1975, c. 243, s. 5.

(c) In all cases in which a pending proceeding shall be assigned to a hearing commissioner, such commissioner shall hear and determine the proceedings and submit his recommended order, but, in the event of a petition to the full Commission to review such recommended order, the hearing commissioner shall take no part in such review, either in hearing oral argument or in consideration of the Commission's decision, but his vote shall be counted in such decision to affirm his original order. (1949, c. 989, s. 1; 1959, c. 639, s. 3; 1963, c. 1165, s. 1; 1975, c. 243, ss. 5, 9, 10.)

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This section supports the holding that three commissioners concurring in order of Commission must have heard evidence. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

Resignation of Commissioner. — The North Carolina Utilities Commission's order requiring the carrier to pay for those calls at intrastate rates did not contravene G.S. 62-76 just because one of the members of a three-member panel that heard the complaint resigned before the panel issued its findings; the Commission's order requiring the carrier to pay a telecommunications company $1,898,685 because it paid for intrastate calls using interstate rates was not an illegal award of damages and was supported by the record. State ex rel. Utils. Comm'n v. Thrifty Call, Inc., 154 N.C. App. 58, 571 S.E.2d 622, 2002 N.C. App. LEXIS 1412 (2002), cert. denied, appeal dismissed, 357 N.C. 66, 579 S.E.2d 575 (2003).

§ 62-77. Recommended decision of panel of three commissioners, single commissioner or examiner.

Any report, order or decision made or recommended by a panel of three commissioners, commissioner or examiner with respect to any matter referred for hearing shall be in writing and shall set forth separately findings of fact and conclusions of law and shall be filed with the Commission. A copy of such recommended order, report and findings shall be served upon the parties who have appeared in the proceeding. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1975, c. 243, s. 9.)

§ 62-78. Proposed findings, briefs, exceptions, orders, expediting cases, and other procedure.

(a) Prior to each decision or order by the Commission in a proceeding initially heard by it and prior to any recommended decision or order of a panel of three commissioners, commissioner or examiner, the parties shall be afforded an opportunity to submit, within the time prescribed by order entered in the cause, unless further extended by order of the Commission, for the consideration of the Commission, panel, commissioner or examiner, as the case may be, proposed findings of fact and conclusions of law and briefs or, in its discretion, oral arguments in lieu thereof.

(b) Within the time prescribed by the panel of three commissioners, commissioner, or examiner, the parties shall be afforded an opportunity to file exceptions to the recommended decision or order and a brief in support thereof, provided the time so fixed shall be not less than 15 days from the date of such recommended decision or order. The record shall show the ruling upon each requested finding and conclusion or exception.

(c) In all proceedings in which a panel of three commissioners, commissioner or examiner has filed a report, recommended decision or order to which exceptions have been filed, the Commission, before making its final decision or order, shall afford the party or parties an opportunity for oral argument. When no exceptions are filed within the time specified to a recommended decision or order, such recommended decision or order shall become the order of the Commission and shall immediately become effective unless the order is stayed or postponed by the Commission; provided, the Commission may, on its own motion, review any such matter and take action thereon as if exceptions thereto had been filed.

(d) When exceptions are filed, as herein provided, it shall be the duty of the Commission to consider the same and if sufficient reason appears therefor, to grant such review or make such order or hold or authorize such further hearing or proceeding as may be necessary or proper to carry out the purposes of this Chapter. The Commission, after review, upon the whole record, or as supplemented by a further hearing, shall decide the matter in controversy and make appropriate order or decision thereon.

(e) The Commission may expedite the hearing and decision of any case if the public interest so requires by the use of pretrial conferences, daily transcripts of evidence, trial briefs, and prompt oral argument, and by granting priority to the hearing and decision of such case. (1949, c. 989, s. 1; 1959, c. 639, s. 4; 1963, c. 1165, s. 1; 1975, c. 243, ss. 9, 10; c. 867, s. 5.)

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Ordinarily, the procedure before the Commission is more or less informal and is not as strict as in superior court, nor is it confined by technical rules; substance and not form is controlling. State ex rel. Utils. Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963).

This section requires the Commission to find all facts essential to a determination of the question at issue. Having found the facts, it may then make factual conclusions. State ex rel. Utils. Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

The reason for compelling adequate factual findings is to permit proper judicial review. State ex rel. Utils. Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

The duty imposed is similar to that duty imposed on a judge of the superior court by former G.S. 1-185 when a jury trial is waived, and on the Industrial Commission by G.S. 97-84 before it can award or deny compensation. State ex rel. Utils. Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

Power to Alter or Amend Orders. — Whatever the effect of subsection (c) of this section on an order filed by a panel of three Commissioners, this does not affect the power of the Utilities Commission to act pursuant to G.S. 62-80. G.S. 62-80 provides the Utilities Commission may "alter or amend" an order after a hearing. By using the words "alter or amend" the legislature intended that the Commission may change an order in some respects without considering all factors that must be considered in a general rate case. The statute does not limit changes in orders to those that have not become final. State ex rel. Utils. Comm'n v. Public Serv. Co., 59 N.C. App. 448, 297 S.E.2d 119 (1982).

Failure to Make Findings Necessitates Remand. — A failure by the Commission to find facts essential to a determination of the rights of the parties necessitates a remand to the Commission to make necessary findings on which it may base its order. State ex rel. Utils. Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

Improper Appeal. — To allow an appeal from a recommended order to which no exception has been taken and which has become the final order of the full Commission by operation of the statute would allow a party, in effect, to "bypass" the full Commission, usurping the administrative agency's authority. State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

Applied in State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

Cited in State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 500 S.E.2d 693 (1998).

§ 62-79. Final orders and decisions; findings; service; compliance.

(a) All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:

(1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and

(2) The appropriate rule, order, sanction, relief or statement of denial thereof.

(b) A copy of every final order or decision under the seal of the Commission shall be served by registered or certified mail upon the person against whom it runs or his attorney and notice thereof shall be given to the other parties to the proceeding or their attorney. Such order shall take effect and become operative when issued unless otherwise designated therein and shall continue in force either for a period which may be designated therein or until changed or revoked by the Commission. If an order cannot, in the judgment of the Commission, be complied with within the time designated therein, the Commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. (1949, c. 989, s. 1; 1957, c. 1152, s. 4; 1959, c. 639, s. 4; 1961, c. 472, s. 1; 1963, c. 1165, s. 1; 1981, c. 193, s. 2.)

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The Commission is required by this section to find all facts essential to a determination of the question at issue. State ex rel. Utils. Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969).

Subsection (a) of this section requires the Commission to find all facts which are essential to a determination of the issues before it, in order that the reviewing court may have sufficient information to determine whether an adequate basis exists, in law and in fact, to support the Commission's resolution of the controverted issues. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

This section requires the commission to find all facts essential to a determination of the question at issue. The commission, however, is not required to comment on every single fact or item of evidence presented by the parties. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

The purpose of the findings required by subsection (a) is to provide the reviewing court with sufficient information to allow it to determine the controverted questions presented in the proceedings. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

The purpose of the required detail as to findings, conclusions, and reasons as mandated by subsection (a) is to provide the appellate court with sufficient information with which to determine under the scope of review the questions at issue in the proceedings. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 500 S.E.2d 693 (1998).

Commission Need Not Comment on Every Fact Presented. — Although the Utilities Commission must consider and determine controverted questions by making findings of fact and conclusions of law, and must set forth the reasons and bases therefor "upon all the material issues of fact, law, or discretion," it need not comment upon every single fact or item of evidence presented by the parties. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

This section does not require that an order of the Commission contain a summary of the appellant's argument if the order taken as a whole is sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and contains the necessary findings of fact and conclusions of law. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

Commission's mislabeling of its findings and conclusions will not be fatal to its order if certain procedural requirements are met. As long as each link in the chain of reasoning appears in the commission's order, mislabeling is merely an inconvenience to the courts. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

The Commission has the duty to enter final orders that are sufficient in detail to enable the Supreme Court on appeal to determine the controverted issues. State ex rel. Utils. Comm'n v. AT & T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

Findings Under G.S. 62-133(d). — The "other material facts of record" considered by the Commission under G.S. 62-133(d) in fixing reasonable and just rates must be found and set forth in its order so that the reviewing court may see what these elements are. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

The Commission is required to set forth factors it considers in fixing reasonable and just rates which are not enumerated in G.S. 62-133. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Questions of Original and Replacement Costs as "Material Issues of Fact". — When the record before the Commission presents questions of the original cost, less depreciation and the replacement cost, less depreciation, these are "material issues of fact," upon each of which the Commission must make its finding. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Determination of "Fair Value". — Having made properly supported findings, it is for the Commission, not the reviewing court, to determine, in its expert discretion and by the use of "balanced scales," the relative weights to be given these several factors in ascertaining the ultimate fact of "fair value." State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

While the Commission has the duty to weigh evidence of "fair value" fairly and in "balanced scales," the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Failure to include all necessary findings of fact is an error of law and a basis for remand under G.S. 62-94(b)(4) because it frus-

trates appellate review. State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

The Commission's order must be sufficient within itself to comply with the statute. Failure to include all necessary findings of fact and details is an error of law and a basis for remand under G.S. 62-94(b)(4) because it frustrates appellate review. State ex rel. Utils. Comm'n v. AT & T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

The Commission was required to make specific findings showing what effect, if any, it gave to financing costs or down market protection, or both, in arriving at its common equity rate of return decision. Failure to do so constituted an error of law requiring a remand for further proceedings. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

Findings Must Be Supported by Competent Evidence. — Since the Commission is required to render its decisions upon questions of law and of fact in the same manner as a court of record, its findings must, as a matter of law, be supported by competent evidence. State ex rel. Utils. Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

Findings Held Sufficient. — Where its final order showed that the Commission arrayed factors suggesting a higher rate of return against those suggesting a lower rate, and appellant's evidence was given substantial weight in the Commission's ultimate conclusion, the Commission's order was sufficiently detailed, and its findings in support of its conclusion were adequate to comply with this section. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988).

Utilities Commission's decision to accept an expert's recommendation of an 11.4% return on equity, based on the credibility and objectivity of his company-specific "discounted cash flow" analysis, was independently reached and supported by competent, material, and substantial evidence. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

Commission's order was sufficient to allow the appellate court to determine the issues of jurisdiction, i.e. violation of the commerce clause, supremacy of federal law, and statutory authorization. State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 174 N.C. App. 681, 622 S.E.2d 169, 2005 N.C. App. LEXIS 2590 (2005).

Reasons for Rejecting Uncontradicted Opinion Testimony. — The Commission is not, as a matter of law, required to set forth in its order its reasons for rejecting uncontradicted opinion testimony; however, it is the better practice for the Commission to do so. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

In a complaint proceeding to determine the reasonableness of proposed increased intrastate rates for the shipment of crude earth by rail, the Utilities Commission was not required to make a specific finding that an emergency or change of circumstances not affecting the entire rate structure had occurred in order to allow a change in the rates. State ex rel. Utils. Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234, cert. denied, 301 N.C. 531, 273 S.E.2d 461 (1980).

Different Reasons Given by Concurring Commissioners Not Grounds for Reversal. — When G.S. 62-60 and subsection (a) of this section are construed together, as they must be, it is apparent that the General Assembly did not intend that an order of the Commission concurred in by the majority of its members, based upon findings of fact concurred in by a majority of its members, might be reversed solely because the members of the concurring majority chose different rules, or supposed rules, of law as support for their decision and order. The diversity of the reasons given by the three commissioners who join in an ultimate decision and order are not a sufficient ground for its reversal. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Order prescribing different Private Line Service rates for AT&T's nonreseller (end user) customers and its reseller customers upon its face was discriminatory, and absent legally adequate reasons in the order why it was not unjustly discriminatory within the meaning of G.S. 62-2(4), the order would be vacated and the cause remanded to the Commission for further proceedings. State ex rel. Utils. Comm'n v. AT & T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

Applied in State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 313 N.C. 215, 328 S.E.2d 264 (1985).

Cited in State ex rel. Utils. Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972); State ex rel. Utils. Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838 (1980); State ex rel. Utils. Comm'n v. Conservation Council, 64 N.C. App. 266, 307 S.E.2d 375 (1983); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988); State ex rel. Utils. Comm'n

v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 337 N.C. 236, 446 S.E.2d 348 (1994); In re Petition of Utils., Inc., 147 N.C. App. 182, 555 S.E.2d 333, 2001 N.C. App. LEXIS 1141 (2001).

§ 62-80. Powers of Commission to rescind, alter or amend prior order or decision.

The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

CASE NOTES

Procedure to Be Informal. — Since the regulation of public utilities is a continuing and continuous process as to each utility, procedure before the Commission must be more or less informal and not confined by technical rules, in order that regulation may be consistent with changing conditions. State ex rel. Utilities Comm'n v. Associated Petro. Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972), cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

This section does not require a motion by the public utility, or other party, as a condition precedent to the authority of the Utilities Commission to amend a previously issued order. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977).

Reconsideration Does Not Require New and Independent Proceeding. — The Utilities Commission has the authority, upon its own motion or upon motion by any party, to reconsider its previously issued order, upon proper notice and hearing, and upon the record already compiled, without requiring institution of a new and independent proceeding by complaint or otherwise. State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

Authority to Rescind, Alter or Amend Is Discretionary. — The statutory authority of the Utilities Commission to rescind, alter or amend any order or decision made by it, upon proper notice to parties and after opportunity for hearing, is obviously discretionary. State ex rel. Utils. Comm'n v. Services Unlimited, Inc., 9 N.C. App. 590, 176 S.E.2d 870 (1970).

General Rate Hearing Not Required for Amendment. — This section requires that the procedures of complaint hearings shall be used before amending an order but it does not require a general rate hearing before an order may be amended. State ex rel. Utils. Comm'n v. Public Serv. Co., 59 N.C. App. 448, 297 S.E.2d 119 (1982).

Effect of G.S. 62-78(c) on Power to Alter or Amend. — Whatever the effect of G.S. 62-78(c) on an order filed by a panel of three Commissioners, this does not affect the power of the Utilities Commission to act pursuant to this section. This section provides that the Utilities Commission may "alter or amend" an order after a hearing. By using the words "alter or amend" the legislature intended that the Commission may change an order in some respects without considering all factors that must be considered in a general rate case. The statute does not limit changes in orders to those that have not become final. State ex rel. Utils. Comm'n v. Public Serv. Co., 59 N.C. App. 448, 297 S.E.2d 119 (1982).

Reconsideration Until Order Is Final. — At least until an order becomes final by expiration of the time allowed for appeal, this section authorizes the Commission, upon its own motion or upon the motion of any party, to reconsider a previously issued order, upon proper notice and hearing, upon the record already compiled, without requiring the institution of a new and independent proceeding by complaint or otherwise. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977).

Modification, etc., Based on Prior Misapprehension of Facts. — This section is broad enough to permit the Commission to modify and amend its order, even substantially, where, upon further consideration of the record before it, the Commission comes to the opinion that its order was due to the Commission's misapprehension of the facts, or disregard of facts, shown by the evidence received at the original hearing. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977).

The Commission may not arbitrarily or capriciously rescind its order approving a contract between utilities. It must appear that such rescission is made because of a change of circumstances requiring it in the public interest. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

In the absence of statutory authority, and in the absence of any additional evidence or a change in conditions, the Commission has no power to reopen a proceeding and modify or set aside an order theretofore made by it, where the order was made in pursuance of an agreement entered into by the parties to the proceeding. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Circumstances Justifying Rescission of Prior Order Approving Agreement Between Carriers. — The improvement and construction of highways between two municipalities making feasible a new and quicker bus route between them was a sufficient change of condition to empower the Utilities Commission to modify or rescind a prior order entered by it approving an agreement between two carriers in regard to their respective services to the public between the two municipalities along the older routes. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Revocation of Prior Order Reversed. — An order of the Utilities Commission revoking its prior order approving an agreement between carriers in regard to their respective services along the route in question and substituting in lieu thereof an order of the Commission having the same effect as the agreement, was reversed, there being no evidence to support the Commission's conclusion that the new order would promote harmony among the carriers, and there being no showing of a change of condition requiring a revision of the prior order in the public interest. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

"Complaint Proceeding" Distinguished from General Rate Case. — A hearing pursuant to the provisions of this section and G.S. 62-136 which involves a single rate or small part of a rate structure of a public utility is called a "complaint proceeding." It differs from a general rate case in that it deals with an emergency or change of circumstances which does not affect the entire rate structure of a utility and may be resolved without involving the procedure outlined in G.S. 62-133. State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

An appeal does not lie from the denial of a petition to rehear. State ex rel. Utils. Comm'n v. Services Unlimited, Inc., 9 N.C. App. 590, 176 S.E.2d 870 (1970).

Running of Appeal Time Tolled. — The running of the time for appeal of an order of the Utilities Commission is tolled during the period between the filing of a petition for reconsideration and the order denying the motion. State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

Applied in State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

Cited in State ex rel. Utils. Comm'n v. North Carolina Gas Serv., 128 N.C. App. 288, 494 S.E.2d 621 (1998); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc., 142 N.C. App. 127, 542 S.E.2d 247, 2001 N.C. App. LEXIS 39 (2001).

§ 62-81. Special procedure in hearing and deciding rate cases.

(a) All cases or proceedings, declared to be or properly classified as general rate cases under G.S. 62-137, or any proceedings which will substantially affect any utility's overall level of earnings or rate of return, shall be set for trial or hearing by the Commission, which trial or hearing shall be set to commence within six months of the institution or filing thereof, and all such cases or proceedings shall be tried or heard and decided, with the issuance of a final order, by the Commission within nine months of the institution or filing thereof. All such cases or proceedings shall be tried or heard and decided in accordance with the rate-making procedure set forth in G.S. 62-133 and such cases shall be given priority over all other cases or proceedings pending before the Commission. In all such cases the Commission shall make a transcript of the evidence and testimony presented and received by it and shall furnish a copy thereof to any party so requesting by the third business day after the taking of such evidence and testimony.

(b) Any public utility filing or applying for an increase in rates for electric, telephone, natural gas or water service shall notify its customers proposed to be affected by such increase of such filing by regular mail or by newspaper publications, as directed by the Commission, within 30 days of such filing, which notice shall state that the Commission shall set and shall conduct a trial or hearing with respect to such filing or application within six months of said filing date. All other public utilities shall give such notice in such manner as shall be prescribed by the Commission.

(c) In cases or proceedings filed with and pending before the Commission, where the total annual revenue requested, or where the total annual revenue increase requested, is less than three hundred thousand dollars ($300,000), even though all or a substantial portion of the rate structure is being initially established or is under review, the chairman of the Commission may refer the proceeding to a panel of three commissioners or to a hearing commissioner or to a hearing examiner for hearing.

(d) In all proceedings for an increase in rates and all other proceedings declared to be general rate cases under G.S. 62-137, the Commission shall conduct the hearing or portions of the hearing within the area of the State served by the public utility whose rates are under consideration, provided this subsection shall not apply to proceedings held pursuant to G.S. 62-134(e) and 62-133(f).

(e) Notwithstanding the provisions of this section, application by any public utility for permission and authority to adjust its rates and charges based solely upon the cost of fuel used in the generation or production of electric power shall be determined in accordance with the provisions of G.S. 62-134(e).

(f) Notwithstanding the provisions of this section, or other provisions of this Chapter which would otherwise require a hearing, where there is no significant public protest received within 30 days of the publication of notice of a proposed rate change for a water or sewer utility, the Commission may decide the proceeding based on the record without a trial or hearing, provided said utility and all other parties of record have waived their right to any such hearing. Any decision made pursuant to this subsection shall be made in accordance with the provisions of G.S. 62-133 or 62-133.1. (1963, c. 1165, s. 1; 1973, c. 1074; 1975, c. 45; c. 243, ss. 6, 9; c. 867, s. 6; 1977, c. 468, s. 15; 1981, c. 193, s. 3; c. 439.)

Editor's Note. — G.S. 62-133(f), referred to in subsection (d) of this section, was repealed by Session Laws 1991, c. 598, s. 7.

G.S. 62-134(e), referred to in subsections (d) and (e) of this section, was repealed by Session Laws 1981 (Regular Session, 1982), c. 1197, s. 2.

CASE NOTES

Applied in State ex rel. Utils. Comm'n v. Thornburg, 324 N.C. 478, 380 S.E.2d 112 (1989).

Cited in State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976); State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

§ 62-82. Special procedure on application for certificate for generating facility; appeal from award order.

(a) Notice of Application for Certificate for Generating Facility; Hearing; Briefs and Oral Arguments. — Whenever there is filed with the Commission an application for a certificate of public convenience and necessity for the construction of a facility for the generation of electricity under G.S. 62-110.1, the Commission shall require the applicant to publish a notice thereof once a week for four successive weeks in a daily newspaper of general circulation in the county where such facility is proposed to be constructed and thereafter the Commission upon complaint shall, or upon its own initiative may, upon reasonable notice, enter upon a hearing to determine whether such certificate shall be awarded. Any such hearing must be commenced by the Commission not later than three months after the filing of such application, and the procedure for rendering decisions therein shall be given priority over all other cases on the Commission's calendar of hearings and decisions, except rate proceedings referred to in G.S. 62-81. Such applications shall be heard as provided in G.S. 62-60.1, and the Commission shall furnish a transcript of evidence and testimony submitted by the end of the second business day after the taking of each day of testimony. The Commission or panel shall require that briefs and oral arguments in such cases be submitted within 30 days after the conclusion of the hearing, and the Commission or panel shall render its decision in such cases within 60 days after submission of such briefs and arguments. If the Commission or panel does not, upon its own initiative, order a hearing and does not receive a complaint within 10 days after the last day of publication of the notice, the Commission or panel shall enter an order awarding the certificate. Notwithstanding this section, applicants for a certificate for solar photovoltaic facilities of 10 kilowatts or less are exempt from the requirement to publish public notice in newspapers.

(b) Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110.1; Bond Prerequisite to Appeal. — Any party or parties opposing, and appealing from, an order of the Commission which awards a certificate under G.S. 62-110.1 shall be obligated to recompense the party to whom the certificate is awarded, if such award is affirmed upon appeal, for the damages, if any, which such party sustains by reason of the delay in beginning the construction of the facility which is occasioned by the appeal, such damages to be measured by the increase in the cost of such generating facility (excluding legal fees, court costs, and other expenses incurred in connection with the appeal). No appeal from any order of the Commission which awards any such certificate may be taken by any party opposing such award unless, within the time limit for filing notice of appeal as provided for in G.S. 62-90, such party shall have filed with the Commission a bond with sureties approved by the Commission, or an undertaking approved by the Commission, in such amount as the Commission determines will be reasonably sufficient to discharge the obligation hereinabove imposed upon such appealing party. The Commission may, when there are two or more such appealing parties, permit them to file a joint bond or undertaking. If the award order of the Commission is affirmed on appeal, the Commission shall determine the amount, if any, of damages sustained by the party to whom the certificate was awarded, and shall issue appropriate orders to assure that such damages be paid and, if necessary, that the bond or undertaking be enforced. (1965, c. 287, s. 3; 1975, c. 243, s. 7; 2004-199, s. 23.)

CASE NOTES

Scope of Commission's Authority and Jurisdiction. — North Carolina Utilities Commission's dismissal of petitioner independent power producer's application and its establishment of minimum filing requirements did not constitute an impermissible deviation from the process specifically provided in this section and G.S. 62-110.1, and some deviation from these sections was not beyond the Commission's authority and jurisdiction. State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993), cert. denied, 335 N.C. 564, 441 S.E.2d 125 (1994).

Cited in Commissioner of Labor v. House of Raeford Farms, Inc., 124 N.C. App. 349, 477 S.E.2d 230 (1996).

§§ 62-83 through 62-89: Reserved for future codification purposes.

ARTICLE 5.

Review and Enforcement of Orders.

§ 62-90. Right of appeal; filing of exceptions.

(a) Any party to a proceeding before the Commission may appeal from any final order or decision of the Commission within 30 days after the entry of such final order or decision, or within such time thereafter as may be fixed by the Commission, not to exceed 30 additional days, and by order made within 30 days, if the party aggrieved by such decision or order shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decisions or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.

All other parties may give notice of cross appeal and set out exceptions which shall set forth specifically the grounds on which the said party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission. Such notice of cross appeal and exceptions shall be filed with the Commission within 20 days after the first notice of appeal and exceptions has been filed, or within such time thereafter as may be fixed by the Commission, not to exceed 20 additional days by order made within 20 days of the first filed notice of appeal and exceptions.

(b) Any party may appeal from all or any portion of any final order or decision of the Commission in the manner herein provided. Copy of the notice of appeal shall be mailed by the appealing party at the time of filing with the Commission, to each party to the proceeding to the addresses as they appear in the files of the Commission in the proceeding. The failure of any party, other than the Commission, to be served with or to receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal.

(c) The Commission may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commission.

(d) The appeal shall lie to the appellate division of the General Court of Justice as provided in G.S. 7A-29. The procedure for the appeal shall be as provided by the rules of appellate procedure.

(e), (f) Repealed by Session Laws 1975, c. 391, s. 12.

(g) Repealed by Session Laws 1983, c. 526, s. 5. (1949, c. 989, s. 1; 1955, c. 1207, s. 1; 1959, c. 639, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 1; 1975, c. 391, s. 12; 1983, c. 526, ss. 4, 5; c. 572.)

Cross References. — As to jurisdiction of the Supreme Court to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission, see N.C. Const., Art. IV, § 12(1).

CASE NOTES

I. In General.
II. Cases Decided Prior to 1949 Revision of Procedural Sections.

I. IN GENERAL.

Necessity for Timely Filing. — An affected party must file exceptions to the determination or decision within 10 (now 30) days after notice of the determination or decision. In re Housing Auth., 233 N.C. 649, 65 S.E.2d 761 (1961).

The Court of Appeals is without jurisdiction to review an original order of the Utilities Commission where no appeal has been taken from the order and the time for giving notice and perfecting appeal has expired. State ex rel. Utils. Comm'n v. Services Unlimited, Inc., 9 N.C. App. 590, 176 S.E.2d 870 (1970).

Who May Appeal. — An appeal from the Utilities Commission is limited to parties to the proceeding; a party is not affected by a ruling of the Utilities Commission unless the decision affects or purports to affect some right or interest of a party to the controversy and is in some way determinative of some material question involved. In re Housing Auth., 233 N.C. 649, 65 S.E.2d 761 (1961).

In order to have standing to appeal under this section, a party must not only file notice of appeal within 30 days, but must also be aggrieved. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 104 N.C. App. 216, 408 S.E.2d 876 (1991), cert. denied, 330 N.C. 618, 412 S.E.2d 95 (1992).

G.S. 62-137 Inapplicable to Proceedings Under Subsection (c) of This Section. — G.S. 62-137 is inapplicable to proceedings conducted under subsection (c) of this section, since their scope is limited by statute to the exceptions on which the particular appeal of a final order or decision is based, leaving the Commission without authority to declare the hearings a general rate case or complaint proceeding. The Commission may consider only the grounds upon which the applicant asserts that the Commission's order or decision is unlawful, unjust, unreasonable or unwarranted, including alleged errors committed by the Commission. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Utility customers association was not an aggrieved party entitled to appeal an order of the Utilities Commission adopting a rate making formula which authorized a natural gas company to adjust its rates when it purchased gas from nontraditional sources. Contention that association was an aggrieved party because the order would allow gas company to increase its rates in the future to the extent necessary to offset previous reductions under the order was without merit. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 104 N.C. App. 216, 408 S.E.2d 876 (1991), cert. denied, 330 N.C. 618, 412 S.E.2d 95 (1992).

Because the Utilities Commission's order regarding funding for a non-profit research organization did not impact rates and because any rate increases would have been effectuated at subsequent rate cases, intervenor-utility customers association was not an "aggrieved party" within the meaning of this section and, thus, lacked standing to appeal. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc., 142 N.C. App. 127, 542 S.E.2d 247, 2001 N.C. App. LEXIS 39 (2001).

Appellate Court Had No Jurisdiction to Review Commission's Interlocutory Order. — Water and sewer processing facilities part-owner's appeal of interlocutory orders of the North Carolina Utilities Commission holding that the part-owner was a public utility under G.S. 62-3(23)a.2 and was subject to the Commission's jurisdiction was dismissed as the absence of any exceptions to G.S. 62-90 or 7A-29, allowing review of interlocutory orders of the Commission, required the appellate court to conclude that it had no jurisdiction to consider appeals of interlocutory orders of the Commission; further, the appellate court did not have authority under G.S. 7A-32(c) to review the part-owner's issues as there was no final order of the Commission. State ex rel. Utils. Comm'n v. Buck Island, Inc., 158 N.C. App. 536, 581 S.E.2d 122, 2003 N.C. App. LEXIS 1186 (2003).

Appeals from Final Orders of North Carolina Utilities Commission. — G.S. 62-90(a) and (d) provide for appeals of final orders of the North Carolina Utilities Commission; G.S. 7A-29(a) and (b) provide for appeals of right from certain administrative agencies, and G.S. 7A-27(d) provides for appeals of right from certain interlocutory orders of the superior or district courts. State ex rel. Utils. Comm'n v. Buck Island, Inc., 158 N.C. App. 536, 581 S.E.2d 122, 2003 N.C. App. LEXIS 1186 (2003).

Construing Notice of Appeal. — Notices of appeal would be considered to be appeals from the original order of the Utilities Commission, even though joint appellants' notices stated that they were appealing from denial of their petition for reconsideration, a non-appealable order, where it could be fairly inferred that they intended to appeal from the original orders and the appellee was not misled. State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

Federal Jurisdiction over Disputes Arising Under This Statute. — The district court erred in asserting federal jurisdiction under 47 U.S.C. § 252(e)(6) over disputes involving contract administration, interpretation and enforcement; the interconnection agreements at the core of those disputes were submitted to the NCUC and approved by it, and no judicial review was sought from these State commission determinations pursuant to this section. Bellsouth Telecomms. v. North Carolina Utils. Comm'n, 240 F.3d 270, 2001 U.S. App. LEXIS 2159 (4th Cir. 2001).

Applied in State ex rel. Utils. Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963); State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973); State ex rel. Utils. Comm'n v. Edmisten, 29 N.C. App. 258, 224 S.E.2d 219 (1976); State ex rel. Utils. Comm'n v. Seaboard C.L.R.R., 62 N.C. App. 631, 303 S.E.2d 549 (1983); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 111 N.C. App. 251, 431 S.E.2d 880 (1993); State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

Cited in State ex rel. Utils. Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976); State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986); State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 92 N.C. App. 545, 375 S.E.2d 515 (1989); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 106 N.C. App. 218, 415 S.E.2d 758 (1992); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 500 S.E.2d 693 (1998).

II. CASES DECIDED PRIOR TO 1949 REVISION OF PROCEDURAL SECTIONS.

Editor's Note. — *All of the cases below were decided before the 1949 revision of the statute relating to procedure before the Utilities Commission and appeals therefrom, and construe former G.S. 62-19 and 62-20, to which this section corresponds.*

Powers and Jurisdiction of Commission. — Under this Chapter as it stood prior to the revision of 1949, it was held that, for the purpose of making investigations and conducting hearings, the legislature had constituted the North Carolina Utilities Commission a court of record, with all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced within the purview of the statute, for which procedure was prescribed and authorized, with the right in "any party affected thereby" to appeal "from all decisions or determinations made by the Utilities Commission." State ex rel. N.C. Utils. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944); Utilities Comm'n v. Atlantic Greyhound Corp., 224 N.C. 672, 32 S.E.2d 23 (1944).

Orders of Commission Need No Confirmation. — The Utilities Commission is a State administrative agency of original and final jurisdiction, and its orders require no confirmation by any court to be effective. State ex rel. Utils. Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

Injunctive Relief Against Exercise of Rights Granted by Commission Refused. — Where plaintiffs instituted action against a competing carrier to restrain it from exercising rights given it by orders of the Utilities Commission amending its franchise, the orders having been entered in proceedings to which plaintiffs were parties, it was held that plaintiffs had an adequate remedy for the protection of their rights by appeal under former G.S. 62-19 and 62-20, and judgment sustaining defendant's demurrer in the independent action was proper. Atlantic Greyhound Corp. v. North Carolina Utils. Comm'n, 229 N.C. 31, 47 S.E.2d 473 (1948).

Right of Appeal Confined to Parties. — Former G.S. 62-20 distinctly confined the right of appeal to a party to the proceeding. North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

Former statute, providing that "from all decisions or determinations made by the Corporation Commission any party affected thereby shall be entitled to an appeal," necessarily meant from a decision which affected or purported to affect some right or interest of a party to the controversy and was in some way determinative of some material question involved. State ex rel. N.C. Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

Under the provisions of former G.S. 62-20, "any party affected" by the order of the Commission as to rates or charges for passengers by a street railway company, etc., was given the right of appeal to the court from such order. In re Southern Pub. Utils. Co., 179 N.C. 151, 101 S.E. 619 (1919).

The right of appeal conferred by former G.S. 62-20 was limited to a party to the proceeding. For purposes of appeal, those who had no property or proprietary rights which were or might be affected by orders of the Commission were not such parties. An appeal by persons who were not parties to the proceeding would be dismissed by the superior court for the reason that said court acquired no jurisdiction by such appeal. State ex rel. Corp. Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928); State ex rel. N.C. Utils. Comm'n v. City of Kinston, 221 N.C. 359, 20 S.E.2d 322 (1942).

Municipality Entitled to Appeal. — It is the duty of a municipality granting a charter to a corporation to operate a streetcar system therein, which, by contract, has limited the fares to be charged passengers within a certain amount, to represent the public in proceedings upon a petition filed by the railway company before the Commission requesting that it be permitted to raise the fares beyond those limited in the contract, and thus the municipality might appeal through the courts as former G.S. 62-20 prescribed, when the order was adverse to it or the interest it represented, as a "party affected by the decision and determination of the Commission," expressly provided for by the statute. Southern Pub. Utils. Co. v. City of Charlotte, 179 N.C. 151, 101 S.E. 619 (1919).

Citizens seeking to have a railway station moved could not appeal from the Commission's decision, under former G.S. 62-20, because they were not parties. North Carolina

Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

Notice Mandatory. — Under former G.S. 62-20, the statutory notice of an appeal by a railroad company from an order of the Commission was mandatory, and could not be extended by the consent of the parties of record. State ex rel. Corp. Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923); State ex rel. N.C. Utils. Comm'n v. Norfolk S. Ry., 224 N.C. 762, 32 S.E.2d 346 (1944).

Notice to Complaining Party Under Former G.S. 62-20. — When notice of appeal to the superior court was given to the Commission by a railroad company, and other requirements of former G.S. 62-20 relating thereto were met by the company, this was sufficient, without giving notice of the appeal to the complaining party in the proceedings had before the Commission, as upon this appeal the statute made the Commission the party plaintiff. State ex rel. N.C. Corp. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909).

Removal to Federal Courts. — Assuming that an order of the Commission made to compel a carrier to change the location and conditions of its depot to promote the convenience, security and accommodation of the public would be an invasion of interstate commerce, this would not transform the proceedings in which the order was made into "a suit at law or in equity," and, as such, removable from the superior court of the State to an inferior federal tribunal, upon the ground of diverse citizenship. State ex rel. N.C. Corp. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909).

In proceedings for the removal of a cause from the State to the federal courts upon the question of diversity of citizenship under the applicable federal statute, the State court is not bound to surrender its jurisdiction until a case has been made which, on the face of the petition, shows the petitioner has a right to the transfer of the cause to the federal courts. State ex rel. N.C. Corp. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909).

Final Process. — Under this Article as it stood before the 1949 revision, the Commission had no power to enforce its orders and decrees by final process issuing directly therefrom, and for such purpose resort had to be had to ordinary courts, either by independent proceedings or in proper instances by process issued in cases carried before such courts on appeal. State ex rel. N.C. Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908). See G.S. 62-97, 62-98.

Removal of Franchise Restriction as to Carriage of Passengers by Motor Carrier. — Former G.S. 62-20 authorized a petitioner to appeal to the superior court from an adverse ruling of the Utilities Commission on its petition for the removal from its franchise of a restriction in regard to the carriage of passengers, and the contention that no appeal would lie from such order because the right of appeal was governed by the motor carrier laws authorizing an appeal from an order affecting franchise only when entered for violation of law was untenable. State ex rel. Utils. Comm'n v. Carolina Scenic Coach Co., 216 N.C. 325, 4 S.E.2d 897 (1939).

Petitioner had the right to appeal to the superior court from the denial of its petition for the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between such cities. State ex rel. Utils. Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

§ 62-91. Appeal docketed; title on appeal; priorities on appeal.

Unless otherwise provided by the rules of appellate procedure, the cause on appeal from the Utilities Commission shall be entitled "State of North Carolina ex rel. Utilities Commission (here add any additional parties in support of the Commission Order and their capacity before the Commission), Appellee(s) v. (here insert name of appellant and his capacity before the Commission), Appellant." Appeals from the Utilities Commission pending in the superior courts on September 30, 1967, shall remain on the civil issue docket of such superior court and shall have priority over other civil actions. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 6; 1975, c. 391, s. 13; 1983, c. 526, s. 6.)

Cross References. — As to jurisdiction of the Supreme Court to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission, see N.C. Const., Art. IV, § 12(1).

CASE NOTES

Utilities Commission as Party. — When the Utilities Commission sits as a court of record to determine the rights of rival claimants to a valuable franchise, it is somewhat anomalous to find it appearing in the Supreme Court to uphold its order from which one or the other party has appealed. However, this procedure seems to have been authorized by the General Assembly. State ex rel. Utils. Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951).

§ 62-92. Parties on appeal.

In any appeal to the appellate division of the General Court of Justice, the complainant in the original complaint before the Commission shall be a party to the record and each of the parties to the proceeding before the Commission shall have a right to appear and participate in said appeal. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 2; 1983, c. 526, s. 7.)

Cross References. — As to jurisdiction of the Supreme Court to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission, see N.C. Const., Art. IV, § 12(1).

CASE NOTES

The Utilities Commission is a party of record in a proceeding before it, and upon appeal the Commission becomes the party plaintiff. State ex rel. N.C. Utils. Comm'n v. Norfolk S. Ry., 224 N.C. 762, 32 S.E.2d 346 (1944).

As to standing of manufacturer and distributor of plastic telephone directory covers to complain and appeal, see State ex rel. Utils. Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

§ 62-93. No evidence admitted on appeal; remission for further evidence.

No evidence shall be received at the hearing on appeal but if any party shall satisfy the court that evidence has been discovered since the hearing before the Commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence, and will materially affect the merits of the case, the court may, in its discretion, remand the record and proceedings to the Commission with directions to take such subsequently discovered evidence, and after consideration thereof, to make such order as the Commission may deem proper, from which order an appeal shall lie as in the case of any other final order from which an appeal may be taken as provided in G.S. 62-90. (1949, c. 989, s. 1; 1955, c. 1207, s. 2; 1963, c. 1165, s. 1.)

CASE NOTES

The validity of the Commission's findings and conclusions must be determined in light of the evidence that was presented to it. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

No Basis for Remand. — Where nothing in the record indicates that any party made a motion to remand, that any party desired to offer further evidence, or that newly discovered evidence was available, there is no basis for the court, in its discretion, to remand the cause. State ex rel. Utils. Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960).

Cited in State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986).

§ 62-94. Record on appeal; extent of review.

(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of appellate procedure, and any alleged irregularities in procedures before the Commission, not shown in the record, shall be considered under the rules of appellate procedure.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or
(2) In excess of statutory authority or jurisdiction of the Commission, or
(3) Made upon unlawful proceedings, or
(4) Affected by other errors of law, or
(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

(d) The court shall also compel action of the Commission unlawfully withheld or unlawfully or unreasonably delayed.

(e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter shall be prima facie just and reasonable. (1949, c. 989, s. 1; 1955, c. 1207, s. 3; 1963, c. 1165, s. 1; 1969, c. 614; 1975, c. 391, s. 14.)

Legal Periodicals. — For case law survey as to judicial review of decisions of administrative agencies, see 45 N.C.L. Rev. 816 (1967).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

I. In General.
II. Standard of Review.
III. Limitations on Review.
  A. In General.
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  A. In General.
  B. Rates.
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V. Cases Decided Prior to 1949 Revision of Procedural Sections.

I. IN GENERAL.

The Utilities Commission is a creature of the legislature and may exercise jurisdiction and regulatory authority only as defined by Chapter 62. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 93 N.C. App. 260, 377 S.E.2d 772 (1989), rev'd on other grounds, 326 N.C. 522, 391 S.E.2d 487 (1990).

G.S. 62-133.6(e) simply allows the legislature to preempt the North Carolina Utilities Commission's ability to compel a general rate case by freezing rates until 31 December 2007; the North Carolina Utilities

Commission properly dismissed a complaint regarding rates and a petition to initiate a general rate proceeding filed against an energy corporation by a customers association. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 163 N.C. App. 46, 592 S.E.2d 221, 2004 N.C. App. LEXIS 253 (2004), cert. denied, 358 N.C. 739, — S.E.2d — (2004), cert. dismissed, 358 N.C. 739, 602 S.E.2d 682 (2004).

Discretion of Utilities Commission. — In deciding complaints, the Utilities Commission is allowed discretion in fashioning a remedy; the Commission could transfer service of one cooperative to electric utility rather than all complainants, as long as its action was not capricious or arbitrary. Dennis v. Duke Power Co., 341 N.C. 91, 459 S.E.2d 707 (1995).

Subsection (b) States Authority of Court. — The authority of the court to which an appeal is taken from an order of the Utilities Commission is stated in subsection (b) of this section. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Subsection (b) gives the Supreme Court ample basis for ordering refunds to ratepayers who have been charged unlawfully high rates. Therefore, the Supreme Court is authorized to order refunds when the Commission has made an error of law in its rate making procedures. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

Appellate review of an order of the North Carolina Utilities Commission is governed by subsections (b) and (c). State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 123 N.C. App. 43, 472 S.E.2d 193 (1996).

Questions on appeal from the Commission must be determined from the record certified by it. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

The Commission has the duty to enter final orders that are sufficient in detail to enable the Supreme Court on appeal to determine the controverted issues. State ex rel. Utils. Comm'n v. AT & T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

Unless Facts Are in Record, Commission's Expert Knowledge Cannot Be Considered. — The Commission's knowledge, however expert, cannot be considered by the Supreme Court on appeal unless the facts embraced within that knowledge are in the record. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Attorney General Not Prejudiced by Failure to Hold Hearing. — The Attorney General was not prejudiced by the action of the Commission in allowing an exploration tracking rate increase to go into effect without a hearing, since a refund could be sought under this section. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Contents of Order Remanding Cause. — If a cause is remanded under this section, the order should specify the ground on which it is based and thereby indicate to the Commission the nature of its further proceedings. State ex rel. Utils. Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960).

Doctrine of Res Judicata. — Where an administrative determination has been reviewed by the courts, the res judicata effect, if any, attaches to the court's judgment rather than to the administrative decision. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Applied in State ex rel. Utils. Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963); State ex rel. N.C. Utils. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210 (1966); State ex rel. Utilities Comm'n v. Associated Petro. Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977); In re Duke Power Co., 37 N.C. App. 138, 245 S.E.2d 787 (1978); State ex rel. Utils. Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234 (1980); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988); State ex rel. Utils. Comm'n v. North Carolina Natural Gas Corp., 323 N.C. 630, 375 S.E.2d 147 (1989); State ex rel. Utils. Comm'n v. Thornburg, 324 N.C. 478, 380 S.E.2d 112 (1989); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989); State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990); State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991); Dunnagan v. Ndikom, 139 N.C. App. 246, 533 S.E.2d 494, 2000 N.C. App. LEXIS 906 (2000); Union Transf. & Storage Co. v. Lefeber, 139 N.C. App. 280, 533 S.E.2d 550, 2000 N.C. App. LEXIS 910 (2000); State ex rel. Utils. Comm'n v. NUI Corp., 154 N.C. App. 258, 572 S.E.2d 176, 2002 N.C. App. LEXIS 1470 (2002).

Cited in State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966); State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968); State ex rel. Utils. Comm'n v. Public Serv. Co., 35 N.C. App. 156, 241 S.E.2d 79 (1978); In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979); State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 61 N.C. App. 42, 300 S.E.2d 395 (1983); State ex rel. Utils. Comm'n v. Central Tel. Co., 60 N.C. App. 493, 299 S.E.2d 264 (1983); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d

763 (1983); State ex rel. Utils. Comm'n v. Conservation Council, 64 N.C. App. 266, 307 S.E.2d 375 (1983); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985); State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986); State ex rel. Utils. Comm'n v. Thornburg, 84 N.C. App. 482, 353 S.E.2d 413 (1987); Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990); State ex rel. Utils. Comm'n v. Water Serv., Inc., 328 N.C. 299, 401 S.E.2d 353 (1991); State ex rel. Utilities Comm'n v. Centel Cellular Co., 103 N.C. App. 731, 407 S.E.2d 257 (1991); State ex rel. Utils. Comm'n v. North Carolina Cellular Ass'n, 111 N.C. App. 801, 433 S.E.2d 785 (1993); State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 500 S.E.2d 693 (1998); In re Petition of Utils., Inc., 147 N.C. App. 182, 555 S.E.2d 333, 2001 N.C. App. LEXIS 1141 (2001); State ex rel. Utils. Comm'n v. Thrifty Call, Inc., 154 N.C. App. 58, 571 S.E.2d 622, 2002 N.C. App. LEXIS 1412 (2002).

II. STANDARD OF REVIEW.

Standard that governs appellate review of Commission orders is statutorily articulated by subsections (b) and (c) of this section. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Commission's Decision Will Be Upheld Unless Assailable Under Subsection (b). — The decision of the Commission with regard to rates for public utilities will be upheld by the Court of Appeals on appeal unless it is assailable on one of the grounds enumerated in subsection (b) of this section. State ex rel. Utils. Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

Judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria of this section which circumscribe judicial review. State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

A decision of the Utilities Commission will be upheld on appeal unless the appellate court finds error based on one of the enumerated grounds of this section. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Absence of proper findings is an error of law and basis for remand under subdivision (b)(4) of this section because it frustrates appellate review. State ex rel. Utils. Comm'n v. Conservation Council, 66 N.C. App. 456, 311 S.E.2d 617, rev'd in part, 312 N.C. 59, 320 S.E.2d 679 (1984); State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

Scope of Review. — Grounds for relief not specifically set forth in the notice of appeal filed with the Commission may not be relied upon in the appellate courts; however, even when specific grounds are set forth, the applicable scope of review may be determined only from an examination of the issues brought forward by the appealing party and the nature of the supporting contentions. Dennis v Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994), modified, 341 N.C. 91, 459 S.E.2d 707 (1995).

In reviewing a decision of the Utilities Commission, the appellate court's role is to determine whether the entire record supports the Commission's decision, and where there are two reasonably conflicting views of the evidence, the appellate court may not substitute its judgment for that of the Commission. State ex rel. Utils. Comm'n v. Carolina Indus. Group For Fair Util. Rates, 130 N.C. App. 636, 503 S.E.2d 697 (1998), cert. denied, 349 N.C. 377 (1998).

Test on Review. — The test applied by a reviewing court involves a determination of whether, after viewing the entire record, the Utilities Commission's findings and conclusions are supported by substantial, competent, and material evidence. State ex rel. Utils. Comm'n v. North Carolina Gas Serv., 128 N.C. App. 288, 494 S.E.2d 621 (1998).

The failure to include all the necessary findings of fact is an error of law and a basis for remand under subdivision (b)(4) of this section, because it frustrates appellate review. State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

The Commission's order must be sufficient within itself to comply with the statute. Failure to include all necessary findings of fact and details is an error of law and a basis for remand under subdivision (b)(4) of this section, because it frustrates appellate review. State ex rel. Utils. Comm'n v. AT & T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

The Commission was required to make specific finds showing what effect, if any, it gave to financing costs or down market protection, or both, in arriving at its common equity rate of return decision. Failure to do so constituted an error of law requiring a remand for further proceedings. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

Function of Court on Review. — The Court of Appeals looks to the findings of fact and conclusions of the Commission and determines whether the Commission has considered the factors required by law and whether its findings are supported by competent, substantial and material evidence in view of the whole record. State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

The test upon appeal from a determination of the Utilities Commission is whether the Commission's findings of fact are supported by competent, material and substantial evidence in view of the entire record. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

The Supreme Court's statutory function is not to determine whether there is evidence to support a position the Commission did not adopt. The court asks instead, whether there is substantial evidence, in view of the entire record, to support the position which the Commission adopted. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Appellate court's statutory function is to assess whether the North Carolina Utilities Commission's order is affected by errors of law and to determine whether there is substantial evidence, in view of the entire record, to support the position adopted. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

The reviewing court should see if, in view of the entire record, the Utilities Commission's findings and conclusions are supported by substantial, competent and material evidence. State ex rel. Utils. Comm'n v. Piedmont Natural Gas Co., 346 N.C. 558, 488 S.E.2d 591 (1997).

Utilities Commission order issuing a Certificate of Environmental Compatibility and Public Convenience and Necessity to a utility to construct a transmission line along a proposed route was affirmed because under G.S. 62-94 and the standard of review, the reviewing court could not weigh the credibility of the evidence and draw the ultimate conclusion; the Commission, after considering evidence from both the utility and the citizens who intervened to object to the proposed route, concluded that the utility demonstrated that the proposed transmission line was necessary for an adequate and reliable supply of electric energy. State ex rel. Utils. Comm'n v. Wardlaw, 179 N.C. App. 582, 634 S.E.2d 898, 2006 N.C. App. LEXIS 2041 (2006).

Substantial Evidence Defined. — Substantial evidence is defined as "more than a scintilla or a permissible inference." It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

Commission may agree with single witness, if the evidence supports his position, no matter how many opposing witnesses might come forward. The court is then required to determine whether the Commission's decision is supported by competent, material and substantial evidence in view of the entire record as submitted. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Evidence of Reasonableness of Practice. — Where the Commission's order required the defendants to do no more than they did voluntarily and without objection for 30 years or more, preceding the last six or eight years, this would seem to be "strong evidence" of the reasonableness of the practice. State ex rel. Utils. Comm'n v. Southern Ry., 256 N.C. 359, 124 S.E.2d 510 (1962).

Findings, inferences, conclusions or decision of Utilities Commission which are arbitrary or capricious and which prejudice substantial rights of appellants are not binding on reviewing court. State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

Subsection (c) requires the reviewing court to take due note of the rule of prejudicial error. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Due account shall be taken of the rule of prejudicial error in the consideration of an appeal. State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Standard Deemed Satisfied. — Where witnesses testified according to a private agreement that was not unanimous, the Utilities Commission was not subjected to a heightened standard of review but satisfied the requirements of this chapter by independently considering and analyzing relevant evidence and facts presented by all the parties. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

Abuse of Commission's Discretion Found. — Decision of the North Carolina Utilities Commission to recognize a utility customers association and a customer as interveners in a settlement proceeding resulting from an investigation that was conducted, pursuant to G.S. 62-37, of accounting irregularities in the way in which a utility reported its regulated income to the Commission was an abuse of the Commission's discretion; the association and the customer were not parties affected by the Commission's order approving the settlement, within the meaning of G.S. 62-37, and as such had no standing to appeal the Commission's approval of the settlement agreement. State ex

rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 163 N.C. App. 1, 592 S.E.2d 277, 2004 N.C. App. LEXIS 261 (2004), appeal dismissed sub nom. Utils. Comm. v. Carolina Util., — N.C. —, 602 S.E.2d 683 (2004), appeal dismissed sub nom. Utils. Comm. v. Carolina Util., — N.C. —, 602 S.E.2d 684 (2004), cert. denied, appeal dismissed, 358 N.C. 739, 602 S.E.2d 683 (2004), cert. dismissed, 358 N.C. 739, 602 S.E.2d 684, 602 S.E.2d 685 (2004).

III. LIMITATIONS ON REVIEW.

A. In General.

Justiciable Controversy Must Be Shown. — While the Utilities Commission authorized itself to review a contract between water service and developers, there was no evidence of any justiciable controversy which would have warranted review of the contracts by the Commission; thus, the Commission did not have jurisdiction to review the contract provisions. State ex rel. Utils. Comm'n v. Carolina Water Serv., 149 N.C. App. 656, 562 S.E.2d 60, 2002 N.C. App. LEXIS 284 (2002), cert. granted, 355 N.C. 757, 566 S.E.2d 481, cert. granted, 356 N.C. 176, 567 S.E.2d 145 (2002).

Limitation on Authority to Review. — The authority of the Court of Appeals and of the Supreme Court in reviewing an order of the Utilities Commission is limited to that conferred by this section. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), aff'd on rehearing, 278 N.C. 235, 179 S.E.2d 419 (1971).

Upon appeal, the authority of the reviewing court to reverse or modify the order of the Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in this section. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Courts do not ordinarily review or reverse the exercise of discretionary power by an administrative agency such as the Utilities Commission, except on showing of capricious, unreasonable or arbitrary action or disregard of law. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

On review of orders from the Commission, the Court of Appeals' action is guided by this section, and where the Commission's actions do not violate the Constitution or exceed statutory authority, appellate review is limited to errors of law, arbitrary action, or decisions unsupported by competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

The authority of an appellate court to reverse or modify an order of the Utilities Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in this section, which includes the authority to reverse or modify such order on the ground that it violates a constitutional provision. State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 396, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

Under applicable standards of appellate review, the Court of Appeals is not at liberty to substitute its judgment for that of the Commission. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 57 N.C. App. 489, 291 S.E.2d 789 (1982), modified, 307 N.C. 541, 299 S.E.2d 763 (1983).

Court's Power to Reverse, Modify or Nullify Substantially Circumscribed. — The court's power to affirm or remand is not specifically circumscribed by this section. However, the power of the court to reverse or modify and, a fortiori, to declare null and void, is substantially circumscribed. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Appellate review of Commission orders is limited to the record as certified. State ex rel. Utils Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Appeals Are Confined to Questions of Law Specifically Set Forth. — Appeals from the Utilities Commission are confined to questions of law upon grounds specifically set forth in appellant's petition for rehearing by the Commission. State ex rel. Utils. Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951). See also State ex rel. Utils. Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

As to necessity for raising grounds for relief before Commission, see State ex rel. Utils. Comm'n v. State, 250 N.C. 410, 109 S.E.2d 368 (1959).

B. Weighing of Evidence.

Weighing of Evidence and Exercise of Judgment Thereon Are Matters for Commission. — The decisions of the Utilities Commission must be within the authority conferred by statute; however, the weighing of the evidence and the exercise of judgment thereon as to transportation problems within the scope of its powers are matters for the Commission. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Commission Without Discretionary Power Where No Evidence to Weigh. — The weighing of the evidence and the exercise of judgment thereon within the scope of its authority are matters for the Commission; even so, the Commission has no discretionary power, where its function is to weigh the evidence and make judgment thereon, if there is no evidence to weigh. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Minimal Consideration of Competent Evidence Correctable on Appeal. — Although it is not for an appellate court to dictate to the Commission what weight it should give to material facts before it, a summary disposition which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. State ex rel. Utils. Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

Comments on Evidence. — The Commission is not required to set forth comments regarding every single fact or item of evidence presented by the parties. Dennis v Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994), modified, 341 N.C. 91, 459 S.E.2d 707 (1995).

Presumption That Commission Considered All Competent Evidence. — In the absence of an express statement by the Commission to the contrary, some record evidence to the contrary, or a summary disposition which indicates to the contrary, the court would presume that the Commission gave proper consideration to all competent evidence presented. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 324 S.E.2d 28 (1986).

The credibility of testimony and the weight to be given it are for the Commission, not for the reviewing court. State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

The credibility of testimony was for the determination of the Commission. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

It is a well-established rule that it is for administrative body, in an adjudicatory proceeding, to determine weight and sufficiency of evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

The credibility of testimony and the weight to be accorded it are matters to be determined by the Commission. However, a summary disposition which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

IV. PRIMA FACIE JUST AND REASONABLE.

A. In General.

Commission's Decision Is Prima Facie Just and Reasonable. — This section provides that on an appeal, the Commission's decision is considered "prima facie just and reasonable," and it should be affirmed if supported by substantial evidence. State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

On appeal, a rate decision, rule, regulation, finding, determination, or order made by the North Carolina Utilities Commission is deemed prima facie just and reasonable. State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 123 N.C. App. 43, 472 S.E.2d 193 (1996).

Burden Is on Appellant to Show Error of Law in Proceedings. — The law imposes the duty upon the Utilities Commission and not the courts to fix rates, and the burden is upon appellant from an order of the Commission to show an error of law in the proceeding before the Commission. State ex rel. Utils. Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963).

The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983); State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

The party attacking rates established by the Commission bears the burden of proving their impropriety. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

But Appellant May Show That Order Was Unsupported by Evidence. — Upon appeal the orders made by the Utilities Commission "shall be prima facie just and reasonable," but this does not preclude the appellant from showing that the evidence offered rebuts the prima facie effect of the order, and that the order was unsupported by competent, material and substantial evidence in view of the entire record. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 235 N.C. 273, 69 S.E.2d 502 (1952); State ex rel. Utils. Comm'n v. Gulf-Atlantic Towing Corp., 251 N.C. 105, 110 S.E.2d 886 (1959).

An order of the Commission requiring a transportation company to maintain public service facilities must be considered prima facie reasonable and just, but this does not preclude the transportation company affected from showing that the order was unsupported by competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 238 N.C. 701, 78 S.E.2d 780 (1953); State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

While the determination of a petition by a carrier to be allowed to discontinue an established service rests in large measure in the sound judgment and discretion of the Utilities Commission, and its order in regard thereto is prima facie just and reasonable, such order is reviewable to ascertain whether it is arbitrary or capricious or if the essential findings of fact on which it is based are supported by competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

B. Rates.

Rates Are Deemed Prima Facie Just and Reasonable. — Upon appeal, rates fixed by the Commission shall be deemed prima facie just and reasonable. State ex rel. N.C. Utils. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966); State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

Rates fixed by the Commission are deemed prima facie just and reasonable. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Legitimate Justification for Industrial and City Rates of Return. — The North Carolina Utilities Commission drew legitimate distinctions which justified its decision to maintain industrial and cities' rates of return at a higher level than residential and commercial and small industrial rates. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Rates of Return Reasonable and Not Discriminatory. — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the approved rates of return were just and reasonable and did not unreasonably discriminate among the various classes of North Carolina Natural Gas Corporation customers and were supported by substantial evidence in view of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Order prescribing different Private Line Service rates for AT&T's nonreseller (end user) customers and its reseller customers upon its face was discriminatory, and absent legally adequate reasons in the order why the order was not unjustly discriminatory within the meaning of G.S. 62-2(4), the order was vacated and the cause is remanded to the Commission for further proceedings. State ex rel. Utils. Comm'n v. AT&T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

Determining a Utility's Capital Structure for Rate Making Purposes. — The Commission is not required, as a matter of law, to reduce the common equity component of a utility's capital structure by an amount equal to its investment in its nonregulated subsidiaries in determining the appropriate capital structure for rate making purposes. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

C. Findings.

Findings of fact made by the Commission are prima facie just and reasonable on appeal. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Court May Not Find Facts or Regulate Utilities. — Although in reviewing an order of the Commission, a court might, upon the same facts, have reached a different result, it is not for the court to find the facts or to regulate utilities. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

When an appeal to the superior court (now to the Court of Appeals) is taken from an order entered by the North Carolina Utilities Commission, the review is limited to the record as certified and to the questions of law presented therein. There is no provision for additional findings of fact by the judge for the purpose of determining the validity of the order entered by the Commission. State ex rel. Utils. Comm'n v. Fox, 236 N.C. 553, 73 S.E.2d 464 (1952); State v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953). See State ex rel. Utils. Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

Findings supported by competent, material and substantial evidence in view of the entire record are binding upon the reviewing court. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utils. Comm'n v. Carolina Coach Co., 269 N.C. 717, 153 S.E.2d 461 (1967); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 47 N.C. App. 418, 267 S.E.2d 488 (1980); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 48 N.C. App. 115, 268 S.E.2d 851 (1980). See also, State ex rel. Utils. Comm'n v. Champion Papers, Inc., 259 N.C.

449, 130 S.E.2d 890 (1963); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

All findings of fact made by the Commission, which are supported by competent, material and substantial evidence, are conclusive. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utils. Comm'n v. Public Staff, 52 N.C. App. 275, 278 S.E.2d 599 (1981); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 313 N.C. 215, 328 S.E.2d 264 (1985); State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

When the Commission's findings are supported by competent, material and substantial evidence, they are binding upon the appellate court. State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

The Commission's findings and conclusions, where supported by competent, material, and substantial evidence, considering the whole record, and taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn, must be affirmed. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 57 N.C. App. 489, 291 S.E.2d 789 (1982), modified, 307 N.C. 541, 299 S.E.2d 763 (1983).

The Commission's order will not be disturbed if upon consideration of the entire record the court finds that the decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

Even Though Reviewing Court Might Have Reached Different Conclusion. — Neither findings of fact nor the Commission's determination of what rates are reasonable may be reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

If the rates are reasonable upon an application of the whole record test, the Court of Appeals is bound by the findings of fact establishing them and may not reach a different finding merely because it could have reached another determination upon the evidence. State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

When the record, considered as a whole, contains substantial evidence supporting the subjective judgment of the Commission on any of the factors in the fixing of reasonable rates under G.S. 62-133, the conclusion reached by the Commission may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission, nor is the Commission required to accept as conclusive the subjective judgment of a witness, even though the record contains no expression of a contrary opinion by another witness. State ex rel. Utils. Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

The authority to determine the adequacy of a utility's service and the rates to be charged lies with the Commission, and a reviewing court may not modify or reverse its determination merely because the court would have reached a different finding based on the evidence. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 317 N.C. 26, 343 S.E.2d 898 (1986); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 91 N.C. 107, 370 S.E.2d 567 (1988).

Any finding of fact made by the Commission, if supported by competent, material and substantial evidence is conclusive, even if the reviewing court would have reached a different result on the same evidence. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Finding Held Error of Law. — Finding of the Commission that legal fees which were incurred by utility in contesting the amount of an administrative penalty imposed as a result of its failure to provide adequate water service were recoverable as part of its operating expenses, in that they were "a reasonable and necessary expenditure" which was associated with its water service to its customers, constituted an error of law under subdivision (b)(4) of this section. State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

Where the individualized nature of a shuttle operation precluded performance by a common carrier, the Utilities Commission erred as a matter of law in finding that performance of the shuttle contract constituted common carriage. State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

Findings Concerning Company's Debt Ratio. — Conclusion of the Utilities Commission that a natural gas company's capital structure should include a short-term debt ratio of 4.02%, based on a short-term debt equal to stored gas inventory rather than "the daily average balance amount of short-term debt for the most recent twelve month period," was supported by substantial evidence. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

Formula Did Not Unreasonably Discriminate. — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the Industrial Sales Tracker Formula did not unreasonably discriminate between North Carolina Natural Gas Corporation's customer classes and these findings were supported by substantial evidence in light of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

D. Determinations.

Determination by Commission Is Prima Facie Just and Reasonable. — A determination by the Commission is not simply prima facie evidence of its validity, but is prima facie just and reasonable. State ex rel. Utils. Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953); State ex rel. N.C. Utils. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955); State ex rel. N.C. Utils. Comm'n v. Casey, 245 N.C. 297, 96 S.E.2d 8 (1957); State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The Commission, not the reviewing court, is to make determination of fair value of the properties. State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

While the Commission has the duty to weigh evidences of "fair value" fairly and in "balanced scales," the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

The Supreme Court may not reverse an order of the Commission because of its weighting of the respective indicators of "fair value," unless it finds such weighting to have been arbitrary and lacking support in the evidence, in view of the entire record, or otherwise affected by error of law. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

The question of whether a case "is to be a general rate case" under the terms of G.S. 62-137 is a mixed question of law and fact. As to such questions, courts should be hesitant to disturb the Commission's expert determination with regard to the nature of the case presented, particularly when its determination is made prior to hearing and for the initial purpose of setting the scope of the hearing and the resulting amount of information which the public utility will be required to furnish. Even at that stage, however, the Commission's determination must be supported by "competent, material and substantial evidence in view of the entire record as submitted." State ex rel. Utils. Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

What constitutes public convenience and necessity is primarily an administrative question with a number of imponderables to be taken into consideration, e.g., whether there is a substantial public need for the service, whether the existing carriers can reasonably meet this need, and whether the service would endanger or impair the operations of existing carriers contrary to the public interest. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

E. Orders.

Order of Commission Is Prima Facie Just and Reasonable. — By this section an order of the Commission is prima facie just and reasonable. This applies to orders approving contracts of public utilities. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

When Order Will Be Affirmed. — Where the order of the Utilities Commission granting petitioner an increase in rates in a general rate case is justified by the findings of fact which are supported by plenary evidence, the order of the Commission will be affirmed. State ex rel. Utils. Comm'n v. Tidewater Natural Gas Co., 259 N.C. 558, 131 S.E.2d 303 (1963).

The rate order of the Commission will be affirmed if upon consideration of the whole record the appellate court finds that the Commission's decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

When Order Remanded to Commission for Further Hearing. — An order of the Commission based on an erroneous interpretation of law should be remanded to the Commission for further hearing and not be terminated by the court where the Commission has the duty to make a positive determination, such as the fixing of rates, and because of some error of law the determination is in suspense, and the utility is entitled to have the determination made. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Inadequate Order. — Order which set forth specific complaints from some customers, but did not state what to do to make the service adequate, and did not indicate in what manner the company violated the Commission's standards, nor what those standards were, was inadequate. State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

V. CASES DECIDED PRIOR TO 1949 REVISION OF PROCEDURAL SECTIONS.

Editor's Note. *— All of the cases below were decided before the 1949 revision of the procedural provisions of this Chapter, and construe former G.S. 62-20 and 62-21, corresponding to G.S. 62-90 and this section. It should be noted that the 1949 revision made many changes in procedure, and especially in the extent of review.*

Appeal to Superior Court Under Former Law Was Trial De Novo. — Upon appeal under the former statute by a party to a proceeding before the Corporation Commission from an order made therein under former G.S. 62-42 and 62-43, the superior court had jurisdiction to try and determine both issues of law and issues of fact, duly presented by assignments of error based upon exceptions duly taken by the appellant during the hearing before the Commission. The trial of such issues by the superior court was de novo. State ex rel. Corp. Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928). See also State ex rel. Corp. Comm'n v. Seaboard Air Line & S. Ry., 161 N.C. 270, 76 S.E. 554 (1912).

A provision of former G.S. 62-21 that on appeal the trial should be "under the same rules and regulations as are prescribed for the trial of other civil causes" meant that the trial should be de novo. State ex rel. Utils. Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943). See also North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

Under this Chapter as it stood before the 1949 revision, the trial in the superior court was de novo, and from thence only would a further appeal lie to the Supreme Court, governed by the rule that such an appeal should not be fragmentary, but should be from a final judgment or one final in its nature. State ex rel. Corp. Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

Rules Applicable on Appeal to Superior Court. — Prior to the 1949 revision, on appeal to the superior court the trial was under the same rules and regulations applicable in other civil causes, save and except the prima facie effect to be given the decision or determination of the Commission. State ex rel. Utils. Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943).

Appeals from the Utilities Commissioner were analogous to appeals from a justice of the peace rather than appeals from a referee; hence, since the trial in the superior court was de novo upon issues of fact raised by the exceptions, the superior court properly refused to pass upon appellant's exceptions to the findings of fact seriatim. State ex rel. Utils. Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

Decision of Commission "Prima Facie Just and Reasonable". — While on appeal from the Utilities Commission to the superior court the provision of former G.S. 62-21 was interpreted to mean that the trial should be de novo, the section also provided that the decision or determination of the Commission "shall be prima facie just and reasonable." State ex rel. Utils. Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943).

Findings of Fact Not Conclusive. — Former G.S. 62-20 and 62-21 did not contain any provision that the findings of fact by the Utilities Commission should be conclusive on appeal. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

What Evidence Admissible. — On appeal from an order of the Commission under former G.S. 62-21 the trial was de novo, tried under the same rules and regulations as are prescribed for the trial of other civil causes; and any relevant evidence could be there introduced, whether it had theretofore been introduced before the Commission or not. State ex rel. Corp. Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912).

Admission of Evidence Held Reversible Error. — Where a union passenger depot had been ordered by the Commission, it was reversible error in the superior court, on appeal from the Commission, for the trial judge to admit evidence as to the effect the relocation would have on property values in a nearby town where the present station of one of the roads was located. State ex rel. Corp. Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912).

When Appellee Entitled to Affirmance of Decision. — Under former G.S. 62-21, in the absence of a showing that the decision of the Utilities Commission was clearly unreasonable and unjust, appellee, on appeal to the superior court, was entitled to an affirmance of the decision of the Commission. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 224 N.C. 390, 30 S.E.2d 328 (1944).

In an application for a certificate of public convenience and necessity, the Utilities Commission must act within the authority conferred by the statute; however, the findings from the evidence and the exercise of judgment thereon within the scope of its powers are matters for the Commission, and its order will not be disturbed when sustained by the findings upon competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Fredrickson Motor Express, 232 N.C. 180, 59 S.E.2d 582 (1950).

§ 62-95. Relief pending review on appeal.

Pending judicial review, the Commission is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, a judge of the appellate court with jurisdiction over the case on appeal is authorized to issue all necessary and appropriate process to postpone the effective date of any action by the Commission or take such action as may be necessary to preserve status or rights of any of the parties pending conclusion of the proceedings on appeal. The court may require the applicant for such stay to post adequate bond as required by the court. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 8; 1983, c. 526, s. 8.)

Cross References. — As to jurisdiction of the Supreme Court to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission, see N.C. Const., Art. IV, § 12(1).

§ 62-96. Appeal to Supreme Court.

Appeals of final orders of the Utilities Commission to the Supreme Court are governed by Article 5 of General Statutes Chapter 7A. In all appeals filed in the Court of Appeals, any party may file a motion for discretionary review in the Supreme Court pursuant to G.S. 7A-31. If the Commission is the appealing party, it is not required to give any undertaking or make any deposit to assure payment of the cost of the appeal, and the court may advance the cause on its docket. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 3; 1983, c. 526, s. 9.)

Cross References. — As to jurisdiction of the Supreme Court to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission, see N.C. Const., Art. IV, § 12(1).

CASE NOTES

An appeal does not lie directly from the Commission to the Supreme Court. State ex rel. Bd. of R.R. Comm'rs v. Wilmington & W. R.R., 122 N.C. 877, 29 S.E. 334 (1898); North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

Scope of Review. — Where the evidence is sufficient to permit and sustain the Commission's findings of fact, conclusions and the decision based thereon, the Supreme Court will consider the proceedings before the Commission only to the extent necessary to determine whether the Court of Appeals committed an error of law. State ex rel. Utils. Comm'n v. J.D. McCotter, Inc., 283 N.C. 104, 194 S.E.2d 859 (1973).

When Supreme Court May Affirm Judgment Reversing Commission. — Upon an appeal to the Supreme Court from a judgment of the superior court (now the Court of Appeals) reversing a decision of the Commission and remanding the matter for further proceedings, the Supreme Court may affirm the judgment of the superior court if the record discloses one or more of the statutory grounds for such judgment and if such ground therefor is set forth specifically in the notice of appeal from the Commission to the superior court. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

In order to affirm a judgment of the superior court (now the Court of Appeals) reversing and remanding a decision of the Commission, it is not required that the Supreme Court concur in the ruling by the superior court upon every ground for relief set forth in the notice of appeal from the Commission to the superior court. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

As to standing of manufacturer and distributor of plastic telephone directory

covers to complain and appeal, see State ex rel. Utils. Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

Applied in State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965).

Cited in State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

§ 62-97. Judgment on appeal enforced by mandamus.

In all cases in which, upon appeal, an order or decision of the Commission is affirmed, in whole or in part, the appellate court shall include in its decree a mandamus to the appropriate party to put said order in force, or so much thereof as shall be affirmed, or the appellate court may make such other order as it deems appropriate. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

CASE NOTES

Mandamus Under Former G.S. 62-25. — Under former G.S. 62-25, the court could compel performance only by resort to the high prerogative writ of mandamus, and that by authority of the statute. State ex rel. N.C. Corp. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909).

Under former G.S. 62-25, the right to a mandamus to enforce a valid order was given in causes which had been carried to the superior court by appeal. State ex rel. N.C. Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

§ 62-98. Peremptory mandamus to enforce order, when no appeal.

(a) If no appeal is taken from an order or decision of the Commission within the time prescribed by law and the person to which the order or decision is directed fails to put the same in operation, as therein required, the Commission may apply to a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in Wake County or in the district or set of districts as defined in G.S. 7A-41.1 in which the business is conducted, upon 10 days' notice, for a peremptory mandamus upon said person for the putting in force of said order or decision; and if said judge shall find that the order of said Commission was valid and within the scope of its powers, he shall issue such peremptory mandamus.

(b) An appeal shall lie to the Court of Appeals in behalf of the Commission, or the defendant, from the refusal or the granting of such peremptory mandamus. The remedy prescribed in this section for enforcement of orders of the Commission is in addition to other remedies prescribed by law. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 4; 1987 (Reg. Sess., 1988), c. 1037, s. 92.)

CASE NOTES

As to enforcement of order by mandamus where no appeal was taken, under former law, see State ex rel. N.C. Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

Where the Commission had ordered two railroad companies to erect a union depot at a junction after a hearing upon the petition of the citizens of the town, and the railroads had lost or waived their statutory right to appeal, such order was regarded as a final judgment, and mandamus proceedings to compel the enforcement of the final order upon failure of the railroads to except and appeal therefrom was the remedy authorized by statute. State ex rel. Corp. Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923).

§ 62-99: Repealed by Session Laws 1967, c. 1190, s. 5.

ARTICLE 5A.

Siting of Transmission Lines.

§ 62-100. Definitions.

As used in this Article:

(1) The term "begin to construct" includes any clearing of land, excavation, or other action that would adversely affect the natural environment of the route of a transmission line; but that term does not include land surveys, boring to ascertain geological conditions, or similar preliminary work undertaken to determine the suitability of proposed routes for a transmission line that results in temporary changes to the land;

(2) The word "county" means any one of the counties listed in G.S. 153A-10;

(3) The word "land" means any real estate or any estate or interest in real estate, including water and riparian rights, regardless of the use to which it is devoted;

(4) The word "lines" means distribution lines and transmission lines collectively;

(5) The word "municipality" means any incorporated community, whether designated as a city, town, or village and any area over which it exercises any of the powers granted by Article 19 of Chapter 160A of the General Statutes;

(6) The term "public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, engaged in producing, generating, transmitting, delivering, or furnishing electricity for private or public use, including counties, municipalities, joint municipal power agencies, electric membership corporations, and public and private corporations; and

(7) The term "transmission line" means an electric line designed with a capacity of at least 161 kilovolts. (1991, c. 189, s. 1.)

Editor's Note. — Session Laws 1991, c. 189, s. 3, made this Article effective December 1, 1991, but provides that the Article shall not apply to any transmission line that the public utility or other person has begun to construct before that date.

CASE NOTES

Relationship With Other Laws. — There was no conflict between G.S. 62-106 and 62-42 because they served different purposes and were reconcilable; the provisions of G.S. 62-100 through G.S. 62-107 dealt with the siting of certain large transmission lines and were not applicable to the case, and G.S. 62-42 was much broader in scope, dealing with compelling any type of needed improvement to a public utility system. The siting of lines of at least 161 kV was often controversial and the legislature's decision to require specialized procedures for the siting of these lines was logical. State ex rel. Utils. Comm'n v. Town of Kill Devil Hills, — N.C. App. —, 670 S.E.2d 341, 2009 N.C. App. LEXIS 4 (2009).

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

Issuance of Certificate. — Utilities Commission order issuing a Certificate of Environmental Compatibility and Public Convenience and Necessity to a utility to construct a transmission line along a proposed route was affirmed because, under G.S. 62-94 and the standard of review, the reviewing court could not weigh the credibility of the evidence and draw the ultimate conclusion; further, the Commission did not improperly shift the burden of proof to the citizens rather than to the utility under G.S. 62-105(a). State ex rel. Utils. Comm'n v. Wardlaw, 179 N.C. App. 582, 634 S.E.2d 898, 2006 N.C. App. LEXIS 2041 (2006).

§ 62-101. Certificate to construct transmission line.

(a) No public utility or any other person may begin to construct a new transmission line without first obtaining from the Commission a certificate of environmental compatibility and public convenience and necessity.

(b) A transmission line for which a certificate is required shall be constructed, operated, and maintained in conformity with the certificate. A certificate may be amended or transferred with the approval of the Commission.

(c) A certificate is not required for construction of the following lines:

(1) A line designed to carry less than 161 kilovolts;

(2) The replacement or expansion of an existing line with a similar line in substantially the same location, or the rebuilding, upgrading, modifying, modernizing, or reconstructing of an existing line for the purpose of increasing capacity or widening an existing right-of-way;

(3) A transmission line over which the Federal Energy Regulatory Commission has licensing jurisdiction, if the Commission determines that agency has conducted a proceeding substantially equivalent to the proceeding required by this Article;

(4) Any transmission line for which, before March 6, 1989, a public utility or other person has surveyed a proposed route and, based on that route, has acquired rights-of-way for it by voluntary conveyances or has filed condemnation proceedings for acquiring those rights-of-way which, together, involve twenty-five percent (25%) or more of the total length of the proposed route;

(5) An electric membership corporation owned transmission line for which the construction or upgrading has had a proceeding conducted which the Commission determines is substantially equivalent to the proceeding required by this Article;

(6) Any line owned by a municipality to be constructed wholly within the corporate limits of that municipality.

(d) The Commission may waive the notice and hearing requirements of this Article and issue a certificate or amend an existing certificate under either of the following circumstances:

(1) When the Commission finds that the owners of land to be crossed by the proposed transmission line segment do not object to such a waiver and either:

  a. The transmission line will be less than one mile long; or

  b. The transmission line is for the purpose of relocating an existing transmission line segment to resolve a highway or other public project conflict; to accommodate a commercial, industrial, or other private development conflict; or to connect an existing transmission line to a substation, to another public utility, or to a public utility customer when any of these is in proximity to the existing transmission line.

(2) If the urgency of providing electric service requires the immediate construction of the transmission line, provided that the Commission shall give notice to those parties listed in G.S. 62-102(b) before issuing a certificate or approving an amendment.

(e) When justified by the public convenience and necessity and a showing that circumstances require immediate action, the Commission may permit an applicant for a certificate to proceed with initial clearing, excavation, and construction before receiving the certificate required by this section. In so proceeding, however, the applicant acts at its own risk, and by granting such permission, the Commission does not commit to ultimately grant a certificate for the transmission line.

(f) Nothing in this section restricts or impairs the Commission's jurisdiction pursuant to G.S. 62-73 to hear or make complaints. (1991, c. 189, s. 1.)

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992); State ex rel. Utils. Comm'n v. Town of Kill Devil Hills, — N.C. App. —, 670 S.E.2d 341, 2009 N.C. App. LEXIS 4 (2009).

§ 62-102. Application for certificate.

(a) An applicant for the certificate described in G.S. 62-101 shall file an application with the Commission containing the following information:

(1) The reasons the transmission line is needed;
(2) A description of the proposed location of the transmission line;
(3) A description of the proposed transmission line;
(4) An environmental report setting forth:
  a. The environmental impact of the proposed action;
  b. Any proposed mitigating measures that may minimize the environmental impact; and
  c. Alternatives to the proposed action.
(5) A list of all necessary approvals that the applicant must obtain before it may begin to construct the transmission line; and
(6) Any other information the Commission requires.

(b) Within 10 days of filing the application, the applicant shall serve a copy of it on each of the following in the manner provided in G.S. 1A-1, Rule 4:

(1) The Public Staff;
(2) The Attorney General;
(3) The Department of Environment and Natural Resources;
(4) The Department of Commerce;
(5) The Department of Transportation;
(6) The Department of Agriculture and Consumer Services;
(7) The Department of Cultural Resources;
(8) Each county through which the applicant proposes to construct the transmission line;
(9) Each municipality through whose jurisdiction the applicant proposes to construct the transmission line; and
(10) Any other party that the Commission orders the applicant to serve.

The copy of the application served on each shall be accompanied by a notice specifying the date on which the application was filed.

(c) Within 10 days of the filing of the application, the applicant shall give public notice to persons residing in each county and municipality in which the transmission line is to be located by publishing a summary of the application in newspapers of general circulation so as to substantially inform those persons of the filing of the application. This notice shall thereafter be published in those newspapers a minimum of three additional times before the time for parties to intervene has expired. The summary shall also be sent to the North Carolina State Clearinghouse. The summary shall be subject to prior approval of the Commission and shall contain at a minimum the following:

(1) A summary of the proposed action;
(2) A description of the location of the proposed transmission line written in a readable style;
(3) The date on which the application was filed; and
(4) The date by which an interested person must intervene.

(d) Inadvertent failure of service on or notice to any municipality, county, governmental agency, or other person described in this section may be cured by an order of the Commission designed to give that person adequate notice to enable effective participation in the proceeding.

(e) An application for an amendment of a certificate shall be in a form approved by and shall contain any information required by the Commission. Notice of such an application shall be in the same manner as for a certificate. (1991, c. 189, s. 1; 1991 (Reg. Sess., 1992), c. 959, s. 18; 1997-261, s. 3; 1997-443, s. 11A.119(a).)

§ 62-103. Parties.

(a) The following persons shall be parties to a certification proceeding under this Article:

(1) The applicant;
(2) The Public Staff.

(b) The following persons may intervene in a certification proceeding under this Article if a petition to intervene is filed with the Commission within 100 days of the filing of the application and the petition is subsequently granted:

(1) Any State department, municipality, or county entitled to notice under G.S. 62-102(b);
(2) Any person whose land will be crossed by the proposed line;
(3) Any other person who can show a substantial interest in the certification proceeding. (1991, c. 189, s. 1.)

§ 62-104. Hearings.

(a) The Commission shall schedule a hearing upon each application filed under this Article not more than 120 days after the filing and shall conclude the proceeding as expeditiously as possible. The Commission may, however, extend this time period for substantial cause.

(b) If, after proper notice of the application has been given, no significant protests are filed with the Commission, the Commission may cancel the hearing and decide the case on the basis of the filed record.

(c) The Commission shall issue an order on each application filed under this Article within 60 days of the conclusion of the hearing. The Commission may extend this time period for substantial cause. (1991, c. 189, s. 1.)

§ 62-105. Burden of proof; decision.

(a) The burden of proof is on the applicant in all cases under this Article, except that any party proposing an alternative location for the proposed transmission line shall have the burden of proof in sustaining its position. The Commission may consider any factors that it finds are relevant and material to its decision. The Commission shall grant a certificate for the construction, operation, and maintenance of the proposed transmission line if it finds:

(1) That the proposed transmission line is necessary to satisfy the reasonable needs of the public for an adequate and reliable supply of electric energy;
(2) That, when compared with reasonable alternative courses of action, construction of the transmission line in the proposed location is reasonable, preferred, and in the public interest;
(3) That the costs associated with the proposed transmission line are reasonable;
(4) That the impact the proposed transmission line will have on the environment is justified considering the state of available technology, the nature and economics of the various alternatives, and other material considerations; and

(5) That the environmental compatibility, public convenience, and necessity require the transmission line.

(b) If the Commission determines that the location of the proposed transmission line should be modified, it may condition its certificate upon modifications it finds necessary to make the findings and determinations set forth in subsection (a) of this section. (1991, c. 189, s. 1.)

CASE NOTES

Burden of Proof. — Utilities Commission order issuing a Certificate of Environmental Compatibility and Public Convenience and Necessity to a utility to construct a transmission line along a proposed route was affirmed because the Commission did not improperly shift the burden of proof to the citizens rather than to the utility under G.S. 62-105(a); the Commission properly assigned to the utility the initial burden of proving it had examined alternative routes and that its preferred route was reasonable and in the public interest. State ex rel. Utils. Comm'n v. Wardlaw, 179 N.C. App. 582, 634 S.E.2d 898, 2006 N.C. App. LEXIS 2041 (2006).

§ 62-106. Effect of local ordinances.

Within 30 days after receipt of notice of an application as provided by G.S. 62-102, a municipality or county shall file with the Commission and serve on the applicant the provisions of an ordinance that may affect the construction, operation, or maintenance of the proposed transmission line in the manner provided by the rules of the Commission. If the municipality or county does not serve notice as provided above of any such ordinance provisions, the provisions of such ordinance may not be enforced by the municipality or county. If the applicant proposes not to comply with any part of the ordinance, the applicant may move the Commission for an order preempting that part of the ordinance. Service of the motion on the municipality or county by the applicant shall make the municipality or county a party to the proceeding. If the Commission finds that the greater public interest requires it, the Commission may include in a certificate issued under this Article an order preempting any part of such county or municipal ordinance with respect to the construction, operation or maintenance of the proposed transmission line. (1991, c. 189, s. 1.)

CASE NOTES

Relationship With Other Laws. — There was no conflict between G.S. 62-106 and 62-42 because they served different purposes and were reconcilable; the provisions of G.S. 62-100 through G.S. 62-107 dealt with the siting of certain large transmission lines and were not applicable to the case, and G.S. 62-42 was much broader in scope, dealing with compelling any type of needed improvement to a public utility system. The siting of lines of at least 161 kV was often controversial and the legislature's decision to require specialized procedures for the siting of these lines was logical. State ex rel. Utils. Comm'n v. Town of Kill Devil Hills, — N.C. App. —, 670 S.E.2d 341, 2009 N.C. App. LEXIS 4 (2009).

§ 62-107. Rules.

Pursuant to G.S. 62-31, the Commission may adopt rules to carry out the purposes of this Article. In addition, the Commission shall adopt rules requiring public utilities to file periodic reports stating their short-term and long-term plans for construction of transmission lines in this State. (1991, c. 189, s. 1.)

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

§§ 62-108, 62-109: Reserved for future codification purposes.

ARTICLE 6.

The Utility Franchise.

§ 62-110. Certificate of convenience and necessity.

(a) Except as provided for bus companies in Article 12 of this Chapter, no public utility shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to construction into territory contiguous to that already occupied and not receiving similar service from another public utility, nor to construction in the ordinary conduct of business.

(b) The Commission shall be authorized to issue a certificate to any person applying to the Commission to offer long distance services as a public utility as defined in G.S. 62-3(23)a.6., provided that such person is found to be fit, capable, and financially able to render such service, and that such additional service is required to serve the public interest effectively and adequately; provided further, that in such cases the Commission shall consider the impact on the local exchange customers and only permit such additional service if the Commission finds that it will not jeopardize reasonably affordable local exchange service.

Notwithstanding any other provision of law, the terms, conditions, rates, and interconnections for long distance services offered on a competitive basis shall be regulated by the Commission in accordance with the public interest. In promulgating rules necessary to implement this provision, the Commission shall consider whether uniform or nonuniform application of such rules is consistent with the public interest. Provided further that the Commission shall consider whether the charges for the provision of interconnections should be uniform.

For purposes of this section, long distance services shall include the transmission of messages or other communications between two or more central offices wherein such central offices are not connected on July 1, 1983, by any extended area service, local measured service, or other local calling arrangement.

(c) The Commission shall be authorized, consistent with the public interest, to adopt procedures for the issuance of a special certificate to any person for the limited purpose of offering telephone service to the public by means of coin, coinless, or key-operated pay telephone instruments. This service may be in addition to or in competition with public telephone services offered by the certificated telephone company in the service area. The access line from the pay instrument to the network may be obtained from the local exchange telephone company in the service area where the pay instrument is located, from any certificated competitive local provider, or any other provider authorized by the Commission. The Commission shall promulgate rules to implement the service authorized by this section, recognizing the competitive nature of the offerings and, notwithstanding any other provision of law, the Commission shall determine the extent to which such services shall be regulated and to the extent necessary to protect the public interest regulate the terms, conditions, and rates for such service and the terms and conditions for interconnection to the local exchange network.

(d) The Commission shall be authorized, consistent with the public interest and notwithstanding any other provision of law, to adopt procedures for the purpose of allowing shared use and/or resale of any telephone service provided to persons who occupy the same contiguous premises (as such term shall be defined by the Commission); provided, however, that there shall be no "networking" of any services authorized under this subsection whereby two or more premises where such services are provided are connected, and provided further that any certificated local provider or any other provider authorized by the Commission may provide access lines or trunks connecting such authorized service to the telephone network, and that the local service rates permitted or approved by the Commission for local exchange lines or trunks being shared or resold shall be on a measured usage basis where facilities are available or on a message rate basis otherwise. Provided however, the Commission may permit or approve flat rates, measured rates, message rates, or some combination of those rates for shared or resold services whenever the service is offered to patrons of hotels or motels, occupants of timeshare or condominium complexes serving primarily transient occupants, to patrons of hospitals, nursing homes, rest homes, or licensed retirement centers, or to members of clubs or students living in quarters furnished by educational institutions, or to persons temporarily subleasing residential premises. The Commission shall issue rules to implement the service authorized by this subsection, considering the competitive nature of the offerings and, notwithstanding any other provision of law, the Commission shall determine the extent to which such services shall be regulated and, to the extent necessary to protect the public interest, regulate the terms, conditions, and rates charged for such services and the terms and conditions for interconnection to the local exchange network. The Commission shall require any person offering telephone service under this subsection by means of a Private Branch Exchange ("PBX") or key system to secure adequate local exchange trunks from any certificated local provider or any other provider authorized by the Commission so as to assure a quality of service equal to the quality of service generally found acceptable by the Commission. Unless otherwise ordered by the Commission for good cause shown by the company, the right and obligation of the certificated local provider or any other provider authorized by the Commission to provide local service directly to any person located within its certificated service area shall continue to apply to premises where shared or resold telephone service is available, provided however, the Commission shall be authorized to establish the terms and conditions under which such services should be provided.

(e) Notwithstanding subsection (d) of this section, the Commission may authorize any telephone services provided to a nonprofit college or university, and its affiliated medical centers, which is qualified under Sections 501 and 170 of the United States Internal Revenue Code of 1986 or which is a State-owned institution, to be shared or resold by that institution on both contiguous campus premises owned or leased by the institution and noncontiguous premises owned or leased exclusively by the institution, provided these services are offered to students or guests housed in quarters furnished by the institution, patrons of hospitals or medical centers of the institution, or persons or businesses providing educational, research, professional, consulting, food, or other support services directly to or for the institution, its students, or guests. The services of a certificated local provider or any other provider authorized by the Commission, when provided to said colleges, universities, and affiliated medical centers shall be rated in the same way as those provided for shared service offered to patrons of hospitals, nursing homes, rest homes, licensed retirement centers, members of clubs or students living in quarters furnished by educational institutions as provided for in subsection (d) of this section. The institutions regulated pursuant to this subsection shall not be prohibited from electing optional services from the certificated local provider or any other provider authorized by the Commission which include measured or message rate services. There shall be no "networking" of any services authorized under this subsection whereby two or more different institutions where such services are provided are interconnected. Any certificated local provider or any other provider authorized by the Commission may provide access lines or trunks connecting such authorized services to the telephone network. The Commission shall require such institutions to secure adequate local exchange trunks from the certificated local provider or any other provider authorized by the Commission to assure a quality of service equal to the quality of service generally found acceptable by the Commission. Unless otherwise ordered by the Commission for good cause shown by the certificated local provider or any other provider authorized by the Commission, the right and obligation of that provider to provide local service directly to any person located within its certificated service area shall continue to apply to premises where shared or resold telephone service is available under this subsection, provided however, the Commission shall be authorized to establish the terms and conditions under which such service should be provided. The Commission shall issue rules to implement the services authorized by this subsection.

(f) Reserved.

(f1) Except as provided in subsection (f2) of this section, the Commission is authorized, following notice and an opportunity for interested parties to be heard, to issue a certificate to any person applying to provide local exchange or exchange access services as a public utility as defined in G.S. 62-3(23) a.6., without regard to whether local telephone service is already being provided in the territory for which the certificate is sought, provided that the person seeking to provide the service makes a satisfactory showing to the Commission that (i) the person is fit, capable, and financially able to render such service; (ii) the service to be provided will reasonably meet the service standards that the Commission may adopt; (iii) the provision of the service will not adversely impact the availability of reasonably affordable local exchange service; (iv) the person, to the extent it may be required to do so by the Commission, will participate in the support of universally available telephone service at affordable rates; and (v) the provision of the service does not otherwise adversely impact the public interest. In its application for certification, the person seeking to provide the service shall set forth with particularity the proposed geographic territory to be served and the types of local exchange and exchange access services to be provided. Except as provided in G.S. 62-133.5(f), any person receiving a certificate under this section shall, until otherwise determined by the Commission, file and maintain with the Commission a complete list of the local exchange and exchange access services to be provided and the prices charged for those services, and shall be subject to such reporting requirements as the Commission may require.

Any certificate issued by the Commission pursuant to this subsection shall not permit the provision of local exchange or exchange access service until July 1, 1996, unless the Commission shall have approved a price regulation plan pursuant to G.S. 62-133.5(a) for a local exchange company with an effective date prior to July 1, 1996. In the event a price regulation plan becomes effective prior to July 1, 1996, the Commission is authorized to permit the provision of local exchange or exchange access service by a competing local provider in the franchised area of such local exchange company.

The Commission is authorized to adopt rules it finds necessary (i) to provide for the reasonable interconnection of facilities between all providers of telecommunications services; (ii) to determine when necessary the rates for such interconnection; (iii) to provide for the reasonable unbundling of essential facilities where technically and economically feasible; (iv) to provide for the transfer of telephone numbers between providers in a manner that is technically and economically reasonable; (v) to provide for the continued development and encouragement of universally available telephone service at reasonably affordable rates; and (vi) to carry out the provisions of this subsection in a manner consistent with the public interest, which will include a consideration of whether and to what extent resale should be permitted. In adopting rules to establish an appropriate definition of universal service, the Commission shall consider evolving trends in telecommunications services and the need for consumers to have access to high-speed communications networks, the Internet, and other services to the extent that those services provide social benefits to the public at a reasonable cost.

Local exchange companies and competing local providers shall negotiate the rates for local interconnection. In the event that the parties are unable to agree within 90 days of a bona fide request for interconnection on appropriate rates for interconnection, either party may petition the Commission for determination of the appropriate rates for interconnection. The Commission shall determine the appropriate rates for interconnection within 180 days from the filing of the petition.

Except as provided in subsections (f4) and (f5) of this section, each local exchange company shall be the universal service provider (carrier of last resort) in the area in which it is certificated to operate on July 1, 1995. Each local exchange company or telecommunications service provider with carrier of last resort responsibility may satisfy its carrier of last resort obligation by using any available technology. In continuing this State's commitment to universal service, the Commission shall, by December 31, 1996, adopt interim rules that designate the person that should be the universal service provider and to determine whether universal service should be funded through interconnection rates or through some other funding mechanism. At a time determined by the Commission to be in the public interest, the Commission shall conduct an investigation for the purpose of adopting final rules concerning the provision of universal services, and whether universal service should be funded through interconnection rates or through some other funding mechanism, and, consistent with the provisions of subsections (f4) and (f5) of this section, the person that should be the universal service provider.

The Commission shall make the determination required pursuant to this subsection in a manner that furthers this State's policy favoring universally available telephone service at reasonable rates.

(f2) The provisions of subsection (f1) of this section shall not be applicable to franchised areas within the State that are being served by local exchange companies with 200,000 access lines or less located within the State, and it is further provided that such local exchange company providing service to 200,000 access lines or less shall not be subject to the regulatory reform procedures outlined under the terms of G.S. 62-133.5(a) or permitted to compete in territory outside of its franchised area for local exchange and exchange access services until such time as the franchised area is opened to competing local providers as provided for in this subsection. Upon the filing of an application by a local exchange company with 200,000 access lines or less for regulation under the provisions of G.S. 62-133.5(a), the Commission shall apply the provisions of that section to such local exchange company, but only upon the condition that the provisions of subsection (f1) of this section are to be applicable to the franchised area and local exchange and exchange access services offered by such a local exchange company.

(f3) The provisions of subsection (f1) of this section shall not be applicable to areas served by telephone membership corporations formed and existing under Article 4 of Chapter 117 of the General Statutes and exempt from regulation as public utilities, pursuant to G.S. 62-3(23)d. and G.S. 117-35. To the extent a telephone membership corporation has carrier of last resort obligations, it may fulfill those obligations using any available technology.

(f4) When any telecommunications service provider: (i) enters into an agreement to provide local exchange service for a subdivision or other area where access to right-of-way for the provision of local exchange service by other telecommunications service providers has not been granted coincident with any other grant of access by the property owner; or (ii) enters into an agreement after July 1, 2008, to provide communications service that otherwise precludes the local exchange company from providing communications service for the subdivision or other area, the local exchange company is not obligated to provide basic local exchange telephone service or any other communications service to customers in the subdivision or other area. In each of the foregoing instances, the telecommunications service provider shall be the provider in the subdivision or other area under the terms of the agreement and applicable law. The local exchange company for the franchise area or territory in which the subdivision or other area is located shall be relieved of any universal service provider obligation for that subdivision or other area. In that case, the local exchange company and all other telecommunications service providers shall retain the option, but not the obligation, to serve customers in the subdivision or other area. The local exchange company shall provide written notification to the appropriate State agency that the local exchange company is no longer the universal service provider for the subdivision or other area. The appropriate State agency shall retain the right to redesignate a local exchange company or telecommunications service provider as the universal service provider in accordance with the provisions of subsection (f5) of this section. Any person that enters into an agreement with a telecommunications service provider to provide local exchange service for a subdivision or other area as described in this subsection shall notify a purchaser of real property within the subdivision or other area of the agreement.

For any circumstance not described in this subsection, a local exchange company may be granted a waiver of its carrier of last resort obligation in a subdivision or other area by the appropriate State agency based upon a showing by the local exchange company of all of the following:

(1) Providing service in the subdivision or area would be inequitable or unduly burdensome.
(2) One or more alternative providers of local exchange service exist.
(3) Granting the waiver is in the public interest.

(f5) If the appropriate State agency finds, upon hearing, that the telecommunications service provider serving the subdivision or other area pursuant to subsection (f4) of this section, or its successor in interest, is no longer willing or no longer able to provide adequate services to the subdivision or other area, the appropriate State agency may redesignate the local exchange company for the franchise area or territory in which the subdivision or other area is located, or another telecommunications service provider, to be the universal service provider for the subdivision or other area. If the redesignated local exchange company is subject to price regulation or other alternative regulation under G.S. 62-133.5, it may treat the costs incurred in extending its facilities into the subdivision or other area as exogenous to that form of regulation and may, subject to providing written notice to the Commission, adjust its rates to recover these costs on an equitable basis from its customers whose rates are subject to regulation under G.S. 62-133.5. Any such action shall be subject to review by the Commission in a complaint proceeding initiated by any interested party pursuant to G.S. 62-73. If the redesignated local exchange company is not subject to price regulation or other alternative regulation under G.S. 62-133.5, it may recover the costs incurred in extending its facilities into the subdivision or other area in the form of a surcharge, subject to Commission approval, spread equitably among all of its customers in a proceeding under G.S. 62-136(a), without having to file a general rate case proceeding. During the period that a telecommunications service provider is serving as a universal service provider and prior to the redesignation of a local exchange company as the universal service provider as provided for herein, for the purposes of the appropriate State agency's periodic certification to the Federal Communications Commission in matters regarding eligible telecommunications carrier status, a local company's status shall not be deemed to affect its eligibility to be an eligible telecommunications carrier, and the appropriate State agency shall so certify.

(f6) For purposes of subsections (f4) and (f5) of this section, the following definitions are applicable:

(1) ''Appropriate State agency'' means the Commission for purposes of any subdivision or other area within the franchise area of a local exchange company, and the Rural Electrification Authority for the purposes of any subdivision or other area within the franchise area or territory of a telephone membership corporation.

(1a) ''Communications service'' means either voice, video, or data service through any technology.

(2) ''Local exchange company'' means a local exchange company subject to price regulation, or other alternative regulation or rate base regulation by the Commission or a telephone membership corporation organized under G.S. 117-30.

(3) ''Telecommunications service provider'' means a competing local provider, or any other person providing local exchange service by means of voice-over-Internet protocol, wireless, power line, satellite, or other nontraditional means, whether or not regulated by the Commission, but the term shall not include local exchange companies or telephone membership corporations.

(g) In addition to the authority to issue a certificate of public convenience and necessity and establish rates otherwise granted in this Chapter, for the purpose of encouraging water conservation, the Commission may, consistent with the public interest, adopt procedures that allow a lessor to charge for the costs of providing water or sewer service to persons who occupy the same contiguous premises. The following provisions shall apply:

(1) All charges for water or sewer service shall be based on the user's metered consumption of water, which shall be determined by metered measurement of all water consumed. The rate charged by the lessor shall not exceed the unit consumption rate charged by the supplier of the service.

(1a) If the contiguous premises were built prior to 1989 and the lessor determines that the measurement of the tenant's total water usage is impractical or not economical, the lessor may allocate the cost for water and sewer service to the tenant using equipment that measures the tenant's hot water usage. In that case, each tenant shall be billed a percentage of the landlord's water and sewer costs for water usage in the dwelling units based upon the hot water used in the tenant's dwelling unit. The percentage of total water usage allocated for each dwelling unit shall be equal to that dwelling unit's individually submetered hot water usage divided by all submetered hot water usage in all dwelling units. The following conditions apply to billing for water and sewer service under this subdivision:

a. A lessor shall not utilize a ratio utility billing system or other allocation billing system that does not rely on individually submetered hot water usage to determine the allocation of water and sewer costs.

b. The lessor shall not include in a tenant's bill the cost of water and sewer service used in common areas or water loss due to leaks in the lessor's water mains. A lessor shall not bill or attempt to collect for excess water usage resulting from a plumbing malfunction or other condition that is not known to the tenant or that has been reported to the lessor.

c. All equipment used to measure water usage shall comply with guidelines promulgated by the American Water Works Association.

d. The lessor shall maintain records for a minimum of 12 months that demonstrate how each tenant's allocated costs were calculated for water and sewer service. Upon advanced written notice to the lessor, a tenant may inspect the records during reasonable business hours.

e. Bills for water and sewer service sent by the lessor to the tenant shall contain all the following information:

1. The amount of water and sewer services allocated to the tenant during the billing period.

2. The method used to determine the amount of water and sewer services allocated to the tenant.

3. Beginning and ending dates for the billing period.

4. The past-due date, which shall not be less than 25 days after the bill is mailed.
5. A local or toll-free telephone number and address that the tenant can use to obtain more information about the bill.

(2) The lessor may charge a reasonable administrative fee for providing water or sewer service not to exceed the maximum administrative fee authorized by the Commission.

(3) The Commission shall issue rules to define contiguous premises and to implement this subsection. In issuing the rule to define contiguous premises, the Commission shall consider contiguous premises where manufactured homes, as defined in G.S. 143-145(7), or spaces for manufactured homes are rented.

(4) The Commission shall develop an application that lessors must submit for authority to charge for water or sewer service. The form shall include all of the following:
a. A description of the applicant and the property to be served.
b. A description of the proposed billing method and billing statements.
c. The schedule of rates charged to the applicant by the supplier.
d. The schedule of rates the applicant proposes to charge the applicant's customers.
e. The administrative fee proposed to be charged by the applicant.
f. The name of and contact information for the applicant and its agents.
g. The name of and contact information for the supplying water or sewer system.
h. Any additional information that the Commission may require.

(5) The Commission shall approve or disapprove an application within 30 days of the filing of a completed application with the Commission. If the Commission has not issued an order disapproving a completed application within 30 days, the application shall be deemed approved.

(6) A provider of water or sewer service under this subsection may increase the rate for service so long as the rate does not exceed the unit consumption rate charged by the supplier of the service. A provider of water or sewer service under this subsection may change the administrative fee so long as the administrative fee does not exceed the maximum administrative fee authorized by the Commission. In order to change the rate or administrative fee, the provider shall file a notice of revised schedule of rates and fees with the Commission. The Commission may prescribe the form by which the provider files a notice of a revised schedule of rates and fees under this subsection. The form shall include all of the following:
a. The current schedule of the unit consumption rates charged by the provider.
b. The schedule of rates charged by the supplier to the provider that the provider proposes to pass through to the provider's customers.
c. The schedule of the unit consumption rates proposed to be charged by the provider.
d. The current administrative fee charged by the provider, if applicable.
e. The administrative fee proposed to be charged by the provider.

(7) A notification of revised schedule of rates and fees shall be presumed valid and shall be allowed to become effective upon 14 days notice to the Commission, unless otherwise suspended or disapproved by order issued within 14 days after filing.

(8) Notwithstanding any other provision of this Chapter, the Commission shall determine the extent to which the services shall be regulated and, to the extent necessary to protect the public interest, regulate the terms, conditions, and rates that may be charged for the services. Nothing in this subsection shall be construed to alter the rights, obligations, or remedies of persons providing water or sewer services and their customers under any other provision of law.

(9) A provider of water or sewer service under this subsection shall not be required to file annual reports pursuant to G.S. 62-36 or to furnish a bond pursuant to G.S. 62-110.3. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1983 (Reg. Sess., 1984), c. 1043, s. 2; 1985, c. 676, s. 9; c. 680; 1987, c. 445, s. 1; 1989, c. 451, ss. 1, 2; 1995, c. 27, s. 4; 1995 (Reg. Sess., 1996), c. 753, s. 1; 1997-207, s. 1; 1998-180, ss. 1, 2; 1998-212, s. 15.8B; 1999-112, s. 1; 2001-252, s. 1; 2001-502, s. 1; 2002-14, s. 1; 2003-99, s. 1; 2003-173, s. 1; 2004-143, s. 7; 2005-385, ss. 1, 2; 2009-202, s. 1; 2009-279, s. 1.)

Cross References. — As to necessity for certificate of convenience and necessity for housing projects, see G.S. 157-28.

Editor's Note. — See Editor's note under G.S. 62-133.5 regarding Session Laws 1995, c. 27, s. 6.1.

This section, as amended by Session Laws 1995, c. 27, s. 4, which added subsections (f1), (f2), and (f3), does not contain a subsection (f).

Session Laws 2003-173, which, in s. 1, inserted the fourth sentence in subsection (g), in s. 2 provides: "In enacting Section 1 of this act, it is the intent of the General Assembly to promote water conservation while protecting public health, safety, welfare, and the environment and avoiding unduly burdensome requirements on consecutive water systems. Section 1 of this act shall not be construed to impose any requirement on a supplying water system other than the requirements that apply to the water system on the date this act becomes effective and that would apply to the supplying water system if a consecutive water system had not been authorized."

Session Laws 2004-143, s. 9, provides: "On 1 August 2004 all certificates of authority for allocation of rental costs and all temporary operating authority as traditional water or sewer utilities issued by the Utilities Commission to entities that provide water or sewer services pursuant to G.S. 62-110(g), as that subsection read prior to the amendments made by Section 7 of this act, shall terminate. All entities operating under these certificates or temporary operating authority shall be deemed to have certificates of authority to charge for water or sewer service at their then existing rates."

Session Laws 2004-143, s. 10, provides: "Effective 1 August 2004, Utilities Commission Rules R18-11 through R18-17 shall be rescinded and former Commission Rules R18-1 through R18-7 as they existed on 18 December 2001 shall be reinstated, subject to the authority of the Commission to modify or rescind them or adopt additional rules."

Pursuant to Session Laws 2005-385, s. 3, subsections (f4) through (f6) of this section are applicable to agreements entered into before, on, or after September 13, 2005.

The definition for "Communications service" as enacted by Session Laws 2009-202, s. 1, was originally designated as subdivision (f6)(4), and was redesignated as subdivision (f6)(1a) at the direction of the Revisor of Statutes to maintain alphabetical order.

Effect of Amendments. — Session Laws 2009-202, s. 1, effective June 26, 2009, rewrote subsection (f1); added the last sentence in subsection (f3); rewrote subsection (f4); in subsection (f5), substituted "serving the subdivision or other area pursuant to subsection (f4) of this section" for "that entered into the agreement'" in the first sentence; and in subsection (f6), added the definition of "Communications service."

Session Laws 2009-279, s. 1, effective October 1, 2009, and applicable to leases entered into on or after that date, in subdivision (g)(1), deleted "and not by any partial measurement of water consumption, unless specifically authorized by the Commission" at the end of the first sentence; and added subdivision (g)(1a).

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

I. In General.
II. Applicability.
III. Public Utility.
IV. Certificate of Public Convenience and Necessity.
V. Duplicate Services.

I. IN GENERAL.

The basis for the requirement of a certificate of public convenience and necessity, as a prerequisite to the right to serve, is the adoption, by the General Assembly, of the policy that, nothing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Requirement Curtails Competition. — Regarding public utilities, competition, deemed unnecessary, is curtailed by the requirement that one desiring to engage in such business procure from the Utilities Commission a certificate of public convenience and necessity. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

By this section the State has granted to the utility company a legal monopoly upon a service vital to the economic well-being and the domestic life of the people of a large territory. This franchise is a property right of great value. Normally, when the grantee sells its business to another company, the monopolistic franchise command a substantial price, over and above the exchange value of the physical properties transferred with it. Thus, the value of the franchise enters into and affects the market price of the utility's stock. It does not, however, enter into the computation of the utility's rate base. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

This State has adopted the policy of granting a telephone company a monopoly upon the rendering of telephone service within its service area. State ex rel. Utils. Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

But nothing in this Chapter confers upon a telephone company a monopoly upon advertising by its business subscribers. State ex rel. Utils. Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

Standing to Contest Application for Certificate. — Plaintiff utilities which, by virtue of their contiguity to subdivision were in a superior position to any other utility in the area to provide service to the development since no other competitor would be able to provide for subdivision without first obtaining a certificate, and in the event that another company sought a certificate, plaintiffs would be afforded the opportunity to contest the application, had a legitimate expectation of entitlement sufficient to give them a protectible interest so as to challenge city's provision of water to the subdivision. Quality Water Supply, Inc. v. City of Wilmington, 97 N.C. App. 400, 388 S.E.2d 608, cert. denied, 326 N.C. 597, 393 S.E.2d 881, 393 S.E.2d 882 (1990).

Access Charge Tariff Within Authority of Commission. — Considering the evidence supporting the view that access charge tariff was calculated to reimburse local exchange companies (LECs) for having to provide additional connection facilities to local networks, payments could not be viewed as mere increased revenues for the LECs, but to provide funds to set off those expenditures that the LECs were required to make to provide additional facilities to handle additional carrier access. The imposition of the access charge tariff was within the authority granted to the Commission by the 1984 amendments to this section. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Plan for Compensation to Local Exchange Companies for Lost Revenues During Transition — Not Invalid. — Plan requiring compensation to local exchange companies for lost revenues during transition period did not violate the equal protection clause or the commerce clause, nor conflict with federal antitrust and communications objectives. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Same — Not a Penalty or Damages. — Plan requiring compensation to local exchange companies for lost revenues during transition period did not impose a "penalty" or constitute money damages, and could more appropriately be considered as a prerequisite to receiving a certificate. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Same — Statutorily Authorized. — Plan requiring compensation to local exchange companies for lost revenues during transition period was reasonably calculated to provide protection for the local exchange customers, and was a proper "term" or "condition" of certification which was consistent with the public interest. The plan was therefore statutorily authorized. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Water Company "Occupies" Through Presence of Water Lines. — Subsection (a) of this section requires only that a company "occupy" an area not being served by another utility. A water company "occupies" through the presence of its water lines in the territory. Quality Water Supply, Inc. v. City of Wilmington, 97 N.C. App. 400, 388 S.E.2d 608, cert. denied, 326 N.C. 597, 393 S.E.2d 881, 393 S.E.2d 882 (1990).

Order for Cellular Carriers to Pay Access Charges Held Proper. — The Utilities Commission did not err by ordering cellular carriers to pay access charges to local exchange companies when providing wide area call reception to their cellular customers. State ex rel. Utilities Comm'n v. Centel Cellular Co., 103 N.C. App. 731, 407 S.E.2d 257 (1991).

In adjudication between two competing certificate applicants, it is for the Utilities Commission to weigh and balance a myriad of factors in an effort to protect the interests and welfare of the general public. State ex rel. Utils. Comm'n v. Piedmont Natural Gas Co., 346 N.C. 558, 488 S.E.2d 591 (1997).

Applied in State ex rel. Utils. Comm'n v. Town of Pineville, 17 N.C. App. 522, 195 S.E.2d 76 (1973); State ex rel. Utils. Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973); State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Cited in State ex rel. Utils. Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972); Secretary of Revenue v. Carolina Tel. & Tel. Co., 81 N.C. App. 240, 344 S.E.2d 46 (1986); State ex rel. Utils. Comm'n v. North Carolina Elec. Membership Corp., 105 N.C. App. 136, 412 S.E.2d 166 (1992); State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

II. APPLICABILITY.

This section does not apply to municipal corporations. Town of Grimesland v. City of Washington, 234 N.C. 117, 66 S.E.2d 794 (1951).

A municipal corporation in the operation of a municipally owned electric power plant with transmission lines extended to supply consumers beyond its corporate limits is not required under this section to obtain from the Utilities Commission a certificate of public convenience and necessity before it can lawfully operate. Town of Grimesland v. City of Washington, 234 N.C. 117, 66 S.E.2d 794 (1951); Pee Dee Elec. Membership Corp. v. Carolina Power & Light Co., 253 N.C. 610, 117 S.E.2d 764 (1961).

This section is not applicable to an electric membership corporation organized under the provisions of G.S. 117-6 to 117-26. Carolina Power & Light Co. v. Johnston County Elec. Membership Corp., 211 N.C. 717, 192 S.E. 105 (1937); Pitt & Greene Elec. Membership Corp. v. Carolina Power & Light Co., 255 N.C. 258, 120 S.E.2d 749 (1961).

Certificate Not Required for Business Other Than Public Utility. — One does not need a certificate of public convenience and necessity in order to engage in a business which is not that of a "public utility" as defined in G.S. 62-3(23). State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utils. Comm'n v. Edmisten, 40 N.C. App. 109, 252 S.E.2d 516 (1979), aff'd in part and rev'd in part on other grounds, 299

N.C. 432, 263 S.E.2d 583 (1980).

Nor Before City Issues Franchise. — Even if a television cable company is a "public utility" as defined in G.S. 62-3, it is not required to obtain from the Utilities Commission a certificate of public convenience and necessity before a franchise is issued by a city to it. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

But Certificate Is Required Before Utility Commences Construction or Operation. — A certificate of public convenience and necessity from the Utilities Commission is required by this section before a public utility may commence construction of its plant or operation of its business. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

III. PUBLIC UTILITY.

The status of an entity as a public utility, entitled to the rights conferred by statute and subject to the jurisdiction of the Commission, does not depend upon whether it has secured a certificate of public convenience and necessity, pursuant to this section, but is determined instead according to whether it is, in fact, operating a business defined by the legislature as a public utility. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

If an entity is, in fact, operating as a public utility, it is subject to the regulatory powers of the Commission, notwithstanding the fact that it has failed to comply with this section before beginning its operation. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1967).

Issuance of Certificate a Nullity If Applicant Is Not Public Utility. — If an applicant's proposed service is not within the definition of "public utility" contained in G.S. 62-3(23), the issuance of a certificate of public convenience and necessity by the Commission to the applicant would be a nullity. It would not supply a basis for a further order conferring upon the applicant a right which may be granted only to a public utility. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

And in Excess of Commission Authority. — To grant a certificate of public convenience and necessity to conduct a business which is not a public utility, within the definition of the statute, would be both arbitrary and in excess of the statutory authority of the Commission. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

And Would Not Transform Ordinary Business into Public Utility. — The issuance of a certificate of public convenience and necessity by the Commission does not transform an ordinary business into a public utility, so as to entitle its operator to the rights of a public utility, or so as to impose upon him the duties and limitations of a public utility. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Definition of Public Utility Cannot Be Extended. — Neither the Commission nor the Supreme Court has authority to add to the types of business defined by the legislature as public utilities. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Neither a telephone answering nor a message relaying service is a public utility within the purview of G.S. 62-3(23). State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

IV. CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

Finding of Both Convenience and Public Need Is Required. — A finding by the Commission that the rendering of the proposed service by an applicant would be a convenience to the public, even if supported by competent and substantial evidence, is not an adequate basis for an order granting the applicant a certificate of public convenience and necessity. To entitle the applicant to such a certificate it is, of course, not necessary for him to show, and the Commission to find, that the proposed service is necessary in the sense of being indispensable. Nevertheless, a mere showing of convenience is not sufficient. There must be an element of public need for the proposed service by the applicant in the area. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Public Convenience and Necessity Must Require Proposed Operation. — The Commission is authorized to issue a certificate of public convenience and necessity if, but only if, the Commission has made findings of fact, supported by competent, material, and substantial evidence, which findings, in turn, support the conclusion that public convenience and necessity "require or will require" the proposed operation by the applicant. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Evidence Held to Show Convenience and Necessity of Services. — Evidence before the Commission indicating that a number of the residences served by applicant's water and sewer systems were situated on quarter-acre lots, which were of insufficient size to support both a well and septic system, and that the occupants of these residences, who were currently among appellant's customers, had no alternative means of water supply or sewage disposal other than the service provided by appellant, clearly supported the conclusion not only that appellant's services constituted a convenience to that segment of the public who used them, but also that such services were necessary to the safety and health of the public. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

Commission's order that appellant apply for a certificate of public convenience and necessity was unnecessary where the Commission had already concluded that appellant's application to abandon service should be denied. Instead, in such a case, the Commission should proceed to establish the territory to be served by appellant, issue the certificate (franchise), establish the rates to be charged for the services, and, if necessary, exercise its statutory powers and authority to compel compliance with its lawful orders. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

The power of eminent domain is inherent in the certificate of public convenience and necessity. State ex rel. Utils. Comm'n v. Edmisten, 40 N.C. App. 109, 252 S.E.2d 516 (1979), aff'd in part and rev'd in part on other grounds, 299 N.C. 432, 263 S.E.2d 583 (1980).

A certificate of public convenience and necessity to render telephone service grants the right to adopt new methods of telephonic communications, including a mobile radio telephone service. State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

A certificate of public convenience and necessity, which authorizes its holder to render "telephone service" does not limit the holder to the practice of the art of telephony as it was known and practiced on the date the certificate was issued, nor to the use therein of devices, equipment and methods then in use. Obviously, it is the intent of such a certificate to authorize the holder to improve its service by adopting and using new and improved devices and methods for telephonic communication. State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Order Held Not to Create a Vested Property Right to Provide Service. — The order of the Commission relating to the provision of intraLATA service by MCI via its own facilities after January 1, 1987, did not give MCI a vested property right of which it was unconstitutionally deprived by the Commission's failure to allow facilities-based intraLATA competition on January 1, 1987. Before MCI could have the right to provide intraLATA service via its own facilities, the Commission would have to issue a certificate of authority to MCI, and the Commission could not issue this certificate without making the requisite findings of fact pursuant to subsection (b) of this section. State ex rel. Utils. Comm'n v. Public Staff, 89 N.C. App. 319, 365 S.E.2d 638 (1988).

V. DUPLICATE SERVICES.

Services Need Not Be Identical to Give Utility Serving Area Prior Right. — Two services need not be identical in every respect in order to give the utility already serving the area the prior right. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 367 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

G.S. 62-42 must be construed in connection with this section, which requires the issuance of a certificate of public convenience and necessity to construct new facilities except where such construction is into territory contiguous to that already occupied and not receiving similar service from another public utility. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27, cert. denied, 285 N.C. 596, 205 S.E.2d 726 (1974).

Thus, Commission Is Without Authority to Compel Duplicate Telephone Service. — A reading of G.S. 62-42 in pari materia with this section results in the determination that the Commission does not have the authority to compel a public utility to provide local exchange service to an area which is already receiving such service from another public utility. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27, cert. denied, 285 N.C. 596, 205 S.E.2d 726 (1974).

To order a telephone company to render service to an area already occupied by another telephone company would foster duplication, wastefulness, and unwarranted competition, all of which are repugnant to the avowed policy of the public utility law. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27, cert. denied, 285 N.C. 596, 205 S.E.2d 726 (1974).

Finding Necessary for Granting Certificate to Competitor. — The requirement of a certificate of public convenience and necessity is not an absolute prohibition of competition between public utilities rendering the same service. There is, however, inherent in this requirement the concept that, once a certificate is granted which authorizes the holder to render the proposed service within the geographic area in question, a certificate will not be granted to a competitor in the absence of a showing that the utility already in the field is not rendering and cannot or will not render the specific service in question. State ex rel. Utils.

Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Commission Should Have Denied Application Where Proposal to Render Substantially Same Service. — Where a public utility had a certificate of convenience and necessity for telephone service in a certain area and was ready and able to provide such area a mobile radio service, the Utilities Commission should have denied an application for a certificate of public convenience and necessity to an applicant who proposed to render substantially the same mobile radio service in the area; the fact that the applicant proposed to offer an electronic personal paging service as an auxiliary to its mobile radio service was not a sufficient difference to justify the issuance of the certificate, when it appeared that the Commission could compel the established utility to install such a service when the public convenience so required. State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

§ 62-110.1. Certificate for construction of generating facility; analysis of long-range needs for expansion of facilities; ongoing review of construction costs; inclusion of approved construction costs in rates.

(a) Notwithstanding the proviso in G.S. 62-110, no public utility or other person shall begin the construction of any steam, water, or other facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility service, even though the facility be for furnishing the service already being rendered, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction.

(b) For the purpose of subsections (a), (c), and (d) of this section, "public utility" shall include any electric membership corporation operating within this State, and the term "public utility service" shall include the service rendered by any such electric membership corporation.

(c) The Commission shall develop, publicize, and keep current an analysis of the long-range needs for expansion of facilities for the generation of electricity in North Carolina, including its estimate of the probable future growth of the use of electricity, the probable needed generating reserves, the extent, size, mix and general location of generating plants and arrangements for pooling power to the extent not regulated by the Federal Energy Regulatory Commission and other arrangements with other utilities and energy suppliers to achieve maximum efficiencies for the benefit of the people of North Carolina, and shall consider such analysis in acting upon any petition by any utility for construction. In developing such analysis, the Commission shall confer and consult with the public utilities in North Carolina, the utilities commissions or comparable agencies of neighboring states, the Federal Energy Regulatory Commission, the Southern Growth Policies Board, and other agencies having relevant information and may participate as it deems useful in any joint boards investigating generating plant sites or the probable need for future generating facilities. In addition to such reports as public utilities may be required by statute or rule of the Commission to file with the Commission, any such utility in North Carolina may submit to the Commission its proposals as to the future needs for electricity to serve the people of the State or the area served by such utility, and insofar as practicable, each such utility and the Attorney General may attend or be represented at any formal conference conducted by the Commission in developing a plan for the future requirements of electricity for North Carolina or this region. In the course of making the analysis and developing the plan, the Commission shall conduct one or more public hearings. Each year, the Commission shall submit to the Governor and to the appropriate committees of the General Assembly a report of its analysis and plan, the progress to date in carrying out such plan, and the program of the Commission for the ensuing year in connection with such plan.

(d) In acting upon any petition for the construction of any facility for the generation of electricity, the Commission shall take into account the applicant's arrangements with other electric utilities for interchange of power, pooling of plant, purchase of power and other methods for providing reliable, efficient, and economical electric service.

(e) As a condition for receiving a certificate, the applicant shall file an estimate of construction costs in such detail as the Commission may require. The Commission shall hold a public hearing on each application and no certificate shall be granted unless the Commission has approved the estimated construction costs and made a finding that construction will be consistent with the Commission's plan for expansion of electric generating capacity. A certificate for the construction of a coal or nuclear facility shall be granted only if the applicant demonstrates and the Commission finds that energy efficiency measures; demand-side management; renewable energy resource generation; combined heat and power generation; or any combination thereof, would not establish or maintain a more cost-effective and reliable generation system and that the construction and operation of the facility is in the public interest. In making its determination, the Commission shall consider resource and fuel diversity and reasonably anticipated future operating costs. Once the Commission grants a certificate, no public utility shall cancel construction of a generating unit or facility without approval from the Commission based upon a finding that the construction is no longer in the public interest.

(e1) Upon the request of the public utility or upon its own motion, the Commission may review the certificate to determine whether changes in the probable future growth of the use of electricity indicate that the public convenience and necessity require modification or revocation of the certificate. If the Commission finds that completion of the generating facility is no longer in the public interest, the Commission may modify or revoke the certificate.

(f) The public utility shall submit a progress report and any revision in the cost estimate for the construction approved under subsection (e) of this section during each year of construction. Upon the request of the public utility or upon its own motion, the Commission may conduct an ongoing review of construction of the facility as the construction proceeds. If the Commission approves any revised construction cost estimate and finds that incurrence of the cost of that portion of the construction of the facility under review was reasonable and prudent, the certificate shall remain in effect. If the Commission disapproves any part of the revised cost estimate or finds that the incurrence of the cost of that portion of the construction of the facility then under review was unreasonable or imprudent, the Commission may modify or revoke the certificate.

(f1) The public utility shall recover through rates in a general rate case conducted pursuant to G.S. 62-133 the actual costs it has incurred in constructing a generating facility in reliance on a certificate issued under this section as provided in this subsection, unless new evidence is discovered (i) that could not have been discovered by due diligence at an earlier time and (ii) that reasonably tends to show that a previous determination by the Commission that a material item of cost was just and reasonable and prudently incurred was erroneous. If the Commission determines that evidence has been submitted that meets the requirements of this subsection, the public utility shall have the burden of proof to demonstrate that the material item of cost was in fact just and reasonable and prudently incurred.

(1) When a facility has been completed, and the construction of the facility has been subject to ongoing review under subsection (f) of this section, the reasonable and prudent costs of construction approved by the Commission during the ongoing review shall be included in the public utility's rate base without further review by the Commission.

(2) If a facility has not been completed, and the construction of the facility has been subject to ongoing review under subsection (f) of this section, the reasonable and prudent costs of construction approved by the Commission during the ongoing review shall be included in the public utility's rate base without further review by the Commission.

(3) If a facility is under construction or has been completed and the construction of the facility has not been subject to ongoing review under subsection (f) of this section, the costs of construction shall be included in the public utility's rate base if the Commission finds that the incurrence of these costs is reasonable and prudent.

(f2) If the construction of a facility is cancelled, including cancellation as a result of modification or revocation of the certificate under subsection (e1) of this section, and the construction of the facility has been subject to ongoing review under subsection (f), absent newly discovered evidence (i) that could not have been discovered by due diligence at an earlier time and (ii) that reasonably tends to show that a previous determination by the Commission that a material item of cost was just and reasonable and prudently incurred was erroneous, the public utility shall recover through rates in a general rate case conducted pursuant to G.S. 62-133 the costs of construction approved by the Commission during the ongoing review that were actually incurred prior to cancellation, amortized over a reasonable time as determined by the Commission. In the general rate case, the Commission shall make any adjustment that may be required because costs of construction previously added to the utility's rate base pursuant to subsection (f1) of this section are removed from the rate base and recovered in accordance with this subsection. Any costs of construction actually incurred, but not previously approved by the Commission, shall be recovered only if they are found by the Commission to be reasonable and prudent. If the Commission determines that evidence has been submitted that meets the requirements of this subsection, the public utility shall have the burden of proof to demonstrate that the material item of cost was just and reasonable and prudently incurred.

(f3) If the construction of a facility is cancelled, including cancellation as a result of the modification or revocation of the certificate under subsection (e1) of this section, and the construction of the facility has not been subject to ongoing review under subsection (f) of this section, the public utility shall recover through rates in a general rate case conducted pursuant to G.S. 62-133 the costs of construction that were actually incurred prior to the cancellation and are found by the Commission to be reasonable and prudent, amortized over a reasonable time as determined by the Commission. In the general rate case, the Commission shall make any adjustment that may be required because costs of construction previously added to the utility's rate base pursuant to subsection (f1) of this section are removed from the rate base and recovered in accordance with this subsection.

(g) The certification requirements of this section shall not apply to a nonutility-owned generating facility fueled by renewable energy resources under two megawatts in capacity or to persons who construct an electric generating facility primarily for that person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation; provided, however, that such persons shall, nevertheless, be required to report to the Utilities Commission the proposed construction of such a facility before beginning construction thereof.

(h) Notwithstanding any other subsections of this section to the contrary, the Commission shall render its decision on an application for a certificate within 45 days of the date the application is filed if (i) the public utility that has applied for the certificate is subject to the provisions of subsection (e) of G.S. 143-215.107D; (ii) the application involves a request by the public utility to construct a generating unit that uses natural gas as the primary fuel at a specific coal-fired generating site that the public utility owns or operates on July 1, 2009; (iii) the coal-fired generating units at the site are not operated with flue gas desulfurization devices; (iv) the public utility will permanently cease operations of all of the coal-fired generating units at the site on or before the completion of the generating unit that is the subject of the certificate application; and (v) the installation of the generating unit that uses natural gas as the primary fuel allows the public utility to meet the requirements of subsection (e) of G.S. 143-215.107D. When the public utility applies for a certificate as provided in this subsection, it shall submit to the Commission and the Department of Environment and Natural Resources a revised verified statement required pursuant to subsection (i) of G.S. 62-133.6 and to the Commission an estimate of the costs of construction of the generating unit that uses natural gas as the primary fuel in such detail as the Commission may require. The provisions of G.S. 62-82 and subsection (e) of this section shall not apply to a certificate applied for pursuant to this subsection. The authority granted pursuant to this subsection expires January 1, 2011. (1965, c. 287, s. 2; 1975, c. 780, s. 1; 1979, c. 652, s. 2; 2007-397, s. 6; 2009-390, s. 1(b).)

Editor's Note. — Session Laws 1997-40, ss. 1 through 4, as amended by Session Laws 1999-122, s. 1, Session Laws 2000-53, s. 1, and Session Laws 2000-181, s. 2.1, provide in part that the Study Commission on the Future of Electric Service in North Carolina is created and the Commission shall consist of 30 voting members. The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each designate a cochair from the General Assembly membership serving on the Commission. The Commission shall examine the cost, adequacy, availability, and pricing of electric rates and service in North Carolina to determine whether legislation is necessary to assure an adequate and reliable source of electricity and economical, fair, and equitable rates for all consumers of electricity in North Carolina. The Commission shall gather data and other information as may be necessary to accomplish the purposes of the Commission, and shall seek input and advice from the Attorney General, the North Carolina Utilities Commission, and the Public Staff of the Utilities Commission and shall also obtain guidance by reviewing electric utility restructuring experiments conducted in other states. The Commission, while in the discharge of official duties, may exercise all the powers provided under the provisions of G.S. 120-19 through G.S. 120-19.4, including the power to request all officers, agents, agencies, and departments of the State to provide any information, data, or documents within their possession, ascertainable from their records, or otherwise available to them, and the power to subpoena witnesses. The Commission shall make a report to the 1998 Regular Session of the 1997 General Assembly, which may contain recommendations, and shall report the results of its study and its recommendations to the 1999 General Assembly. The Commission is to report periodically thereafter and is to terminate June 30, 2006.

Session Laws 2002-167, ss. 6(a) through (c), provide: "(a) The North Carolina Utilities Commission shall include the following additional items in the study it is presently conducting for the Commission on the Future of Electronic Service in North Carolina referred to as 'Investigation of Green Power and Public Benefit Fund Voluntary Check-Off Programs':

"(1) Identification of funding mechanisms in addition to voluntary purchase of green power blocks that would stimulate green power production in the State.

"(2) Identification of incentives in addition to funding mechanisms that would stimulate green power production in the State.

"(3) Identification of barriers that would impede green power production in the State and strategies to address those barriers.

"(4) Identification of appropriate methods of promoting the purchase of green power by the various electric customer groups.

"(5) Identification of methods whereby the State can provide incentives and resources that would stimulate the production and use of green power that would protect water quality; promote water conservation and water reuse; protect air quality; protect public health, safety, welfare, and the environment; and provide for the safe and efficient disposal of animal waste in the State.

"(b) In making recommendations to address the additional items listed in subsection (a) of this section, the North Carolina Utilities Commission shall consider the impact of its recommendations on residential, commercial, and industrial consumers of electricity in the State.

"(c) The North Carolina Utilities Commission shall make its final report on its investigation of green power and public benefit fund voluntary check-off programs, including the additional items set forth in subsection (a) of this section, to the Commission on the Future of Electric Service in North Carolina and the Environmental Review Commission not later than 15 March 2003. The delivery of this report shall not preclude either of the receiving commissions from asking for additional information or reports on these subjects."

Session Laws 2007-397, s. 15 contains a severability clause.

Session Laws 2009-390, s. 1(a), provides: "The General Assembly makes the following findings:

"(1) In 2002, North Carolina enacted S.L. 2002-4, the Clean Smokestacks Act, with the goal of improving air quality in the State.

"(2) With the enactment of the Clean Smokestacks Act, North Carolina became a national leader in multipollutant air emissions reduction strategies and has experienced significant reductions in oxides of nitrogen (NOx) and sulfur dioxide (SO2), and, as a co-benefit, mercury.

"(3) Duke Energy and Progress Energy, the investor-owned public utilities governed by the Clean Smokestacks Act, actively participated in the negotiations that led to the enactment of the Clean Smokestacks Act and recommended substantial emissions reductions requirements and an aggressive timeline for achieving compliance with those requirements.

"(4) Both Duke Energy and Progress Energy have produced emissions reductions greater than and sooner than required by the Clean Smokestacks Act.

"(5) The retirement of coal-fired generating units and installation of generating units that use natural gas as the primary fuel will reduce emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) more than would the installation of sulfur dioxide (SO2) emissions controls on the coal-fired generating units.

"(6) The retirement of coal-fired generating units and installation of generating units that use natural gas as the primary fuel will reduce emissions of carbon dioxide (CO2) and mercury (Hg) significantly more than would the installation of sulfur dioxide (SO2) emissions controls on the coal-fired generating units.

"(7) The retirement of coal-fired generating units that are owned and operated by Progress Energy and located in eastern North Carolina and the installation of generating units that use natural gas as their primary fuel to replace them will reduce emissions of oxides of nitrogen (NOx), sulfur dioxide (SO2), carbon dioxide (CO2), and mercury (Hg) more than would the installation of sulfur dioxide (SO2) emissions controls on the older coal-fired generating units."

Session Laws 2009-451, s. 9.14(c), provides: "The North Carolina Utilities Commission is directed to facilitate and expedite wind energy pilot projects developed pursuant to this act that come within its jurisdiction to the extent allowed by law and consistent with State statute. A wind turbine constructed pursuant to this section shall be exempt from the requirements of G.S. 62-110.1. For such wind turbines owned by a public utility, upon an application by the public utility seeking a rider to recover the costs of such project, the Utilities Commission shall establish an annual rider for the public utility to recover the just and reasonable costs, including the utility's cost of debt and equity, of such project upon completion."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-397, s. 6, effective January 1, 2008, substituted "facilities; ongoing review of construction costs; inclusion of approved construction costs in rates" for "facilities" in the section catchline; inserted "of subsections (a), (c), and (d)" at the beginning of subsection (b); substituted "Federal Energy Reulatory Commission" for "Federal Power Commission" throughout subsection (c); in subsection (e), substituted "a certificate" for "such certificate" in the first sentence, deleted "such" twice in the second sentence, and added the last three sentences; added subsection (e1); substituted the present provisions of subsection (f) for the former provisions which read: "The Commission shall maintain an ongoing review of such construction as it proceeds and the applicant shall submit each year during construction a progress report and any revisions in the cost estimates for the construction."; added subsections (f1) through (f3); inserted "to a nonutility-owned generating facility fueled by renewable energy resources under two megawatts in capacity or" in the first sentence of subsection (g); and made minor stylistic changes.

Session Laws 2009-390, s. 1(b), effective July 31, 2009, added subsection (h).

CASE NOTES

This section was enacted to help curb overexpansion of generating facilities beyond the needs of the service area. To this end, the General Assembly used the term "public convenience and necessity" to define the standard to be applied by the Utilities Commission to proposed facilities. State ex rel. Utils. Comm'n v. High Rock Lake Ass'n, 37 N.C. App. 138, 245 S.E.2d 787, cert. denied, 295 N.C. 646, 248 S.E.2d 257 (1978).

The purpose of requiring a certificate of public convenience and necessity before a generating facility can be built is to prevent costly overbuilding. Environmental concerns were generally left to other regulatory agencies, except as they affect the cost and efficiency of the proposed generating facility. State ex rel. Utils. Comm'n v. High Rock Lake Ass'n, 37 N.C. App. 138, 245 S.E.2d 787, cert. denied, 295 N.C. 646, 248 S.E.2d 257 (1978).

Advance Certification of Facilities in Other States Not Contemplated. — This section does not appear to contemplate advance certification by the North Carolina Utils. Commission of facilities built in other states. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Public convenience and necessity is based on an element of public need for the proposed service. State ex rel. Utils. Comm'n v. High Rock Lake Ass'n, 37 N.C. App. 138, 245 S.E.2d 787, cert. denied, 295 N.C. 646, 248 S.E.2d 257 (1978).

Subdivision (b)(1) of G.S. 62-133 does not require the Commission to make new findings on the need for the construction. Before any public utility begins the construction of a facility for generating electricity for use by the public it must first obtain from the Commission a certificate stating that public convenience and necessity requires, or will require such construction. Before such a certificate can be granted the applicant must file an estimate of construction costs and the Commission must hold public hearings. This procedure satisfies the argument that the construction must be necessary. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

Subsection (c) of this section makes it clear that the only purpose of a least-cost planning proceeding is to assist the Utilities Commission in developing, publicizing, and keeping current an analysis of the long-range needs for expansion of facilities for the generation of electricity in North Carolina. Nowhere is it suggested in subsection (c) that the purpose of the proceeding is to issue directives which fundamentally alter a given utility's operations. State ex rel. Utils. Comm'n v. North Carolina Elec. Membership Corp., 105 N.C. App. 136, 412 S.E.2d 166 (1992).

Scope of Commission's Authority and Jurisdiction. — North Carolina Utilities Commission's dismissal of petitioner independent power producer's application and its establishment of minimum filing requirements did not constitute an impermissible deviation from the process specifically provided in this section and G.S. 62-82, and some deviation from these sections was not beyond the Commission's authority and jurisdiction. State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993), cert. denied, 335 N.C. 564, 441 S.E.2d 125 (1994).

Because the North Carolina Utilities Commission had authority to conduct a pre-sale review of proposed contracts involving sales of electricity by a utility to wholesale customers in interstate commerce under G.S. 62-110.1(a), (c), (d), its actions were not preempted by 16 U.S.C.S. §§ 824(a), (b)(1), 824e(a), (d), 824d(a), (c). State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005).

Inclusion of Facility in Another State Absent North Carolina Certificate of Necessity. — The Commission acted within the limits of its authority when it included Catawba Unit 1, located in South Carolina, in power company's rate base, even though no North Carolina certificate of necessity had been obtained prior to beginning construction thereof. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

The furnishing of electric service to an area subsequently annexed must be carried out pursuant to the 1965 Electric Act. State ex rel. Utils. Comm'n v. VEPCO, 310 N.C. 302, 311 S.E.2d 586 (1984).

The 1965 Electric Act, G.S. 160A-331 to 160A-338 and 62-110.1 to 62-110.2, does not empower or restrict municipalities in the operation of their electric systems outside their corporate limits. State ex rel. Utils. Comm'n v. VEPCO, 310 N.C. 302, 311 S.E.2d 586 (1984).

Review of Grant of Certificate. — On appeal from a decision of the Commission granting a certificate under this section, the court must look to the findings of fact and conclusions of the Commission and determine if the Commission has considered the factors required by law and if the findings of fact necessary to support granting of the certificate are supported by substantial evidence in view of the whole record. State ex rel. Utils. Comm'n v. High Rock Lake Ass'n, 37 N.C. App. 138, 245 S.E.2d 787, cert. denied, 295 N.C. 646, 248 S.E.2d 257 (1978).

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

OPINIONS OF ATTORNEY GENERAL

Municipalities and counties are subject to the provisions of this section which require public utilities and other persons to obtain a certificate of public convenience and necessity prior to construction of any facility for generation of electricity. See opinion of Attorney General to Mr. Robert H. Bennink, Jr., General Counsel and Hearing Examiner, North Carolina Utilities Commission, 55 N.C.A.G. 18 (1985).

§ 62-110.2. Electric service areas outside of municipalities.

(a) As used in this section, unless the context otherwise requires, the term:

(1) "Premises" means the building, structure, or facility to which electricity is being or is to be furnished; provided, that two or more buildings, structures, or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer for commercial, industrial, institutional, or governmental purposes, shall together constitute one "premises," except that any such building, structure, or facility shall not, together with any other building, structure, or facility, constitute one "premises" if the electric service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building, structure, or facility; and

(2) "Line" means any conductor for the distribution or transmission of electricity, other than

a. In the case of overhead construction, a conductor from the pole nearest the premises of a consumer to such premises, or a conductor from a line tap to such premises, and

b. In the case of underground construction, a conductor from the transformer (or junction point, if there be one) nearest the premises of a consumer to such premises.

(3) "Electric supplier" means any public utility furnishing electric service or any electric membership corporation.

(b) In areas outside of municipalities, electric suppliers shall have rights and be subject to restrictions as follows:

(1) Every electric supplier shall have the right to serve all premises being served by it, or to which any of its facilities for service are attached, on April 20, 1965.

(2) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965, which are located wholly within 300 feet of such electric supplier's lines as such lines exist on April 20, 1965, except premises which, on said date, are being served by another electric supplier or to which any of another electric supplier's facilities for service are attached.

(3) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965, which are located wholly within 300 feet of lines that such electric supplier constructs after April 20, 1965, to serve consumers that it has the right to serve, except premises located wholly within a service area assigned to another electric supplier pursuant to subsection (c) hereof.

(4) Any premises initially requiring electric service after April 20, 1965, which are located wholly or partially within 300 feet of the lines of one electric supplier and also wholly or partially within 300 feet of the lines of another electric supplier, as each of such supplier's lines exist on April 20, 1965, or as extended to serve consumers that the supplier has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(5) Any premises initially requiring electric service after April 20, 1965, which are not located wholly within 300 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the consumer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) hereof, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(6) Any premises initially requiring electric service after April 20, 1965, which are located partially within a service area assigned to one electric supplier and partially within a service area assigned to another electric supplier pursuant to subsection (c) hereof, or are located partially within a service area assigned to one electric supplier pursuant to subsection (c) hereof and partially within 300 feet of the lines of another electric supplier, as such lines exist on April 20, 1965, or as extended to serve consumers it has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and the electric supplier not so chosen shall not thereafter furnish service to such premises.

(7) Any premises initially requiring electric service after April 20, 1965, which are located only partially within a service area assigned to one electric supplier pursuant to subsection (c) hereof and are located wholly outside the service areas assigned to other electric suppliers and are located wholly more than 300 feet from other electric suppliers' lines, may be served by any electric supplier which the consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(8) Every electric supplier shall have the right to serve all premises located wholly within the service area assigned to it pursuant to subsection (c) hereof.

(9) No electric supplier shall furnish temporary electric service for the construction of premises which it would not have the right to serve under this subsection if such premises were already constructed. The construction of lines for, and the furnishing of, temporary service for the construction of premises which any other electric supplier, if chosen by the consumer, would have the right to serve if such premises were already constructed, shall not impair the right of such other electric supplier to furnish service to such premises after the construction thereof, if then chosen by the consumer; nor, unless the consumer chooses to have such premises served by the supplier which furnished the temporary service, shall the furnishing of such temporary service or the construction of a line therefor impair the right of any other electric supplier to furnish service to any other premises which, without regard to the construction of such temporary service line, it has the right to serve.

(10) No electric supplier shall furnish electric service to any premises in this State outside the limits of any incorporated city or town except as

permitted by this section; provided, that nothing in this section shall restrict the right of an electric supplier to furnish electric service to itself or to exchange or interchange electric energy with, purchase electric energy from or sell electric energy to any other electric supplier.

(c)(1) In order to avoid unnecessary duplication of electric facilities, the Commission is authorized and directed to assign, as soon as practicable after January 1, 1966, to electric suppliers all areas, by adequately defined boundaries, that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the dates of the assignments; provided, that the Commission may leave unassigned any area in which the Commission, in its discretion, determines that the existing lines of two or more electric suppliers are in such close proximity that no substantial avoidance of duplication of facilities would be accomplished by assignment of such area. The Commission shall make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers, but not considering rate differentials among electric suppliers.

(2) The Commission, upon agreement of the affected electric suppliers, is authorized to reassign to one electric supplier any area or portion thereof theretofore assigned to another; and the Commission, notwithstanding the lack of such agreement, is authorized to reassign to one electric supplier any area or portion thereof theretofore assigned to another, except premises being served by the other electric supplier or to which any of its facilities for service are attached and except such portions of such area as are within 300 feet of the other electric supplier's lines, upon finding that such reassignment is required by public convenience and necessity. In determining whether public convenience and necessity requires such reassignment, the Commission shall consider, among other things, the adequacy and dependability of the service of the affected electric suppliers, but shall not consider rate differentials between such electric suppliers.

(d) Notwithstanding the provisions of subsections (b) and (c) of this section:

(1) Any electric supplier may furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, upon agreement of the affected electric suppliers; and

(2) The Commission shall have the authority and jurisdiction, after notice to all affected electric suppliers and after hearing, if a hearing is requested by any affected electric supplier or any other interested party, to order any electric supplier which may reasonably do so to furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, and to order such other electric supplier to cease and desist from furnishing electric service to such premises, upon finding that service to such consumer by the electric supplier which is then furnishing service, or which has the right to furnish service, to such premises, is or will be inadequate or undependable, or that the rates, conditions of service or service regulations, applied to such consumer, are unreasonably discriminatory.

(e) The furnishing of electric service in any area which becomes a part of any municipality after April 20, 1965, either by annexation or incorporation, (whether or not such area, or any portion thereof, shall have been assigned pursuant to subsection (c) of this section) shall be subject to the provisions of Part 2, Article 16 of Chapter 160A of the General Statutes, and any provisions of this section inconsistent with said Article shall not be applicable within such area after the effective date of such annexation or incorporation. (1965, c. 287, s. 5; 1989 (Reg. Sess., 1990), c. 1024, s. 14.)

Legal Periodicals. — For 1984 survey of commercial law, "Utilities — Extension of Electric Service: The Municipalities' Power Play," see 63 N.C.L. Rev. 1095 (1985).

CASE NOTES

I. In General.
II. Municipality.
III. Rights and Restrictions.
IV. Assignment.

I. IN GENERAL.

Purpose. — One of the purposes of this Chapter is to vest the Utilities Commission with authority and responsibility to assign territory to electric suppliers. State ex rel. Utils. Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

Another purpose of this Chapter, and particularly subsection (b) of this section, is to declare certain rights of electric suppliers in areas outside of municipalities pending the assignment of territory. State ex rel. Utils. Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

A principal purpose of this section is to provide an orderly method for allocation of service areas as among competing suppliers of electricity and thereby to eliminate unnecessary duplication of electric line facilities. State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp., 3 N.C. App. 318, 164 S.E.2d 895 (1968), aff'd, 275 N.C. 250, 166 S.E.2d 663 (1969).

The overriding purpose of this section is to promote the public interest, not the business of the electric membership cooperative or that of the investor-owned utility. State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The former absence of statutory provisions restricting competition between electric membership corporations and public utility suppliers of electric power gave rise to many contracts between these two types of suppliers designed to fix their respective territorial rights, which contracts, in turn, gave rise to much litigation. In the hope of putting an end to or reducing this turmoil, the 1965 legislature enacted this section, the language of which was the result of collaboration and agreement between the two types of suppliers. State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The clear purpose of Session Laws 1965, c. 287, is to prevent wasteful duplication of competing facilities, and thereby serve the public interest. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

The Territorial Assignment Act of 1965, as codified at this section and G.S. 160A-331 through 160A-338, represents an attempt to eliminate the uneconomic duplication of transmission and distribution systems bred of unbridled competition between public utilities, electric membership corporations and municipalities by designating the various competitors' rights. Morgan v. Town of Hertford, 70 N.C. App. 725, 321 S.E.2d 170 (1984).

Discretion of Utilities Commission. — In deciding complaints, the Utilities Commission is allowed discretion in fashioning a remedy; the Commission could transfer only service of one cooperative to electric utility rather than all complainants, as long as its action was not capricious or arbitrary. Dennis v. Duke Power Co., 341 N.C. 91, 459 S.E.2d 707 (1995).

Prior to the enactment of this section in 1965, there was no restraint upon competition in rural areas between electric membership corporations and public utility suppliers of electric power, except as established by contract. State ex rel. Utils. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Prior to enactment of this section, electric membership cooperatives and investor-owned public utility companies were free to compete in the rural portions of this State, in the absence of contractual restrictions upon such right, irrespective of the fact that such competition resulted in substantial duplication of power lines and facilities. State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The common-law doctrine of abandonment does not apply to the 1965 Electric Act. Duke Power Co. v. City of Morganton, 90 N.C. App. 755, 370 S.E.2d 54 (1988).

Section Passed Together with G.S. 160A-331 Through 160A-338. — This section applying to rural areas, and G.S. 160A-331 through 160A-338, applying to municipalities, were part of the same act, and both sought to eliminate the wasteful duplication of power lines by assigning territories to specific suppliers of electricity. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

Considered together, the sections cover the entire State and reflect interests of municipalities, utility companies and cooperatives. They form a unified plan for eliminating duplication of electric facilities by assigning territories to particular suppliers. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

This section controls over G.S. 160A-312 in case of a dispute regarding electrical services. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

Legislature Determines What Policy Is in Public Interest. — It is for the legislature, not for the Supreme Court or the Utilities Commission, to determine whether the policy of free competition between the suppliers of electric power, or the policy of territorial monopoly, or an intermediate policy is in the public interest. State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Neither Supreme Court Nor Utilities Commission May Forbid Service Permitted by Legislature. — If the legislature has enacted a statute declaring the right of a supplier of electricity to serve, notwithstanding the availability of the service of another supplier closer to the customer, neither the Supreme Court nor the Utilities Commission may forbid service by such supplier merely because it will necessitate an uneconomic or unsightly duplication of transmission or distribution lines. State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

The Commission cannot arbitrarily attach conditions to a franchise, for it must exercise its discretion in good faith in the light of existing facts and circumstances. State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

Authority of Utilities Commission to Restrict Competition. — The Utilities Commission is a creature of the legislature and has no authority to restrict competition between suppliers of electricity, except insofar as that authority has been conferred upon it by statute. State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Competitive Rights as to Areas Outside City Limits Not Altered. — Session Laws 1965, c. 287, including this section, did not, without more, alter the competitive rights of municipalities, investor-owned utilities and electric membership corporations to compete for patronage in areas outside the corporate limits of municipalities. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

An electric membership corporation and a public utility corporation are free to compete in rural areas unless forbidden by some provision of this section. State ex rel. Utils. Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

Except as restricted by contract, electric membership corporations and public utility companies supplying electricity are free to compete in the rural areas of this State, notwithstanding the fact that such competition may result in substantial duplication of electric power lines and other facilities. State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

No Territorial Monopoly. — In the absence of a valid grant of such right by statute, or by an administrative order issued pursuant to statutory authority, and in the absence of a valid contract with its competitor or with the person to be served, a supplier of electric power or other public utility service has no territorial monopoly or other right to prevent its competitor from serving anyone who desires the competitor to do so. State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Manufacturing Plant But Not Tract as "Premises". — "Premises," as that word is defined in subsection (a)(1), embraces the manufacturing plant of an electric consumer and not the tract upon which it is located; consequently, public membership corporation had no right under subsection (b)(1) to provide electric service to a plant on the ground that it had served a residence and electric signs previously located on the tract. State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Power to Transfer Discretionary. — Under subsection (d)(2), once the Utilities Commission has made appropriate findings which would justify a transfer, the power of the Commission to order a transfer is discretionary. Dennis v Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994), modified, 341 N.C. 91, 459 S.E.2d 707 (1995).

Applied in State ex rel. Utils. Comm'n v. VEPCO, 310 N.C. 302, 311 S.E.2d 586 (1984).

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

II. MUNICIPALITY.

A municipality is not an "electric supplier," as that term is used in this section. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974); State ex rel. Utils. Comm'n v. VEPCO, 62 N.C. App. 262, 302 S.E.2d 642 (1983), rev'd on other grounds, 310 N.C. 302, 311 S.E.2d 586 (1984).

Nor Is a Municipally Owned System. — Electric power companies and electric membership corporations are defined by statute as "electric suppliers"; municipally owned systems are not so defined. State ex rel. Utils. v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

Designation of Municipality as "Electrical Supplier" Is Legislative Function. — It is for the Legislature, and not the court, to define "electric supplier" further than presently set out in subdivision (a)(3) of this section, if it intends that municipalities be so designated. State ex rel. Utils. Comm'n v. VEPCO, 62 N.C. App. 262, 302 S.E.2d 642 (1983), rev'd on other grounds, 310 N.C. 302, 311 S.E.2d 586 (1984).

Municipality Not Prohibited from Serving Customers Outside City. — Since a city is neither a "public utility" nor an electric membership corporation and therefore is not an "electric supplier," it is not prohibited from serving customers outside the city. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

Authority for Furnishing Service Outside Corporate Limits. — The 1965 Electric Act, appearing in G.S. 160A-331 through 160A-338 and this section, does not empower or authorize municipalities to operate electric systems outside corporate limits, nor does it restrict such service. Insofar as the General Statutes are concerned, the sole authority for, and the only restriction upon municipalities furnishing electric service outside corporate limits is found in G.S. 160A-312. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983); State ex rel Utils. Comm'n v. VEPCO, 310 N.C. 302, 311 S.E.2d 586 (1984).

Concerns of Municipal Electrical System and Utility Company or Cooperative Distinguished. — The primary purpose of a municipal electrical system is to serve customers within the boundaries of the municipality, while a utility company or cooperative is chiefly concerned with customers outside the city limits. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508 (1967), aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

Only Limit on City as Supplier of Electric Service Is "Reasonable Limits" in G.S. 160A-312. — Since a municipality is not an "electric supplier" as that term is used in this section its public works commission is not prohibited from supplying electric service to a customer outside city's limits, so long as its extension of service is within "reasonable limitations," as provided for in G.S. 160A-312. South River Elec. Membership Corp. v. City of Fayetteville, 113 N.C. App. 401, 438 S.E.2d 464, cert. denied, 336 N.C. 74, 445 S.E.2d 38 (1994).

For case holding extension of city's electric system across its city limits beyond its authority, see Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

III. RIGHTS AND RESTRICTIONS.

Rights Conferred on Electric Suppliers by Subsection (b). — Subsection (b) of this section confers upon each electric supplier in the State the right, in territories outside of municipalities, to serve all "premises" being served by it on April 20, 1965, and the right to serve "premises" initially requiring service after that date, located within 300 feet of a line of such supplier and not in a territory assigned by the Utilities Commission to a different supplier pursuant to subsection (c) of this section. State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Any "premises" in territories lying outside of a municipality and more than 300 feet from the line of any electric supplier can be served, prior to an assignment of such territory by the Utilities Commission, by any electric supplier chosen by the user, and service of such premises by any other supplier is prohibited. State ex rel Utils. Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The language of subsection (b)(5) is clear and unambiguous and presents no problem of construction. State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp., 3 N.C. App. 318, 164 S.E.2d 895 (1968), aff'd, 275 N.C. 250, 166 S.E.2d 663 (1969).

One seeking electric service should not be denied the right to choose between vendors unless compelled by some cogent reason. State ex rel. Utils. Comm'n v. Lumbee River Elec.

Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Right of Electric Supplier Chosen Under Subsection (b) to Deny Service. — Conclusion of the Utilities Commission that a consumer has the unrestricted choice of an electric supplier under subsection (b) of this section is subject to the right of the chosen electric supplier to deny the service unless required otherwise by the utilities Commission. State ex rel Utils. Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

Validity of Requiring Certificate of Convenience and Necessity for Extension of Facilities. — The police power of the State is broad enough to include a statute providing that a public utility company, desiring to serve a new area, must obtain from the Utilities Commission a certificate that public convenience and necessity requires the proposed extension of its distribution facilities. State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Choice of Electric Supplier. — Utility department had a statutory right under this section to choose its electric supplier where the buildings and structures of the utility department facility were located on one tract or contiguous tracts of land and thus constituted one premises under subdivision (a)(1). Crescent Elec. Membership Corp. v. Duke Power Co., 126 N.C. App. 344, 485 S.E.2d 312 (1997), cert. denied, 346 N.C. 545, 488 S.E.2d 798 (1997).

IV. ASSIGNMENT.

Construction. — Where provisions of this section relating to assignment of electric service territory in rural areas are clear and understandable on their face, the Supreme Court is not required to construe this statute in connection with other provisions of this Chapter relating to powers of the Utilities Commission to regulate public utilities. State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Subsection (c) contemplates the assignment of a territory to a single supplier for all classes of users of electric power, nothing else appearing. However, the statutory direction that the Commission assign service areas "by adequately defined boundaries" does not compel the conclusions that the intent of the legislature was to require the Commission to choose between (1) jeopardizing the industrial development of a geographic area by assigning it exclusively to an electric membership cooperative, or (2) boxing the cooperative into the narrow strips bordering its existing lines by assigning the territory outside those strips to an investor-owned utility for all types of electric service. State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

But One Area May Be Assigned Jointly to Two Electric Suppliers. — The Utilities Commission did not exceed its authority under this section in assigning the same areas jointly to two electric suppliers, subject to consumers reasonable choice of supplier, since under appropriate circumstances and appropriate findings by the Commission, public convenience and necessity may require such an assignment. State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

Under appropriate circumstances and appropriate findings by the Commission, public convenience and necessity may determine that some areas be assigned to two or more electric suppliers with later determination of the circumstances under which a particular electric supplier may properly extend service to a particular consumer. State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

The Commission did not exceed its statutory authority in making an assignment of an area jointly to two electric suppliers. State ex rel. Utils. Comm'n v. Edgecombe-Martin County Elec. Membership Corp., 5 N.C. App. 680, 169 S.E.2d 225 (1969).

Division May Be Made on Basis of Users' Demand Level. — It is within the statutory authority of the Commission, when the public convenience and necessity so requires, to assign a territory to one supplier of electricity for service below a specified level of demand and to another supplier for service above that level of demand. State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Reassignment to Serve User Whose Demand Is Above Division Line. — Subsection (c) of this section authorizes the Commission, having determined, upon sufficient and competent evidence, that the public convenience and necessity would best be promoted by dividing the geographic area into two service areas on the basis of the users' demand levels, to permit, on the basis of public convenience and necessity, an electric membership cooperative, to which the area of the smaller demands has been assigned, to serve a user whose demand is above the division line, if that user desires to become a member of the cooperative and thus to use its service. State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Considerations in Assigning Areas to Electric Suppliers. — Subsection (c) of this section declares the purpose for which the authority to assign "areas" is conferred upon the

Commission. That purpose is "to avoid unnecessary duplication of electric facilities." To accomplish this objective, the statute directs the Commission to make assignments "in accordance with public convenience and necessity." In determining whether an assignment is in accord with "public convenience and necessity," the Commission is directed to consider the "adequacy and dependability of the service of electric suppliers." It is also directed to consider "other things." State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

In assigning rural service areas to electric suppliers pursuant to this section, the Utilities Commission may consider, in addition to development of natural resources and employment opportunities, (1) the past history of service to residential, agricultural, and small commercial users in adjacent territories, (2) the capital required for supplying electric power to large users in the territory and the past experience of a supplier in serving such users, and (3) the demonstrated preference of a substantial class of potential users for one supplier over another. State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The attraction of industry to a sparsely settled rural territory, which will develop its natural resources and provide opportunity of employment to its residents, is one of the "other things" to be considered by the Commission in determining what assignment of territory to electrical suppliers will be in accord with public convenience and necessity. State ex rel. Utils. Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Right to Serve Not Exclusive. — While an electric supplier has the right to serve all premises in its assigned area, the mere grant of a right to serve is not the grant of an exclusive right to do so. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

The assignment of an area to an electric supplier by the Utilities Commission does not automatically preclude a city from extending its service lines into the area. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

§ 62-110.3. Bond required for water and sewer companies.

(a) No franchise may be granted to any water or sewer utility company until the applicant furnishes a bond, secured with sufficient surety as approved by the Commission, in an amount not less than ten thousand dollars ($10,000). The bond shall be conditioned upon providing adequate and sufficient service within all the applicant's service areas, including those for which franchises have previously been granted, shall be payable to the Commission, and shall be in a form acceptable to the Commission. In setting the amount of a bond, the Commission shall consider and make appropriate findings as to the following:

(1) Whether the applicant holds other water or sewer franchises in this State, and if so its record of operation,

(2) The number of customers the applicant now serves and proposes to serve,

(3) The likelihood of future expansion needs of the service,

(4) If the applicant is acquiring an existing company, the age, condition, and type of the equipment, and

(5) Any other relevant factors, including the design of the system.

Any interest earned on a bond shall be payable to the water or sewer company that posted the bond.

(b) Notwithstanding the provisions of G.S. 62-110(a) and subsection (a) of this section, no water or sewer utility shall extend service into territory contiguous to that already occupied without first having advised the Commission of such proposed extension. Upon notification, the Commission shall require the utility to furnish an appropriate bond, taking into consideration both the original service area and the proposed extension. This subsection shall apply to all service areas of water and sewer utilities without regard to the date of the issuance of the franchise.

(c) The utility, the Public Staff, the Attorney General, and any other party may, at any time after the amount of a bond is set, apply to the Commission to raise or lower the amount based on changed circumstances.

(d) The appointment of an emergency operator, either by the superior court in accordance with G.S. 62-118(b) or by the Commission with the consent of the owner or operator, operates to forfeit the bond required by this section. The court or Commission, as appropriate, shall determine the amount of money needed to alleviate the emergency and shall order that amount of the bond to be paid to the Commission as trustee for the water or sewer system.

(e) If the person who operated the system before the emergency was declared desires to resume operation of the system upon a finding that the emergency no longer exists, the Commission shall require him to post a new bond, the amount of which may be different from the previous bond. (1987, c. 490, s. 2; 1995, c. 28, s. 1.)

§ 62-110.4. Alternative operator services.

The Commission shall not issue a certificate of public convenience and necessity pursuant to G.S. 62-110(b) to any interexchange carrier which the Commission has determined to have the characteristics of an alternative operator service unless the Commission shall have determined that class of interexchange carriers to be in the public interest and shall have promulgated rules to protect the public interest and to require, at a minimum, that any such interexchange carrier assure appropriate disclosure to end-users of its identity, services, rates, charges, and fees. In order to effectuate notice to end-users, the Commission may, notwithstanding any other provision of law, require that any person owning or operating a facility for the use of the travelling or transient public which has contracted with such an interexchange carrier prominently display an end-user notice provided for in the Commission's rules. (1989, c. 366, s. 1.)

§ 62-110.5. Commission may exempt certain nonprofit and consumer-owned water or sewer utilities.

The Commission may exempt any water or sewer utilities owned by nonprofit membership or consumer-owned corporations from regulation under this Chapter, subject to those conditions the Commission deems appropriate, if:

(1) The members or consumer-owners of the corporation elect the governing board of the corporation pursuant to the corporation's articles of incorporation and bylaws; and

(2) The Commission finds that the organization and the quality of service of the utility are adequate to protect the public interest to the extent that additional regulation is not required by the public convenience and necessity. (1997-437, s. 2.)

§ 62-110.6. Rate recovery for construction costs of out-of-state electric generating facilities.

(a) The Commission shall, upon petition of a public utility, determine the need for and, if need is established, approve an estimate of the construction costs and construction schedule for an electric generating facility in another state that is intended to serve retail customers in this State.

(b) The petition may be filed at any time after an application for a certificate or license for the construction of the facility has been filed in the state in which the facility will be sited. The petition shall contain a showing of need for the facility, an estimate of the construction costs, and the proposed construction schedule for the facility.

(c) The Commission shall conduct a public hearing to consider and determine the need for the facility and the reasonableness of the construction cost estimate and proposed construction schedule. If the Commission finds that the construction will be needed to assure the provision of adequate public utility service within North Carolina, the Commission shall approve a construction cost estimate and a construction schedule for the facility. In making its determinations under this section, the Commission may consider whether the state in which the facility will be sited has issued a certificate or license for construction of the facility and approved a construction cost estimate and construction schedule for the facility. The Commission shall issue its order not later than 180 days after the public utility files its petition.

(d) G.S. 62-110.1(f) shall apply to the construction cost estimate determined by the Commission to be appropriate, and the actual costs the public utility incurs in constructing the facility shall be recoverable through rates in a general rate case pursuant to G.S. 62-133 as provided in G.S. 62-110.1(f1).

(e) If the construction of a facility is cancelled, the public utility shall recover through rates in a general rate case conducted pursuant to G.S. 62-133 the costs of construction that were actually incurred prior to the cancellation and are found by the Commission to be reasonable and prudent, as provided in subsections (f2) and (f3) of G.S. 62-110.1. (2007-397, s. 7.)

Editor's Note. — Session Laws 2007-397, s. 15 contains a severability clause.

Session Laws 2007-397, s. 16, made this section effective January 1, 2008.

§ 62-110.7. Project development cost review for a nuclear facility.

(a) For purposes of this section, "project development costs" mean all capital costs associated with a potential nuclear electric generating facility incurred before (i) issuance of a certificate under G.S. 62-110.1 for a facility located in North Carolina or (ii) issuance of a certificate by the host state for an out-of-state facility to serve North Carolina retail customers, including, without limitation, the costs of evaluation, design, engineering, environmental analysis and permitting, early site permitting, combined operating license permitting, initial site preparation costs, and allowance for funds used during construction associated with such costs.

(b) At any time prior to the filing of an application for a certificate to construct a potential nuclear electric generating facility, either under G.S. 62-110.1 or in another state for a facility to serve North Carolina retail customers, a public utility may request that the Commission review the public utility's decision to incur project development costs. The public utility shall include with its request such information and documentation as is necessary to support approval of the decision to incur proposed project development costs. The Commission shall hold a hearing regarding the request. The Commission shall issue an order within 180 days after the public utility files its request. The Commission shall approve the public utility's decision to incur project development costs if the public utility demonstrates by a preponderance of evidence that the decision to incur project development costs is reasonable and prudent; provided, however, the Commission shall not rule on the reasonableness or prudence of specific project development activities or recoverability of specific items of cost.

(c) All reasonable and prudent project development costs, as determined by the Commission, incurred for the potential nuclear electric generating facility shall be included in the public utility's rate base and shall be fully recoverable through rates in a general rate case proceeding pursuant to G.S. 62-133.

(d) If the public utility is allowed to cancel the project, the Commission shall permit the public utility to recover all reasonable and prudently incurred project development costs in a general rate case proceeding pursuant to G.S. 62-133 amortized over a period equal to the period during which the costs were incurred, or five years, whichever is greater. (2007-397, s. 7.)

Editor's Note. — Session Laws 2007-397, s. 15 contains a severability clause.

Session Laws 2007-397, s. 397, s. 16, made this section effective January 1, 2008.

§ 62-111. Transfers of franchises; mergers, consolidations and combinations of public utilities.

(a) No franchise now existing or hereafter issued under the provisions of this Chapter other than a franchise for motor carriers of passengers shall be sold, assigned, pledged or transferred, nor shall control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition of control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity. Provided, that the above provisions shall not apply to regular trading in listed securities on recognized markets.

(b) No certificates issued under the provisions of this Chapter for motor carriers of passengers shall be sold, assigned, pledged, transferred, or control changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any motor carrier of passengers be made through acquisition of control by stock purchases or otherwise, except after application to and written approval by the Commission as in this section provided, provided that the above provisions shall not apply to regular trading in listing securities on recognized markets. The applicant shall give not less than 10 days' written notice of such application by registered mail or by certified mail to all connecting and competing carriers. When the Commission is of the opinion that the transaction is consistent with the purposes of this Chapter the Commission may, in the exercise of its discretion, grant its approval, provided, however, that when such transaction will result in a substantial change in the service and operations of any motor carrier of passengers party to the transaction, or will substantially affect the operations and services of any other motor carrier, the Commission shall not grant its approval except upon notice and hearing as required in G.S. 62-262.1 for bus companies upon an application for an original certificate. In all cases arising under the subsection it shall be the duty of the Commission to require the successor carrier to satisfy the Commission that the operating debts and obligations of the seller, assignor, pledgor, lessor or transferor, including taxes due the State of North Carolina or any political subdivision thereof are paid or the payment thereof is adequately secured. The Commission may attach to its approval of any transaction arising under the section such other conditions as the Commission may determine are necessary to effectuate the purposes of this Article.

(c) No sale of a franchise for a motor carrier of household goods shall be approved by the Commission until the seller shall have filed with the Commission a statement under oath of all debts and claims against the seller, of which such seller has any knowledge or notice, (i) for gross receipts, use or privilege taxes due or to become due the State, as provided in the Revenue Act, (ii) for wages due employees of the seller, other than salaries of officers and in the case of motor carriers, (iii) for unremitted C.O.D. collections due shippers, (iv) for loss of or damage to goods transported, or received for transportation, (v) for overcharges on property transported, and, (vi) for interline accounts due other carriers, together with a bond, if required by the Commission, payable to the State, executed by a surety company authorized to do business in the State, in an amount double the aggregate of all such debts and claims conditioned upon the payment of the same within the amount of such bond as the amounts and validity of such debts and claims are established by agreement of the parties, or by judgment. This subsection shall not be applicable to sales by personal representatives of deceased or incompetent persons, receivers or trustees in bankruptcy under court order.

(d) No person shall obtain a franchise for the purpose of transferring the same to another, and an offer of such transfer within one year after the same was obtained shall be prima facie evidence that such certificate was obtained for the purpose of sale.

(e) The Commission shall approve applications for transfer of motor carrier franchises made under this section upon finding that said sale, assignment, pledge, transfer, change of control, lease, merger, or combination is in the public interest, will not adversely affect the service to the public under said franchise, will not unlawfully affect the service to the public by other public utilities, that the person acquiring said franchise or control thereof is fit, willing and able to perform such service to the public under said franchise, and that service under said franchise has been continuously offered to the public up to the time of filing said application or in lieu thereof that any suspension of service exceeding 30 days has been approved by the Commission as provided in G.S. 62-112(b)(5). Provided, however, the Commission shall approve, without imposing conditions or limitations, applications for the transfer of a bus company franchise made under this section upon finding that the person acquiring the franchise or control of the franchise is fit, willing and able to perform services to the public under that franchise. (1947, c. 1008, s. 22; 1949, c. 1132, s. 20; 1953, c. 1140, s. 3; 1957, c. 1152, s. 10; 1961, c. 472, ss. 6, 7; 1963, c. 1165, s. 1; 1967, c. 1202; 1985, c. 676, ss. 10, 11; 1995, c. 523, s. 2.)

CASE NOTES

Showing of Public Need Not Required. — The showing of public need which G.S. 62-262(e)(1) requires of an application for a new authority is not applicable in a transfer proceeding under this section and was not written into it by subsection (a) of this section. State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Subsection (e) of this section does not indicate a policy change toward protecting existing certificate holders from lawful competition. Moreover, like the test of "public convenience and necessity" in subsection (a), the requirement that the Commission find the transfer "in the public interest" does not write into the transfer approval procedure the new certificate test of public need required by G.S. 62-262(e)(1). State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Where the issue of dormancy under G.S. 62-112(c) has been raised, if the Commission finds that the franchise is not dormant, it must then determine if the criteria required by this section for approval of the transfer have been met. If the Commission finds that the franchise is dormant under G.S. 62-112(c), the application for transfer must be denied, because approval would in effect constitute the granting of a new franchise without satisfying the new authority test and other requirements of G.S. 62-262(e). State ex rel. Utils. Comm'n v. Estes Express Lines, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

Test for "Public Convenience and Necessity". — The requirement of "public convenience and necessity" referred to in subsection (a) of this section is satisfied by a showing that the authority has been and is being actively applied in satisfaction of the public need which was shown to exist when the authority was originally acquired. State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

The criteria "if justified by the public convenience and necessity" in subsection (a) of this section has been interpreted as a statutory basis for the test of dormancy. Where the authority has been abandoned or "dormant," the Commission has denied applications for transfer because approval would in effect be the granting of a new authority without satisfying the new authority test of public need set out in G.S. 62-262(e). Where the authority has been actively operated, the applicants for sale and transfer of motor freight carrier rights are under no burden to show through shipper witnesses that a demand and need exist. The rationale is that public convenience and necessity was shown to exist when the authority was granted or acquired, and the rebuttable presumption of law is that it continues. State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Public Convenience and Necessity for Proposed Transfers of Water and Sewer Franchises. — When the commission is adjudging public convenience and necessity in the context of proposed transfers of water and sewer franchises under subsection (a) of this section, it must inquire into all aspects of anticipated service and rates occasioned and engendered by the proposed transfer, and then determine whether the transfer will serve the public convenience and necessity. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

Utility commission did not err in approving acquisition of utility's certificate of public convenience and necessity, denying inclusion of acquired utility's purchase price in the base rate, and reducing connection fees. In re Petition of Utils., Inc., 147 N.C. App. 182, 555 S.E.2d 333, 2001 N.C. App. LEXIS 1141 (2001).

State Policy Favors Transfers of Actively Operated Motor Freight Carrier Certificates. — The policy of the State, as declared in the Public Utilities Act of 1963, clearly favors transfers of actively operated motor freight carrier certificates without unreasonable restraint. State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970); State ex rel. Utils. Comm'n v. Estes Express Lines, 33 N.C. App. 99, 234 S.E.2d 628 (1977).

Transfer to a More Competitive Carrier Not Prohibited. — The possibility that a transfer of authority to a more competitive carrier will adversely affect existing carriers does not make such a transfer contrary to the public interest as a matter of law. State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970); State ex rel. Utils. Comm'n v. Estes Express Lines, 33 N.C. App. 99, 234 S.E.2d 628 (1977).

Requirement of subsection (e) of this section that the Commission find that the proposed transfer "will not adversely affect the service to the public under said franchise" is satisfied by a determination that the proposed transferee of the franchise is capable of rendering service equal to that of the proposed transferor, and does not prohibit approval where transfer of the franchise to a more competitive hauler would have an adverse effect on existing carriers. State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Bond as Condition Precedent to Commission's Approval. — This section requires as a condition precedent to the Commission's approval of the sale of a motor carrier's franchise a bond from the seller conditioned for the payment of (1) taxes, (2) wages due employees of the seller, (3) unremitted C.O.D. collections due seller, (4) "for loss or damage of goods transported or received for transportation," (5) overcharge on property transported, and (6) for interline accounts to other carriers. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963), decided under this section as it stood prior to the 1963 amendment.

Question of Whether Purchaser of Water or Sewer Franchise Can Provide Better Service. — The question of whether another potential purchaser of a water or sewer franchise can provide better service is plainly relevant under the broad public convenience and necessity test of subsection (a) of this section. But such a showing would not of itself be dispositive of the issue of whether approval should be granted. When weighing the broad aspects and implications of public convenience and necessity, the Commission is cloaked with wide discretion and is not required to reject an application for transfer merely because another potential purchaser produces evidence that it might be able to do a better job. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

Transfers of Utility Franchises Cannot Be Made Contingent upon Commission Approval. — Lawful transfers of ownership and control of utility franchises cannot be made contingent upon or subject to commission approval; however, in emergency situations, the Commission can issue temporary or interim orders giving conditional or temporary approval of operational control. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

This section does not permit the completion of transfers contingent upon or subject to Commission approval; the legislature, by the unambiguous terms of the statute, clearly intended to prohibit de facto transfers of franchises before the Commission has had the opportunity to pass upon the merits of the transfer under the public convenience and necessity test. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

Certificate Holder Not Released from Liability for Nonperformance of Duties. — This section does not confer upon the Utilities Commission the power to release the holder of a certificate of convenience and necessity from liability for the nonperformance of public duties incident to the certificate, and the Commission possesses no such power in the absence of a delegation thereof by the legislature. Hough-Wylie Co. v. Lucas, 236 N.C. 90, 72 S.E.2d 11 (1952).

A lease of intrastate motor vehicle common carrier operating rights, approved by the Utilities Commission, does not release lessor, the holder of the certificate of convenience and necessity, from liability for nonperformance of franchise duties or torts incident to operation, and a shipper may hold lessor liable for lessee's failure to make prompt remittance of C.O.D. collections as required by G.S. 62-273. Hough-Wylie Co. v. Lucas, 236 N.C. 90, 72 S.E.2d 11 (1952).

Duty of Transferee to Render Services Called for. — Approval by the Commission of the transfer of a carrier's certificate of authority implies a duty on the part of the transferee to render the service called for in the certificate, which it must perform in a substantial manner. State ex rel. Utils. Comm'n v. Colter, 259 N.C. 269, 130 S.E.2d 385 (1963).

Right to Combine Purchased Route Authority and Original Route Authority of Purchasing Carrier. — Where an irregular carrier acquired the certificate of another irregular carrier with the authority of the Utilities Commission, the purchasing carrier had the legal right to combine or "tack" the irregular route authority purchased by it and its original irregular route authority, as there were no conditions or restrictions imposed by statute or any rule or regulation of the Commission in effect at the time of the purchase. State ex rel. Utils. Comm'n v. Forbes Transf. Co., 259 N.C. 688, 131 S.E.2d 452 (1963).

"Fit, Willing, and Able" Condition of Approval Is Relevant Under Subsection (a). — The "fit, willing, and able" condition of approval set forth in subsection (e) pertaining to transfers of motor carrier franchises is also a relevant question under the separate public convenience and necessity test of subsection (a). State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

Findings Held to Obviate Application of Subsection (d). — In a proceeding to obtain approval of the Utilities Commission for the transfer of all the capital stock of a franchise carrier from one holding corporation to another, findings of the Commission, supported by substantial evidence, to the effect that the franchise carrier did not in fact obtain its franchise for the purpose of transferring it to another obviated the application of subsection (d) of this section. State ex rel. Utils. Comm'n v. Carolina Coach Co., 269 N.C. 717, 153 S.E.2d 461 (1967).

Subsection (e) Operates as Separate Test. — The plain language of subsection (e) of this section unambiguously indicates the intent of the legislature for that section to operate as a separate and distinct test, applying only to transfers of motor carrier franchises; that the broader public convenience and necessity test necessarily subsumes under it some of the same elements does not alter this fact. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

Subsection (e) is inapplicable to transfer approval proceedings involving water and sewer franchises. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

Findings Held to Support Conclusion That Transfer of Stock Was Justified. — In a proceeding to obtain approval of the Utilities Commission for the transfer of all the capital stock of a franchise carrier from one holding corporation to another, findings, supported by evidence, that the franchise carrier was conducting active operations under the franchise and that its ability to render service to the public within the limits of its franchise rights would not be adversely affected by the proposed transfer of its stock supported conclusion that the proposed sale of its stock was justified by the public convenience and necessity within the meaning of this section. State ex rel. Utils. Comm'n v. Carolina Coach Co., 269 N.C. 717, 153 S.E.2d 461 (1967).

Contract to Pay Claims Under Section as Surety Contract. — That portion of a contract under which a company obligates itself to pay any shipper or consignee claims for which the assured would be liable by the provision of this section, with stipulation that the assured should reimburse the company for any such payment, is a surety contract. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

Applied in State ex rel. Utils. Comm'n v. United Tank Lines, 34 N.C. App. 543, 239 S.E.2d 266 (1977).

§ 62-112. Effective date, suspension and revocation of franchises; dormant motor carrier franchises.

(a) Franchises shall be effective from the date issued unless otherwise specified therein, and shall remain in effect until terminated under the terms thereof, or until suspended or revoked as herein provided.

(b) Any franchise may be suspended or revoked, in whole or in part, in the discretion of the Commission, upon application of the holder thereof; or, after notice and hearing, may be suspended or revoked, in whole or in part, upon complaint, or upon the Commission's own initiative, for wilful failure to comply with any provision of this Chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition or limitation of such franchise; provided, however, that any such franchise may be suspended by the Commission upon notice to the holder or lessee thereof without a hearing for any one or more of the following causes:

(1) For failure to provide and keep in force at all times security, bond, insurance or self-insurance for the protection of the public as required in G.S. 62-268 of this Chapter.

(2) For failure to file and keep on file with the Commission applicable tariffs or schedules of rates as required in this Chapter.

(3) For failure to pay any gross receipts, use or privilege taxes due the State of North Carolina within 30 days after demand in writing from the agency of the State authorized by law to collect the same; provided, that this subdivision shall not apply to instances in which there is a bona fide controversy as to tax liability.

(4) For failure for a period of 60 days after execution to pay any final judgment rendered by a court of competent jurisdiction against any holder or lessee of a franchise for any debt or claim specified in G.S. 62-111(b) and (c).

(5) For failure to begin operations as authorized by the Commission within the time specified by order of the Commission, or for suspension of authorized operations for a period of 30 days without the written consent of the Commission, save in the case of involuntary failure or suspension brought about by compulsion upon the franchise holder or lessee.

(c) The failure of a common carrier of passengers or household goods by motor vehicles to perform any transportation for compensation under the authority of its certificate for a period of 30 consecutive days shall be prima facie evidence that said franchise is dormant and the public convenience and necessity is no longer served by such common carrier certificate. Upon finding after notice and hearing that no such service has been performed for a period of 30 days the Commission is authorized to find that the franchise is dormant and to cancel the certificate of such common carrier. The Commission in its discretion may give consideration in such finding to other factors affecting the performance of such service, including seasonal requirements of the passengers or commodities authorized to be transported, the efforts of the carrier to make its services known to the public, the equipment and other facilities maintained by the carrier for performance of such service, and the means by which such carrier holds itself out to perform such service. A proceeding may be brought under this section by the Commission on its own motion or upon the complaint of any shipper or any other carrier. The franchise of a motor carrier may be canceled under the provisions of this section in any proceeding to sell or transfer or otherwise change control of said franchise brought under the provisions of G.S. 62-111, upon finding of dormancy as provided in this section. Any motor carrier who has obtained authority to suspend operations under the provisions of G.S. 62-112(b)(5) and the rules of the Utilities Commission issued thereunder shall not be subject to cancellation of its franchise under this section during the time such suspension of operations is authorized. In determining whether such carrier has made reasonable efforts to perform service under said franchise the Commission may in its discretion give consideration to disabilities of the carrier including death of the owner and physical disabilities.

(d) This section shall be applicable to bus companies. (1947, c. 1008, s. 23; 1949, c. 1132, s. 21; 1963, c. 1165, s. 1; 1967, c. 1201; 1985, c. 676, s. 12; 1995, c. 523, s. 3.)

Legal Periodicals. — For survey of 1977 law on common carriers, see 56 N.C.L. Rev. 853 (1978).

CASE NOTES

Evidence Justifying a Finding of Dormancy. — Under subsection (c) the failure to perform any transportation for compensation under the authority of the franchise for a period of 30 days is prima facie evidence that the franchise is dormant. Such evidence is sufficient to justify but not to compel a finding that the franchise is dormant. State ex rel. Utils. Comm'n v. Estes Express Lines, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

Upon a prima facie showing of dormancy under subsection (c) the Commission in its discretion may then consider other factors affecting the performance of such services, the subsection listing factors which may be considered. If the Commission in its discretion considers other factors, it may find that the evidence relating to one or more of these factors rebuts the prima facie evidence of dormancy and that the franchise is not dormant. And if the evidence relating to one or more of these factors, as found by the Commission, is competent, material and substantial, the finding will not be disturbed on appeal under G.S. 62-94(b)(5). State ex rel. Utils. Comm'n v. Estes Express Lines, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

Evidence Sufficient to Rebut Dormancy Case. — Evidence that transferor continuously advertised its services, that it was ready, willing and able to haul both exempt and nonexempt commodities under its franchise, and that it charged published tariff rates in hauling both exempt and nonexempt commodities, was competent, material and substantial, and was sufficient to rebut the prima facie evidence of dormancy and to support the consideration by the Commission of one or more of the "other factors" listed in subsection (c). State ex rel. Utils. Comm'n v. Estes Express Lines, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

Effect on Transfer of Dormancy Finding. — Where the issue of dormancy under subsection (c) has been raised, if the Commission finds that the franchise is not dormant, it must then determine if the criteria required by G.S. 62-111 for approval of the transfer have been met. If the Commission finds that the franchise is dormant under subsection (c), the application for transfer must be denied, because approval would in effect constitute the granting of a new franchise without satisfying the new authority test and other requirements of G.S. 62-262(e). State ex rel. Utils. Comm'n v. Estes Express Lines, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

When the irregular route operating authority portion of applicant's franchise certificate was suspended, any service provided under this part of the certificate naturally was suspended, so that the Commission did not err in concluding that the portion of the franchise certificate providing for irregular route authority was suspended. State ex rel. Utils. Comm'n v. Estes Express Lines, 33 N.C. App. 99, 234 S.E.2d 628 (1977).

Applied in Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967); State ex rel. Utils. Comm'n v. United Tank Lines, 34 N.C. App. 543, 239 S.E.2d 266 (1977).

Cited in State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

§ 62-113. Terms and conditions of franchises.

(a) Each franchise shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, a motor carrier or other public utility is authorized to operate: and there shall, at the time of issuance and from time to time thereafter, be attached to the privileges granted by the franchise such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of a carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of a carrier or other public utility, the requirements established by the Commission under this Chapter; provided, however, that no terms, conditions, or limitations shall restrict the right of a motor carrier of household goods only to add to its equipment and facilities over the routes, between the termini, or within the territory specified in the franchises, as the development of the business and the demands of the public shall require. This subsection shall not be applicable to bus companies or their franchises.

(b) Each bus company franchise shall specify the fixed routes over which, and the fixed termini, if any, between which the bus company may operate. A franchise for bus companies engaged in charter operations may provide for fixed routes or statewide operating authority.

(c) Any broadband service provider that provides voice grade communication services within a defined service territory or franchise area, and elects to provide broadband service in areas contiguous to its service territory or franchise area, may provide such voice grade service as an incident to such broadband service to a customer when the incumbent telecommunications or cable provider is not currently providing broadband service to the customer, without violating its service territory restrictions or franchise agreement. (1947, c. 1008, s. 12; 1949, c. 1132, s. 11; 1963, c. 1165, s. 1; 1985, c. 676, s. 13; 1995, c. 523, s. 4; 2009-80, s. 1.)

Effect of Amendments. — Session Laws 2009-80, s. 1, effective June 11, 2009, added subsection (c).

CASE NOTES

The Commission need not approve or reject an application as submitted. It may attach to the certificate granted such reasonable terms, conditions and limitations as the public convenience and necessity may require. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Obligations Inherent in Acceptance of Certificate. — Inherent in the acceptance of a certificate and the exercise of the rights and privileges evidenced thereby is the correlative obligation to serve the shipping public faithfully, in accordance with reasonable rules and regulations prescribed by the Utilities Commission and in conformity with the requirements of the statute prescribing duties to be performed by the carrier for the protection of the shipping public. Hough-Wylie Co. v. Lucas, 236 N.C. 90, 72 S.E.2d 11 (1952).

§ 62-114: Repealed by Session Laws 1995, c. 523, s. 5.

§ 62-115. Issuance of partnership franchises.

No franchise shall be issued under this Article to two or more persons until such persons have executed a partnership agreement, filed a copy of said agreement with the Commission, and indicated to the Commission, in writing, that they have complied with Article 14 of Chapter 66 relating to doing business under an assumed name. (1947, c. 1008, s. 14; 1949, c. 1132, s. 14; 1961, c. 472, s. 5; 1963, c. 1165, s. 1.)

§ 62-116. Issuance of temporary or emergency authority.

(a) Upon the filing of an application in good faith for a franchise, the Commission may in its discretion, after notice by regular mail to all persons holding franchises authorizing similar services within the same territory and upon a finding that no other adequate existing service is available, pending its final decision on the application, issue to the applicant appropriate temporary authority to operate under such just and reasonable conditions and limitations as the Commission deems necessary or desirable to impose in the public interest; provided, however, that pending such final decision on the application, the applicant shall comply with all the provisions of this Chapter, and with the lawful orders, rules and regulations of the Commission promulgated thereunder, applicable to holders of franchises, and upon failure of an applicant so to do, after reasonable notice from the Commission requiring compliance therewith in the particulars set out in the notice, and after hearing, the application may be dismissed by the Commission without further proceedings, and temporary authority issued to such applicant may be revoked. The authority granted under this section shall not create any presumption nor be considered in the action on the permanent authority application.

(b) Upon its own initiative, or upon written request by any customer or by any representative of a local or State government agency, and after issuance of notice to the owner and operator and after hearing in accordance with G.S. 1A-1, Rule 65(b), the Commission may grant emergency operating authority to any person to furnish water or sewer utility service to meet an emergency to the extent necessary to relieve the emergency; provided, that the Commission shall find from such request, or from its own knowledge, that a real emergency exists and that the relief authorized is immediate, pressing and necessary in the public interest, and that the person so authorized has the necessary ability and is willing to perform the prescribed emergency service. Upon termination of the emergency, the emergency operating authority so granted shall expire upon order of the Commission. An emergency is defined herein as the imminent danger of losing adequate water or sewer utility service or the actual loss thereof. (1947, c. 1008, s. 10; 1949, c. 1132, s. 9; 1963, c. 1165, s. 1; 1973, c. 1108.)

§ 62-117. Same or similar names prohibited.

No public utility holding or operating under a franchise issued under this Chapter shall adopt or use a name used by any other public utility, or any name so similar to a name of another public utility as to mislead or confuse the public, and the Commission may, upon complaint, or upon its own initiative, in any such case require the public utility to discontinue the use of such name, preference being given to the public utility first adopting and using such name. (1947, c. 1008, s. 15; 1949, c. 1132, s. 15; 1963, c. 1165, s. 1.)

§ 62-118. Abandonment and reduction of service.

(a) Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power, after petition and notice, to authorize by order any public utility to abandon or reduce such service. Upon request from any party having an interest in said utility service, the Commission shall hold a public hearing on such petition, and may on its own motion hold a public hearing on such petition. Provided, however, that abandonment or reduction of service of motor carriers shall not be subject to this section, but shall be authorized only under the provisions of G.S. 62-262(k) and G.S. 62-262.2.

(b) If any person or corporation furnishing water or sewer utility service under this Chapter shall abandon such service without the prior consent of the Commission, and the Commission subsequently finds that such abandonment of service causes an emergency to exist, the Commission may, unless the owner or operator of the affected system consents, apply in accordance with G.S. 1A-1, Rule 65, to a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or 7A-48 in the district or set of districts as defined in G.S. 7A-41.1 in which the person or corporation so operates, for an order restricting the lands, facilities and rights-of-way used in furnishing said water or sewer utility service to continued use in furnishing said service during the period of the emergency. An emergency is defined herein as the imminent danger of losing adequate water or sewer utility service or the actual loss thereof. The court shall have jurisdiction to restrict the lands, facilities, and rights-of-way to continued use in furnishing said water or sewer utility service by appropriate order restraining their being placed to other use, or restraining their being prevented from continued use in furnishing said water or sewer utility service, by any person, corporation, or their representatives. The court may, in its discretion, appoint an emergency operator to assure the continued operation of such water or sewer utility service. The court shall have jurisdiction to require that reasonable compensation be paid to the owner, operator or other party entitled thereto for the use of any lands, facilities, and rights-of-way which are so restricted to continued use for furnishing water or sewer utility service during the period of the emergency, and it may require the emergency operator of said lands, facilities, and rights-of-way to post bond in an amount required by the court. In no event shall such compensation, for each month awarded, exceed the net average monthly income of the utility for the 12-month period immediately preceding the order restricting use.

(c) Whenever the Commission, upon complaint or investigation upon its own motion, finds that the facilities being used to furnish water or sewer utility service are inadequate to such an extent that an emergency (as defined in G.S. 62-118(b) above) exists, and further finds that there is no reasonable probability of the owner or operator of such utility obtaining the capital necessary to improve or replace the facilities from sources other than the customers, the Commission shall have the power, after notice and hearing, to authorize by order that such service be abandoned or reduced to those customers who are unwilling or unable to advance their fair share of the capital necessary for such improvements. The amount of capital to be advanced by each customer shall be subject to approval by the Commission, and shall be advanced under such conditions as will enable each customer to retain a proprietary interest in the system to the extent of the capital so advanced. The remedy prescribed in this subsection is in addition to other remedies prescribed by law. (1933, c. 307, s. 32; 1963, c. 1165, s. 1; 1971, c. 552, s. 1; 1973, c. 1393; 1985, c. 676, s. 14; 1987 (Reg. Sess., 1988), c. 1037, s. 93; 1989 (Reg. Sess., 1990), c. 1024, s. 15.)

CASE NOTES

Paramount Right of State to Regulate Public Utilities. — The power of a municipality to grant franchises to public utilities for the use of its streets and to provide service to its citizens must yield to the paramount right of the State to regulate public utilities through the Utilities Commission, even when they are operated within the corporate boundaries of a municipality. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774, cert. denied, 285 N.C. 661, 207 S.E.2d 752 (1974).

Utility Owes Duty of Continuous Operation. — While a public utility retains its franchise, it owes to the State and the public the duty of continuous operation. State ex rel. Utils. Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

Consent of Customer or Commission Necessary Before Abandonment of Service. — A power company may not abandon service to any customer, subject to the customer's paying his bill, without the consent of the customer or authorization of the Utilities Commission. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774, cert. denied, 285 N.C. 661, 207 S.E.2d 752 (1974).

Customer Entitled to Restoration of Service Absent Contrary Order. — Where a power company discontinued its service for nonpayment of charges, the customer, upon payment of the charges, was entitled to restoration of the service where the company did not obtain an order from the Commission. Sweetheart Lake, Inc. v. Carolina Power & Light Co., 211 N.C. 269, 189 S.E. 785 (1937).

Discretionary Power of Commission to Authorize Discontinuance. — The General Assembly intended that the Utilities Commission exercise the power conferred upon it to authorize a discontinuance of an established service in large measure according to its judgment and discretion. State ex rel. Utils. Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

The power of the Commission to authorize an abandonment of service is, in large measure, discretionary. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

The Commission's power to require a utility to continue a service is not unlimited. To require a utility, particularly a small operation, to continue an unprofitable operation would violate constitutional guarantees against the taking of property without just compensation. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

Propriety of Order Requiring Continued Operation. — An order of the Commission, based upon proper findings and conclusions, requiring appellant to continue operation of her utilities would not violate constitutional prohibitions against involuntary servitude. Appellant voluntarily put her land and equipment to a public use and collected compensation for the services which she provided, and having done so, the Commission may require that she continue to use it in the service to which she voluntarily dedicated it so long as she is justly compensated for such service. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

Showing Required for Abandonment. — When a public utility seeks to abandon service, it must establish that the public no longer needs the service which it was created to render, or that there is no reasonable probability of its being able to realize sufficient revenue by the rendition of such service to meet its expenses. State ex rel. Utils. Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

Where a utility seeks authorization to abandon service, the ultimate issue for resolution is whether the operation of the system can produce sufficient revenues to meet the expenses of operation. To resolve this issue, there must be findings of fact as to the reasonable expenses of operation and the revenues which the system may be reasonably expected to produce. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

The burden is on the utility seeking authorization to abandon service to establish that there is no reasonable probability of its being able to realize sufficient revenue by the rendition of such service to meet its expenses. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

The doctrine of convenience and necessity is a relative or elastic theory rather than an abstract or absolute rule. The facts in each case must be separately considered, and from those facts it must be determined whether or not public convenience and necessity require a given service to be performed or dispensed with. The convenience and necessity required are those of the public and not of an individual or individuals. State ex rel. Utils. Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

Waste of a utility's manpower or other resources, with no substantial resulting benefit to the public, is not in the public interest and is not required. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

A railroad may not be denied the right to curtail or abandon a service for which there is no substantial public need, even though, upon its entire business, the company is earning a fair rate of return. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

Though prosperous, a railroad or other utility company may not be denied the right to effect economies in its operation, so as to increase its earnings, unless it may reasonably be found, upon the evidence before the Commission, that the public convenience and necessity requires the continuation of the service in question. An occasional inconvenience to a shipper, which is trivial in comparison with the saving to the railroad from the elimination of the service, will not suffice to show such public convenience and necessity. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

But It May Be Required to Retain Station Required by Public Convenience and Necessity. — A railroad may be required to keep a station open, with an agent in attendance, if the public convenience and necessity requires such service, even though this can be done only at a loss to the railroad, provided such loss is not so great as to be unreasonable in comparison with the public's benefit from the service. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

And It May Not Substantially Reduce Hours Station Is Open Without Commission's Order. — A liberal construction of G.S. 62-2, 62-32, 62-131 and 62-247 and this section, so as to effectuate the policy of the State as therein declared, compels the conclusion that when a railroad corporation has established and maintained a freight depot or passenger station pursuant to the order of the Commission, or has established and maintained for a year or more such depot or station on its own initiative, it may not, without first obtaining an order from the Commission authorizing it to do so, substantially reduce the number of hours per day during which such station shall be kept open and attended by an agent of the railroad for the service of the public. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

But Commission May Not Withhold Ap-

proval of Reduction Unreasonably. — When a railroad company applies for an order authorizing it to substantially reduce the number of hours per day during which a depot or station shall be kept open and attended by an agent, the Commission may not withhold its approval unreasonably and arbitrarily. It may deny such permission only after a hearing and only if it finds and concludes, upon competent, material and substantial evidence, in view of the entire record, both that the public convenience and necessity requires the station or depot to be so kept open for a greater portion of the day, and that the railroad, by so doing, will not incur costs out of proportion to any benefit to the public. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

As to power of Commission under former G.S. 62-39 to require transportation and transmission companies to maintain facilities, see State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 233 N.C. 365, 64 S.E.2d 272 (1951); State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 235 N.C. 273, 69 S.E.2d 502 (1952); State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 238 N.C. 701, 78 S.E.2d 780 (1953).

Evidence Held to Show Convenience and Necessity. — Evidence before the Commission indicating that a number of the residences served by applicant's water and sewer systems were situated on quarter-acre lots, which were of insufficient size to support both a well and septic system, and that the occupants of these residences, who were currently among appellant's customers, had no alternative means of water supply or sewage disposal other than the service provided by appellant, clearly supported the conclusion not only that appellant's services constituted a convenience to that segment of the public who used them, but also that such services were necessary to the safety and health of the public. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), modified and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987).

ARTICLE 6A.

Radio Common Carriers.

§§ 62-119 through 62-125: Repealed by Session Laws 1995, c. 523, s. 31.

§§ 62-126 through 62-129: Reserved for future codification purposes.

ARTICLE 7.

Rates of Public Utilities.

§ 62-130. Commission to make rates for public utilities.

(a) The Commission shall make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction. A rate is made, fixed, established or allowed when it becomes effective pursuant to the provisions of this Chapter.

(b) Repealed by Session Laws 1985, c. 676, s. 15.

(c) The Commission may make, require or approve, after public hearing, for intrastate shipments what are known as milling-in-transit, processing-in-transit, or warehousing-in-transit rates on grain, lumber to be dressed, cotton, peanuts, tobacco, or such other commodities as the Commission may designate.

(d) The Commission shall from time to time as often as circumstances may require, change and revise or cause to be changed or revised any rates fixed by the Commission, or allowed to be charged by any public utility.

(e) In all cases where the Commission requires or orders a public utility to refund moneys to its customers which were advanced by or overcollected from its customers, the Commission shall require or order the utility to add to said refund an amount of interest at such rate as the Commission may determine to be just and reasonable; provided, however, that such rate of interest applicable to said refund shall not exceed ten percent (10%) per annum. (1899, c. 164, ss. 2, 7, 14; 1903, c. 683; Rev., ss. 1096, 1099, 1106; 1907, c. 469, s. 4; Ex. Sess. 1908, c. 144, s. 1; 1913, c. 127, s. 2; 1917, c. 194; C.S., ss. 1066, 1071, 3489; Ex. Sess. 1920, c. 51, s. 1; 1925, c. 37; 1929, cc. 82, 91; 1933, c. 134, s. 8; 1941, c. 97; 1953, c. 170; 1963, c. 1165, s. 1; 1981, c. 461, s. 1; 1985, c. 676, s. 15(1).)

Legal Periodicals. — For article on electric rates, see 12 N.C.L. Rev. 289 (1934).

CASE NOTES

Purpose of Regulation. — With public utilities the State has undertaken to protect the public from the customary consequences of monopoly, by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

An uncontrolled legal monopoly in an essential service leads, normally and naturally, to poor service and exorbitant charges. To prevent such result, the legislature has conferred upon the Utilities Commission the power to police the operations of the utility company, so as to require it to render service of good quality at charges which are reasonable. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Article Not in Conflict with Chapter 75. — The provisions of this Article as to rate regulation are not in conflict with Chapter 75, Monopolies and Trusts. Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

The rates of public utilities under the jurisdiction of the Utilities Commission are not subject to attack on the basis that they violate the antitrust laws. Challenges to rates are limited by the legal theories provided by the Public Utilities Act. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 313 N.C. 215, 328 S.E.2d 264 (1985).

Rate Making Within Police Power of State. — The authority conferred upon the Commission to establish reasonable and just rates for charges by a public service corporation for furnishing electrical power to its customers comes within the police powers of the State, and contracts previously made are subordinate to the public interest that such rates be reasonable and just, and afford the corporation supplying the service a safe return upon its investments, having proper regard to the public interest that plants of this character should be properly run and maintained. State ex rel. Corp. Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

The Commission is given general supervision over railways, street railways, and like companies of the State, and is empowered to fix such notes, charges and tariffs as may be reasonable and just, having in view the value of the property, the cost of improvements and maintenance, the probable earning capacity under the proposed rates, the sums required to meet operating expenses, and other specific matters pertinent to such an inquiry; these are police powers, delegated to the Commission, and governmental so far as they extend. Southern Pub. Utils. Co. v. City of Charlotte, 179 N.C. 151, 101 S.E. 619 (1919).

Power to Establish Rates Delegated to Commission. — The General Assembly has delegated to the Commission, and not to the courts, the duty and power to establish rates for public utilities. State ex rel. N.C. Utils. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

This section, in general terms, directs the Commission to establish just and reasonable rates for all utilities. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

The Commission is given broad and general powers to make rates for freight and passenger service. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

But authority of the Utilities Commission to set different rates is not unbridled. There must be substantial differences in service or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

Duty to Fix Just and Reasonable Rates. — When the Commission is called upon by either a corporation or those to whom the services are rendered under its franchise to exercise its rate fixing power and authority, it is its duty to fix and establish just and reasonable rates to be charged for such services. Corporation Comm'n v. Henderson Water Co., 190 N.C. 70, 128 S.E. 465 (1925).

Classification Must Not Be Arbitrary. — The mere fact of classification in rate regulating is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground, something which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 17 S. Ct. 255, 41 L. Ed. 666 (1897); Efland v. Southern Ry., 146 N.C. 135, 59 S.E. 355 (1907).

Unreasonable Application of Same Rates May Be Discriminatory. — Where substantial differences in services or conditions exist, unreasonable application of the same rates may be discriminatory and thus improper. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

The burden of showing the impropriety of rates established by the Commission lies with the party alleging such discrimination. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

Rates Set by Commission Supersede Contrary Private Contract Provisions. — Rates for public utility service fixed by an order of the Commission, otherwise lawful, supersede contrary provisions in private contracts concerning rates for such service. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

The rates of transportation allowed carriers of freight are established by the Interstate Commerce Commission and the State Corporation Commission (now the Utilities Commission), and may not be affected by any agreement to the contrary between the carriers or their agents or employees and the shipper; notwithstanding any such agreement, the carrier may demand and enforce the rates established by law. Southern Ry. v. Latham, 176 N.C. 417, 97 S.E. 234 (1918).

A public service railway corporation operating in various localities may not by contract fix its passenger fares and thus prevent the Commission, under the authority conferred by statute, from determining what rates are, under the circumstances, just and reasonable, for such would authorize such companies to discriminate, unlawfully, among its patrons. Southern Pub. Utils. Co. v. City of Charlotte, 179 N.C. 151, 101 S.E. 619 (1919); City of Winston-Salem v. Winston-Salem City Coach Lines, 245 N.C. 179, 95 S.E.2d 510 (1956).

And Enforcement of Such Rates Does Not Impair Obligations of Contract. — The enforcement of an order of the Commission superseding rates set by contract does not constitute an impairment of the obligation of such contract, since contracts of public utilities, fixing rates for service, are subject to the police power of the State. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

The consumer has no vested right in existing rates and the Commission may change the rates as circumstances dictate. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

The Commission has plenary authority to modify an application by a utility when its modification is based on competent evidence, findings and conclusions showing it to be just and reasonable. The Commission is not limited by the utility's application in the entry of its final order based on evidence adduced at the hearings. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 361, 230 S.E.2d 671 (1976).

And to Correct Rate Schedules. — In the unlikely event that other costs of the utility should decline, the Commission, either on its own motion or that of another interested party, has plenary authority to intervene and make corrections in the utility's rate schedules including, if circumstances should require it, the abrogation of the fuel clause. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

North Carolina rates may not be structured by external system usage. Such action is outside the intended scope of the Commission's authority under G.S. 62-2. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

Rates Must Be Fixed Prospectively. — The Utilities Commission exceeded its statutory authority in requiring a manufacturer to pay a surcharge for emergency natural gas used by the manufacturer prior to the date that the tariff including the surcharge became effective, even though the supplier did not bill the manufacturer for such gas until after the tariff became effective. A rate is fixed or allowed when it becomes effective pursuant to subsection (a) of this section, and rates must be fixed prospectively from their effective date. Section 62-136(a) provides that the Commission shall determine rates to be thereafter observed and in force. The Commission may not fix rates retroactively so as to make them collectible for past services. State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 42 N.C. App. 606, 257 S.E.2d 439 (1979), cert. denied, 299 N.C. 124, 261 S.E.2d 926 (1980).

"Tariff" and "Rates" Synonymous. — The word "tariff," used in connection with the rates of a common carrier, did not have any special legal significance that would differentiate it in effect from the word "rates," used in former G.S. 62-148 in connection with a contract carrier. State ex rel. Utils. Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

An annual "true up" of the curtailment tracking rate of a natural gas company was not a change in the general fixed rate, since the curtailment tracking rate merely creates an estimated rate based on projected gas availability. Therefore, the "true up" of the CTR is a correction of an estimated rate, and does not constitute retroactive general rate making.

State ex rel. Utils. Comm'n v. CF Indus., Inc., 299 N.C. 504, 263 S.E.2d 559 (1980).

Fuel adjustment clause formula used by power company qualified as a valid part of a rate or rate schedule within the meaning of this section. State ex rel. Utils. Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975), aff'd, 291 N.C. 361, 230 S.E.2d 671 (1976).

Testing Reasonableness of Affiliated Company Expenses. — The Commission has the authority and the right at all times to test the reasonableness of expenses paid to affiliated companies (or allocated by them) and to cause the petitioning utility to offer affirmative evidence of their reasonableness or risk their disapproval. The Commission has the obligation to test the reasonableness of such expenses whenever they are properly challenged. State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

The Commission must always determine that expenses paid to affiliated companies are reasonable, and the burden of persuasion on that issue always rests with the utility. The Commission, of course, has the right to test the reasonableness of such expenses. If there is an absence of data and information from which either the propriety of incurring the expense or the reasonableness of the cost can readily be determined, the Commission may require the utility to prove their propriety and reasonableness by affirmative evidence. State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Although it always has the authority to do so, in the absence of contradiction or challenge by affirmative evidence offered by any party to the proceeding, the Commission has no affirmative duty to make further inquiry or investigation into the reasonableness of charges or fees paid to affiliated companies. While affiliation calls for close scrutiny, affiliation alone does not impose an additional burden of proof or require the presentation of additional evidence of reasonableness. State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 707 (1982).

Reasonableness of affiliated company expenses may be tested on the basis of (1) the cost of the same services on the open market, (2) the cost similar utilities pay to their service companies, or (3) the reasonableness of the expenses incurred by the affiliated company in generating the service. State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Rates of Return Reasonable and Did Not Discriminate. — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the approved rates of return were just and reasonable and did not unreasonably discriminate among the various classes of North Carolina Natural Gas Corporation customers and were supported by substantial evidence in view of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Formula Not Unreasonably Discriminatory. — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the Industrial Sales Tracker Formula did not unreasonably discriminate between North Carolina Natural Gas Corporation's customer classes and these findings were supported by substantial evidence in light of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Evidence Not Sufficient for Proceeding. — The Utilities Commission's failure to initiate a ratemaking or complaint proceeding concerning a utility's rate of return was not arbitrary and capricious where the Commission found that the rate exceeded that authorized in only three of the preceding 32 quarters. State ex rel. Utils. Comm'n v. Carolina Indus. Group For Fair Util. Rates, 130 N.C. App. 636, 503 S.E.2d 697 (1998), cert. denied, 349 N.C. 377 (1998).

Legitimate Justification to Maintain Industrial and City Rates of Returns. — The North Carolina Utilities Commission drew legitimate distinctions which justified its decision to maintain industrial and city rates of return at a higher level than residential and commercial and small industrial rates. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Power to Ascertain Corporation in Control. — The Commission has the incidental power (subject to the right of appeal) to ascertain what particular corporation is in the control of or operates any telegraph line in this State, in order that it may exercise its authority to fix rates, as well as to know against whom to proceed for a violation of its regulations. State ex rel. R.R. Comm'rs v. Western Union Tel. Co., 113 N.C. 213, 18 S.E. 389 (1893), appeal dismissed, 17 S. Ct. 1002, 41 L. Ed. 1187 (1897).

Fees and Charges Made by Municipality for Sewerage Connections. — The Utilities Commission has no jurisdiction to fix or supervise the fees and charges to be made by a municipality for connections with a city sewerage system, either within or without its corporate limits. Atlantic Constr. Co. v. City of Raleigh, 230 N.C. 365, 53 S.E.2d 165 (1949).

The Commission has authority to fix city bus fares. State ex rel. Utils. Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956). See § 62-260.

An intracity carrier, holding a certificate of exemption issued by the Commission and a franchise from the city or town in which it operates, is exempt from control of the Commission except as to rates and controversies with respect to extensions and services. State ex rel. N.C. Utils. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

When Fares of Street Railway May Be Raised. — A public service street railway company, operating under a city charter and under a contract with the city restricting the passenger fare authorized to be charged its patrons, may be authorized by the Commission to raise charges to its passengers when, in the opinion of the Commission, such is necessary for it to properly maintain its system, allowing a reasonable profit, to meet the requirements of the public for adequate, safe, and convenient service. Southern Pub. Utils. Co. v. City of Charlotte, 179 N.C. 151, 101 S.E. 619 (1919).

Joint Rate Between Lumber Railroad and Connecting Carrier. — When a lumber railroad is of standard gauge and of sufficient equipment and extensiveness to affect the interest of the public, the Commission may make a valid order establishing a joint rate of transportation in the same cars between it and a connecting common carrier by rail to points beyond the initial road. Corporation Comm'n ex rel. Raleigh Granite Co. v. Atlantic C.L.R.R., 187 N.C. 424, 121 S.E. 767 (1924).

Electric Power Rates Coextensive with State's Jurisdiction. — When the Commission has finally established, under the provisions of the statute, rates to be charged by a public service corporation for furnishing electrical power, the rates are coextensive with the State's jurisdiction and territory, and conclusively bind all corporations, companies, or persons who are parties to the suit and have been afforded an opportunity to be heard. State ex rel. Corp. Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

Sale of Electricity Generated in Another State. — While the generation of electricity in another state, when transported to purchasers in this State, may be regarded as interstate commerce, its distribution and sale here is local to the State, permitting the Commission to establish a just and reasonable rate of charge in conformity with the statutory powers, there being no interfering act of Congress relating to the subject. State ex rel. Corp. Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

Telephone Company Must Not Discriminate. — A telephone company is subject to public regulation and reasonable control, and is required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions. Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co., 159 N.C. 9, 74 S.E. 636 (1912). See also Godwin v. Telephone Co., 136 N.C. 258, 48 S.E. 636 (1904); Walls v. Strickland, 174 N.C. 298, 93 S.E. 857 (1917).

Telegram Transmitted over Lines of Another Company. — Where a telegraph company had a continuous line between two points in this State, the fact that, in transmitting a message, it sent the message over the lines of another company, did not excuse its violation of the rate prescribed by the Railroad Commission (now Utilities Commission). Leavell v. Western Union Tel. Co., 116 N.C. 211, 21 S.E. 391 (1895), appeal dismissed, 17 S. Ct. 1002, 41 L. Ed. 1187 (1897).

Telegraphic Messages Traversing Another State. — Telegraphic messages transmitted by a company from and to points in this State, although traversing another state in the route, are subject to the tariff regulations of the Railroad Commission (now Utilities Commission). State ex rel. R.R. Comm'rs v. Western Union Tel. Co., 113 N.C. 213, 18 S.E. 389 (1893), appeal dismissed, 17 S. Ct. 1002, 41 L. Ed. 1187 (1897).

When the Utilities Commission found that natural gas corporation had received payments in lieu of what it would have received under a service contract and that the customers of the company were bearing the company's contract costs, it was within the power of the Commission under G.S. 62-32(b) and subsections (a) and (d) of this section to take these payments into account in setting a reasonable rate. State ex rel. Utils. Comm'n v. North Carolina Natural Gas Corp., 76 N.C. App. 330, 332 S.E.2d 755, cert. denied, 314 N.C. 675, 336 S.E.2d 405 (1985).

Authority to Allow Use of Availability Charge in Rate Schedule for Recreational Subdivision. — The Utilities Commission has jurisdiction and authority to allow the use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utils. Comm'n v. Carolina Forest Utils., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Landowners in a recreational subdivision who pay availability charges are "consumers" or stand in a consumer-like relationship to the utility providing water service. State ex rel. Utils. Comm'n v. Carolina Forest Utils., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Mandamus to Remedy Discrimination. — Where a public service corporation has discriminated among its patrons in its charges for electricity, mandamus will lie to compel it to charge a uniform or undiscriminating rate, for the question does not require the courts to fix a rate or pass upon its reasonableness. North Carolina Pub. Serv. Co. v. Southern Power Co., 179 N.C. 18, 101 S.E. 593 (1919), rehearing dismissed, 179 N.C. 330, 102 S.E. 625 (1920).

Applied in State ex rel. Utils. Comm'n v.

Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984); State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

Cited in State ex rel. Utils. Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976); State ex rel. N.C. Utils. Comm'n v. Transylvania Util. Co., 30 N.C. App. 336, 226 S.E.2d 824 (1976); State ex rel. Utils. Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838 (1980); State ex rel. Utils. Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981); State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); ALCOA v. Utilities Comm'n, 713 F.2d 1024 (4th Cir. 1983); State ex rel. Utils. Comm'n v. Thornburg, 84 N.C. App. 482, 353 S.E.2d 413 (1987).

§ 62-131. Rates must be just and reasonable; service efficient.

(a) Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable.

(b) Every public utility shall furnish adequate, efficient and reasonable service. (1933, c. 307, ss. 2, 3; 1963, c. 1165, s. 1.)

CASE NOTES

Purpose of Chapter. — The clear purpose of this Chapter is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in G.S. 62-133. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), aff'd on rehearing, 278 N.C. 235, 179 S.E.2d 419 (1971).

The word "rate" used in the Public Utilities Act refers not only to the monetary amount which each customer must ultimately pay, but also to the published method or schedule by which that amount is figured. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

The term "public utility" in subsection (b) includes a railroad corporation. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

Duty and Authority of Commission. — The statutes confer upon the Commission, not upon the Supreme Court, the duty and authority to determine adequacy of service and reasonable rates therefor. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), aff'd or rehearing, 278 N.C. 235, 179 S.E.2d 419 (1971).

There is nothing in the applicable provisions of the Public Utilities Act which prohibits the use of a fossil fuel adjustment clause in the context of the factual circumstances which the utility and the Commission face in a given case. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Investor Risk and Rate of Return — Factors for Consideration. — The law permits the Commission to consider both size and management in assessing investor risk insofar as such risk may bear on an appropriate return on equity capital; a utility's small size may increase investor risk and justify a higher return. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988).

While efficient management should not justify a higher common equity rate of return, it is appropriate for the Commission to consider good management as a factor which reduces investor risk and militates in favor of a lower return on equity capital. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988).

Formula Did Not Unreasonably Discriminate. — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the Industrial Sales Tracker Formula did not unreasonably discriminate between North Carolina Natural Gas Corporation's customer classes and these findings were supported by substantial evidence in light of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Rates of Return Reasonable and Not Discriminatory. — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the approved rates of return were just and reasonable and did not unreasonably discriminate among the various classes of North Carolina Natural Gas Corporation customers and were supported by substantial evidence in view of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Legitimate Justification for Industrial and City Rates of Return. — The North Carolina Utilities Commission drew legitimate distinctions which justified its decision to maintain industrial and city rates of return at a higher level than residential and commercial and small industrial rates. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Testing Reasonableness of Affiliated Company Expenses. — The Commission has the authority and the right at all times to test the reasonableness of expenses paid to affiliated companies (or allocated by them) and to cause the petitioning utility to offer affirmative evidence of their reasonableness or risk their disapproval. The Commission has the obligation to test the reasonableness of such expenses whenever they are properly challenged. State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

The Commission must always determine that expenses paid to affiliated companies are reasonable and the burden of persuasion on that issue always rests with the utility. The Commission, of course, has the right to test the reasonableness of such expenses. If there is an absence of data and information from which either the propriety of incurring the expense or the reasonableness of the cost can readily be determined, the Commission may require the utility to prove their propriety and reasonableness by affirmative evidence. State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Although it always has the authority to do so, in the absence of contradiction or challenge by affirmative evidence offered by any party to the proceeding, the Commission has no affirmative duty to make further inquiry or investigation into the reasonableness of charges or fees paid to affiliated companies. While affiliation calls for close scrutiny, affiliation alone does not impose an additional burden of proof or require the presentation of additional evidence of reasonableness. State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Reasonableness of affiliated company expenses may be tested on the basis of (1) the cost of the same services on the open market, (2) the cost similar utilities pay to their service companies, or (3) the reasonableness of the expenses incurred by the affiliated company in generating the service. State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Duty of Utility to Render Adequate Service. — Having been granted a monopoly in its franchise area, the utility is under a duty to render reasonably adequate service. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), aff'd on rehearing, 278 N.C. 235, 179 S.E.2d 419 (1971).

Utility Must Accept Responsibility. — A public utility, which has been allowed to charge rates sufficient to enable it to maintain its properties, in addition to the earning of a fair return thereon, and which nevertheless permits its properties to fall into such a poor state of maintenance as to impair the quality of its service, must accept the responsibility for its resulting inability to render adequate service to its patrons. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), aff'd on rehearing, 278 N.C. 235, 179 S.E.2d 419 (1971).

Quality of Service to Be Considered in Fixing Rates. — It was not the intent of the legislature to require the Commission to fix rates without any regard to the quality of the service rendered by the utility and thus to assure a "complacent monopoly" a fair return upon the fair value of its properties while it persists in rendering mediocre service and turns a deaf ear both to customer complaints and to Commission orders for improvement. On the contrary, the quality of the service rendered is, necessarily, a factor to be considered in fixing the "just and reasonable" rate therefor. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Increase May Be Granted Notwithstanding Service Inadequacy. — It is not unlawful for the Commission, in the exercise of its discretion, to grant an increase in rates, notwithstanding existing service inadequacy, as an appropriate step in the improvement of the service. State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

Findings Showing Effect of Inadequacy of Service on Decision Fixing Rates. — If the Commission found the quality of a utility's service to fall short of the requirement in this section that it be adequate, efficient and reasonable, then the Commission should make specific findings showing the effect of any such inadequacy upon its decision under G.S. 62-133 fixing rates which are fair both to the public utility and to the consumer. State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Deduction of Profit from Rate Increase Upheld. — Based on the evidence of utility's inadequate service record, the Commission's determination to penalize it by deleting its profit from rate increase was clearly proper. State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

Applied in State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

Cited in State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976); State ex rel. Utils. Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981); State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

§ 62-132. Rates established under this Chapter deemed just and reasonable; remedy for collection of unjust or unreasonable rates.

The rates established under this Chapter by the Commission shall be deemed just and reasonable, and any rate charged by any public utility different from those so established shall be deemed unjust and unreasonable. Provided, however, that upon petition filed by any interested person, and a hearing thereon, if the Commission shall find the rates or charges collected to be other than the rates established by the Commission, and to be unjust, unreasonable, discriminatory or preferential, the Commission may enter an order awarding such petitioner and all other persons in the same class a sum equal to the difference between such unjust, unreasonable, discriminatory or preferential rates or charges and the rates or charges found by the Commission to be just and reasonable, nondiscriminatory and nonpreferential, to the extent that such rates or charges were collected within two years prior to the filing of such petition. (1913, c. 127, s. 3; C.S., s. 1067; 1929, cc. 241, 342; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Legal Periodicals. — For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

CASE NOTES

There is in this Article a clear statutory dichotomy between rates which are made, fixed or established by the Commission on the one hand and those which are simply permitted or allowed to go into effect at the instance of the utility on the other. Rates which are established by the Commission, that is after a full hearing, findings, conclusion and a formal order, "shall be deemed just and reasonable, and any rate charged by any public utility different from those so established shall be deemed unjust and unreasonable." Rates which the Commission simply allows to go into effect by any of the methods described in G.S. 62-134 and 62-135 are subject to being challenged by interested parties or the Commission itself and after a "hearing thereon, if the Commission shall find the rates or charges collected to be other than the rates established by the Commission, and to be unjust, unreasonable, discriminatory or preferential, the Commission may" order refund pursuant to the provisions of this section. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Rates Fixed by Commission Are Prima Facie Valid, Just and Reasonable. — The rates fixed by the Commission are not only prima facie evidence of their validity, but also prima facie evidence that they are just and reasonable. State ex rel. N.C. Utils. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Until Modified on Appeal or by Commission. — Rates or charges fixed by an order of the Commission are to be considered just and reasonable unless and until they shall be changed or modified on appeal or by the further action of the Commission itself. In re Southern Pub. Utils. Co., 179 N.C. 151, 101 S.E. 619 (1919). See also State ex rel. N.C. Corp. Comm'n v. Seaboard Air Line Ry., 173 N.C. 413, 92 S.E. 150 (1917).

Rates Other Than Those Fixed Deemed Unjust. — The rates approved by the Commission shall be deemed to be just and reasonable, and any different rate shall be deemed unjust and unreasonable. State ex rel. N.C. Utils. Comm'n v. Norfolk S. Ry., 249 N.C. 477, 106 S.E.2d 681 (1959).

The Commission is authorized by statute to fix just and reasonable rates or charges, and when they are so fixed, other or lower rates are to be deemed as unjust and unreasonable. State ex rel. Corp. Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

"Established" rates, unlike "permitted" or "allowed" rates, are determined by the Commission after a full hearing, findings, conclusions and a formal order. Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990).

One claiming that rates or charges established by the Commission are unreasonable or excessive has the burden of proving his contention. Corporation Comm'n v. Henderson Water Co., 190 N.C. 70, 128 S.E. 465 (1925); State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983).

Appropriate Claims for Relief May Exist Under G.S. 62-139 and 62-140. — An appropriate claim for relief where the disputed rates are "established" by the Commission may exist under G.S. 62-140 which prohibits unreasonable discrimination by public utilities, or under G.S. 62-139 which prohibits a utility from receiving more compensation for services than the amount prescribed by the Commission. Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990).

A refund pursuant to this section may be ordered even absent a utility's agreement to provide one. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Attorney General Not Prejudiced Where Refund Could Be Sought. — The Attorney General was not prejudiced by the action of the Commission in allowing an exploration tracking rate increase to go into effect without a hearing since a refund could be sought under this section. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Notice of Possible Liability for Refund. — Where a corporation was held to be a public utility and made a party to a general rate case this was adequate notice that it might be held liable for a refund. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983), aff'd, 313 N.C. 614, 332 S.E.2d 397 (1985), rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

Where Utilities Commission after due notice and hearing established, rates for intrastate shipments of pulpwood which it found to be just and reasonable, and thereafter upon petition of defendant and other carriers for reconsideration, the rate so established was ordered "to remain in full force and effect," these rates so established would be deemed the only just and reasonable rates for this commodity over defendant's lines, rendering it unlawful for defendant to charge a greater amount. State ex rel. N.C. Utils. Comm'n v. Atlantic C.L.R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

In a proceeding to recover excessive freight charges collected because of an error in the tariff distance table filed with the Utilities Commission, the charges being in conformity with the tariff schedule for a greater distance than the correct distance between the termini, evidence offered by the carriers as to whether the higher rate was fair and reasonable for the shorter distance was properly excluded, since the carriers should not be permitted to change the rate by reason of a mistake in their tariff distance table, and petitioners were entitled to recover that part of the excess charged which was not barred by the limitation contained in the statute. State ex rel. N.C. Utils. Comm'n v. Norfolk S. Ry., 249 N.C. 477, 106 S.E.2d 681 (1959).

Applied in State ex rel. Utils. Comm'n v. State, 250 N.C. 410, 109 S.E.2d 368 (1959); State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984); Eaton Corp. v. Public Serv. Co., 99 N.C. App. 174, 392 S.E.2d 404 (1990).

Cited in State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

§ 62-133. How rates fixed.

(a) In fixing the rates for any public utility subject to the provisions of this Chapter, other than bus companies, motor carriers and certain water and sewer utilities, the Commission shall fix such rates as shall be fair both to the public utilities and to the consumer.

(b) In fixing such rates, the Commission shall:

(1) Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within the State, less that portion of the cost that has been consumed by previous use recovered by depreciation expense. In addition, construction work in progress may be included in the cost of the public utility's property under any of the following circumstances:

a. To the extent the Commission considers inclusion in the public interest and necessary to the financial stability of the utility in question, reasonable and prudent expenditures for construction work in progress may be included, subject to the provisions of subdivision (4a) of this subsection.

b. For baseload electric generating facilities, reasonable and prudent expenditures shall be included pursuant to subdivisions (2) or (3) of G.S. 62-110.1(f1), whichever applies, subject to the provisions of subdivision (4a) of this subsection.

(1a) Apply the rate of return established under subdivision (4) of this subsection to rights-of-way acquired through agreements with the Department of Transportation pursuant to G.S. 136-19.5(a) if acquisition is consistent with a definite plan to provide service within five years of the date of the agreement and if such right-of-way acquisition will result in benefits to the ratepayers. If a right-of-way is not used within a reasonable time after the expiration of the five-year period, it may be removed from the rate base by the Commission when rates for the public utility are next established under this section.

(2) Estimate such public utility's revenue under the present and proposed rates.

(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

(4) Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) of this subsection as will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, including, but not limited to, the inclusion of construction work in progress in the utility's property under sub-subdivision b. of subdivision (1) of this subsection, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms that are reasonable and that are fair to its customers and to its existing investors.

(4a) Require each public utility to discontinue capitalization of the composite carrying cost of capital funds used to finance construction (allowance for funds) on the construction work in progress included in its rate based upon the effective date of the first and each subsequent general rate order issued with respect to it after the effective date of this subsection; allowance for funds may be capitalized with respect to expenditures for construction work in progress not included in the utility's property upon which the rates were fixed. In determining net operating income for return, the Commission shall not include any capitalized allowance for funds used during construction on the construction work in progress included in the utility's rate base.

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to subdivision (3) of this subsection the rate of return fixed pursuant to subdivisions (4) and (4a) on the cost of the public utility's property ascertained pursuant to subdivisions (1) and (1a) of this subsection.

(c) The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

(d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates.

(e) The fixing of a rate of return shall not bar the fixing of a different rate of return in a subsequent proceeding.

(f) Repealed by Session Laws 1991, c. 598, s. 7.

(g) Reserved.

(h) Repealed by Session Laws 1998-128, s. 4, effective September 4, 1998. (1899, c. 164, s. 2, subsec. 1; Rev., s. 1104; C.S., s. 1068; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1971, c. 1092; 1973, c. 956, s. 1; c. 1041, s. 1; 1975, c. 184, s. 2; 1977, c. 691, ss. 2, 3; 1981, c. 476; 1981 (Reg. Sess., 1982), c. 1197, s. 6; 1985, c. 676, s. 15(2); 1989 (Reg. Sess., 1990), c. 962, s. 4; 1991, c. 598, s. 7; 1998-128, s. 4; 2007-397, s. 8.)

Cross References. — As to small water and sewer utility rates, see G.S. 62-133.1.

Editor's Note. — Session Laws 2007-397, s. 3, provides: "If the federal government imposes requirements similar to those set out in G.S. 62-133.8 on electric power suppliers in the State, the Utilities Commission shall determine the applicability of federal and State requirements so as to apply the more stringent requirements except to the extent that State requirements may be specifically preempted by federal law. The Commission shall adopt rules to establish a procedure as an alternative to the procedure set out in G.S. 62-133 to annually adjust the rates of electric public utilities to allow timely recovery of all reasonable costs of compliance with the federal and State requirements pursuant to G.S. 62-133.8(h), as enacted by Section 2 of this act. In adopting rules to establish the procedure, the Commission shall incorporate the provisions of this act in accordance with this section and the public interest."

Session Laws 2007-397, s. 15 contains a severability clause.

Effect of Amendments. — Session Laws 2007-397, s. 8, effective January 1, 2008, rewrote subdivision (b)(1); added subdivisions (b)(1)a. and b.; in subdivision (b)(4), inserted "of this subsection" following "pursuant to subdivision (1)", inserted language beginning "including, but not limited to, the inclusion of construction work" and ending "subdivision (1) of this subsection", and substituted "that" for "which" twice.

Legal Periodicals. — For survey of 1972 case law on public utility rate regulation, see 51 N.C.L. Rev. 1140 (1973).

For survey of 1974 case law on public utilities, see 53 N.C.L. Rev. 1083 (1975).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For survey of 1977 law on public utility rate regulation, see 56 N.C.L. Rev. 847 (1978).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

I. In General.
II. Powers and Duties of Utilities Commission, Generally.
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IV. Rate Base.
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  A. In General.
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I. IN GENERAL.

Constitutionality. — The power to grant franchises to public service corporations and to fix their rates rests in the General Assembly, which power the General Assembly may delegate to an administrative agency, provided the General Assembly prescribes rules and standards to guide such agency in the exercise of the delegated authority. The statute delegating to the Utilities Commission this authority is constitutional in fixing adequate rules and standards. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Stimulation of the economy is an essential public and governmental purpose and the manner in which this purpose is to be accomplished is, within constitutional limits, exclusively a legislative decision. The authority to set rates to be charged by a public utility for its services rests in the legislature and is delegated by it to the Utilities Commission under sufficient rules and standards to guide the Commission in exercising this power. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983).

Commerce Clause Not Violated. — The North Carolina Utilities Commission is authorized by Congress to act with regard to arrangements between cogenerators and power company, so that the commission's disallowance of the amount by which contracts exceeded the company's avoided costs was consistent with federal laws and regulations and constituted lawful retail ratemaking. The commission's actions did not violate the Commerce Clause. State ex rel. Utils. Comm'n v. North Carolina Power Comm'n, 338 N.C. 412, 450 S.E.2d 896 (1994), reh'g denied, 339 N.C. 743, 454 S.E.2d 269 (1995), cert. denied, 516 U.S. 1092, 116 S. Ct. 813, 133 L. Ed. 2d 758 (1996).

Requirement That Utility Prefile Testimony Prior to That of Intervenors Is Constitutional. — A utility's due process rights were not violated by requiring it to prefile its testimony prior to the prefiling of the intervenors' testimony and requiring it to file its brief concurrently with the intervenors, where it should have been forewarned of what the intervenors intended to show. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983), aff'd, 313 N.C. 614, 332 S.E.2d 397 (1985), rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

This section merely codified the former statute as interpreted by Supreme Court. State ex rel. Utils. Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Purpose of Chapter. — The clear purpose of this Chapter is to confer upon the Utilities Commission the power and duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in this section. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

The primary purpose of this Chapter is not to guarantee to the stockholders of a public utility constant growth in the value of and in the dividend yield from their investment, but is to assure the public of adequate service at a reasonable charge. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

The provisions of this Chapter designed to assure the utility of adequate revenues are in the nature of corollaries to the basic proposition that the public is entitled to adequate service at reasonable rates and safeguards against administrative action which would violate constitutional protections by confiscation of the utility's property. Without such assurance, the owners of capital would not invest in the utility's bonds or stock and the utility could not provide the plant necessary for the rendering of adequate service. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

By adopting this section, the legislature intended to establish an overall scheme for fixing rates, and this section must be interpreted in its entirety in order to comply with the legislative intent. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Purpose of Former Subsection (f). — The purpose of former subsection (f) of this section was to allow the retailer to automatically pass on to the consumer changes in the wholesale cost of natural gas, over which neither the retailer nor the Utilities Commission had control, whenever the natural gas suppliers' price was revised upward or downward, thus avoiding costly and protracted rate proceedings. State ex rel. Utils. Comm'n v. CF Indus., Inc., 39 N.C. App. 477, 250 S.E.2d 716, cert. denied, 297 N.C. 180, 254 S.E.2d 39 (1979).

Former subsection (f) was a mechanism whereby a natural gas utility could pass on to its customers supplier increases or decreases without going through the costly and protracted procedures of a general rate case. State ex rel. Utils. Comm'n v. Public Serv. Co., 307 N.C. 474, 299 S.E.2d 425 (1983).

Former subsection (f) dealt only with rate changes while G.S. 62-136(c) specifically sets forth the criteria pursuant to which refunds should be distributed. State ex rel. Utils. Comm'n v. Public Serv. Co., 307 N.C. 474, 299 S.E.2d 425 (1983).

G.S. 62-136(c) more specifically applies to supplier refunds received by natural gas distributing utilities than did former subsection (f) and is the proper statute to be applied in determining the appropriate distribution of these supplier refunds. State ex rel. Utils. Comm'n v. Public Serv. Co., 307 N.C. 474, 299 S.E.2d 425 (1983).

Proceeding Is General Rate Case Where Question Is Fair Return on Investment. — The Commission was correct in conducting the proceeding as a general rate case, where the primary question was what is a fair rate of return on the utility's investment so as to enable it by sound management to pay a fair profit to its stockholders and to maintain and expand its facilities and services in accordance with the reasonable requirement of its creditors. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983), aff'd, 313 N.C. 614, 332 S.E.2d 397 (1985), rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

Subdivision (b)(3) shall be read in conjunction with subsection (c) of this section, as must subdivision (b)(1). State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

It is a well-established rule that it is for the administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

Sales Agreements Held Reasonable As Means of Financing Nuclear Station. — The Commission properly found that nuclear power plant sales agreements, as a whole, were reasonably and prudently entered into by power company as means of financing completion of the nuclear station. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Access Charge Tariff. — Considering the evidence supporting the view that access charge tariff was calculated to reimburse local exchange companies (LECs) for having to provide additional connection facilities to local networks, payments could not be viewed as mere increased revenues for the LECs, but to provide funds to set off those expenditures that the LECs were required to make to provide additional facilities to handle additional carrier access. The imposition of the access charge tariff was within the authority granted to the Commission by the 1984 amendments to G.S. 62-110. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

An order which indicates that the Utilities Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

Applied in City of High Point v. Duke Power Co., 34 F. Supp. 339 (M.D.N.C. 1940); State ex rel. Utils. Comm'n v. Martel Mills Corp., 232 N.C. 690, 62 S.E.2d 80 (1950); State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970); State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974); State ex rel. Utils. Comm'n v. VEPCO, 21 N.C. App. 45, 203 S.E.2d 418 (1974); State ex rel. Utils. Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974); State ex rel. Utils. Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975); State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980); State ex rel. Utils. Comm'n v. Duke Power Co., 51 N.C. App. 698, 277 S.E.2d 444 (1981); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 309 N.C. 238, 306 S.E.2d 113 (1983); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 64 N.C. App. 609, 307 S.E.2d 803 (1983); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 313 N.C. 215, 328 S.E.2d 264 (1985); State ex rel. Utils. Comm'n v. Public Staff, 331 N.C. 215, 415 S.E.2d 354 (1992); State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 106 N.C. App. 491, 417 S.E.2d 75 (1992).

Cited in State ex rel. Corp. Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923); State ex rel. N.C. Utils. Comm'n v. Atlantic C.L.R.R., 224 N.C. 283, 29 S.E.2d 912 (1944); State ex rel. Utils. Comm'n v. State, 250 N.C. 410, 109 S.E.2d 368 (1959); State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969); State ex rel. Comm'r of Ins. v. State ex rel. Att'y Gen., 16 N.C. App. 724, 193 S.E.2d 432 (1972); State ex rel. N.C. Utils. Comm'n v. Transylvania Utils. Co., 30 N.C. App. 336, 226 S.E.2d 824 (1976); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976); State ex rel. Utils. Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979); State ex rel. Utils. Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234 (1980); State ex rel. Utils.

Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980); State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980); State ex rel. Utils. Comm'n v. Public Staff, 52 N.C. App. 275, 278 S.E.2d 599 (1981); State ex rel. Utils. Comm'n v. Thornburg, 84 N.C. App. 482, 353 S.E.2d 413 (1987).

II. POWERS AND DUTIES OF UTILITIES COMMISSION, GENERALLY.

Commission Exercises Function of Legislative Branch of Government. — In fixing rates to be charged by a public utility, the Commission is exercising a function of the legislative branch of the government. It may not, therefore, exceed the limitations imposed upon the legislature by the State and federal Constitutions. The Commission, however, does not have the full power of the legislature, but only that portion conferred upon it in this Chapter. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

And Must Comply with Requirements of This Chapter. — In fixing the rates to be charged by a public utility for its service, the Commission must comply with the requirements of this Chapter. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The Utilities Commission acted in excess of its statutory authority when it permitted the North Carolina Natural Gas Corporation to pass on additional costs resulting solely from an increase in storage capacity without complying with the statutory procedures required for a general rate case. State ex rel. Utils. Comm'n v. CF Indus., Inc., 39 N.C. App. 477, 250 S.E.2d 716, cert. denied, 297 N.C. 180, 254 S.E.2d 39 (1979).

This section is a part of the rate-making power of the Commission. State ex rel. Utils. Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98, cert. denied, 284 N.C. 124, 199 S.E.2d 663 (1973).

And Controls Commission in Establishing Rates. — In establishing rates, the Commission is governed and controlled by the provisions of this section. Southern Ry. v. McNeill, 155 F. 756 (E.D.N.C. 1907).

The legislative mandate is that the Commission shall fix rates which will enable a well managed utility to earn a "fair rate of return" on the "fair value" if its properties are "used and useful" in rendering its service. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

The responsibility for fixing rates rests with the Utilities Commission and not the Supreme Court. However, there is nothing in the statutes that requires the Commission to accept the rate or rates proposed, or to reject them altogether. State ex rel. Utils. Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

It is the prerogative of the Commission, and not the Court of Appeals, to decide the question as to what constitutes fair and reasonable rates that may be charged by a utility, as the Commission is an agency composed of men of special knowledge, observation, and experience in their field, and has at hand a staff trained for this type of work, and the law imposes upon it, not the Court of Appeals, the duty to fix the rates. State ex rel. Utils. Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The statutes confer upon the Commission, not upon the Supreme Court, the duty and authority to determine adequacy of service and reasonable rates therefor. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

It is the Commission's duty to sift through the evidence and draw a conclusion therefrom as to a fair and reasonable rate of return. State ex rel. Utils. Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

Thus, neither the Supreme Court nor the Court of Appeals is authorized to fix rates for a public utility. State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Court may not substitute its judgment, either with respect to factual disputes or policy disagreements, for that of the Commission. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983).

Power and Duty to Compel Adequate Service and Fix Rates. — This Chapter confers upon the Utilities Commission the power and duty to compel a public utility to render adequate service, and also confers upon the Commission the duty to fix reasonable rates for the rendering of adequate service. State ex rel. Utils. Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974); State ex rel. Utils. Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Commission's Rate Making Powers Not Governed by Principles of Res Judicata. — Since the exercise of the Commission's rate making power is a legislative rather than a judicial function, such orders are not governed by the principles of res judicata, and are reviewable in later appeals of closely related matters. State ex rel. Utils. Comm'n v.

Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Attorney General's appeal from Utilities Commission order was not barred by the doctrine of res judicata, where the prior Commission rulings relied on by appellee power company as a bar to appellant's position were all designated by the Commission as "general rate cases" in which appellee sought Commission authority to increase its electric rates and charges, and where in fixing the rates to be charged by the utility, the Commission was exercising a function delegated to it by the legislative branch of the government. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Tax Reform Benefits Passed on to Ratepayers by Rulemaking Rather Than Ratemaking Procedure. — Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 (TRA-86) through a rulemaking procedure rather than a ratemaking procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

Nowhere in subdivision (b)(1) is there a requirement that the Commission make findings as to the cost of each project and when it will be needed. To require such extensive evidence would put an undue burden on the utility and cause the rate-making process to be more time consuming and difficult of administration. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

Subdivision (b)(1) does not require the Commission to make new findings on the need for construction. Before any public utility begins the construction of a facility for generating electricity for use by the public it must first obtain from the Commission a certificate stating that public convenience and necessity requires, or will require such construction. Before such a certificate can be granted the applicant must file an estimate of construction costs and the Commission must hold public hearings. This procedure satisfies the argument that the construction must be necessary. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

Commission to Fix Rates as Low as Constitutionally Possible. — The origin of this section supports the inference that the legislature intended for the Commission to fix rates as low as may be reasonably consistent with the requirements of the due process clause of U.S. Const., Amend. XIV, those of N.C. Const., Art. I, § 19, being the same in this respect. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utils. Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

Specific and unambiguous factual findings by the Commission are necessary to enable a reviewing court to determine whether the duty imposed by G.S. 62-131 has been performed. State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Findings as to Original and Replacement Cost Less Depreciation. — Where evidence of original cost, less depreciation, and of replacement cost, less depreciation, is introduced, the Commission must make, and set forth in its order, its findings as to both of these evidential facts, along with any "other facts" considered by it. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972). See also State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Exercise of Subjective Judgment by Commission. — Under this section the weight to be given the respective indications of fair value, the determination of the total amount reasonably necessary for working capital and the determination of what constitutes a fair rate of return requires exercise of a subjective judgment by the Commission. State ex rel. Utils. Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

The Commission is not required to accept as conclusive the subjective judgment of a witness, even though the record contains no expression of a contrary opinion by another witness. State ex rel. Utils. Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

The findings of the Commission, when supported by competent evidence, are conclusive. State ex rel. Utils. Comm'n v. Duke Power Co., 21 N.C. App. 89, 203 S.E.2d 404, rev'd on other grounds, 285 N.C. 377, 206 S.E.2d 269 (1974).

If there is competent evidence to support the findings and conclusions of the Commission, they will be upheld by the reviewing court. State ex rel. Utils. Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

The Commission as factfinder, determines the credibility of the evidence, and its findings of fact which are supported by competent, material and substantial evidence, are conclusive, and the court is bound by them. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983); State ex rel. Utils. Comm'n v.

Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

Determination of Credibility and Weight of Evidence. — As a general rule, it is for the Commission, not the reviewing court, to determine the credibility of and the weight to be given to all competent evidence. The rule is fully applicable when there is conflicting testimony by experts as to which method among those available to experts in their field is best suited for use in resolving a particular question they are asked to address as experts. State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 320 N.C. 1, 358 S.E.2d 35 (1987).

And May Not Be Disturbed Merely Because Court Might Have Concluded Differently. — The Commission's findings, supported by substantial evidence, may not properly be set aside by the reviewing court merely because a different conclusion could have been reached upon the evidence. State ex rel. Utils. Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

When the record, considered as a whole, contains substantial evidence supporting the subjective judgment of the Commission on any of these factors in the fixing of reasonable rates, the conclusion reached by the Commission may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission. State ex rel. Utils. Comm'n v. VEPCO, 385 N.C. 398, 206 S.E.2d 283 (1974); State ex rel. Utils. Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

The Commission's determination, reached pursuant to the mandate of this section and to the statutory procedural requirements, may not be reversed by the Court of Appeals or by the Supreme Court merely because it would have reached a different conclusion upon the evidence, but it is otherwise if it does not appear from the order of the Commission that the statutory mandates have been obeyed. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Under this section the determination of what constitutes a fair rate of return requires the exercise of a subjective judgment by the Commission and its decision may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

When a telephone company offered substantial evidence to show that there was no significant excess plant margin, this conflict of evidence presented a question of fact upon which the finding of the Commission was conclusive and could not be disturbed by the reviewing court, even though the court might have reached a different conclusion thereon. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

A reviewing court may neither retry such disputed questions of fact nor substitute its judgment for that of the Commission. State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 320 N.C. 1, 358 S.E.2d 35 (1987).

Commission's Decision Will Be Upheld Unless Assailable Under G.S. 62-94(b). — The decision of the Commission with regard to rates for public utilities will be upheld by the Court of Appeals on appeal unless it is assailable on one of the grounds enumerated in G.S. 62-94(b). State ex rel. Utils. Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

Findings, inferences, conclusions or decisions of the Commission which are arbitrary or capricious and which prejudice substantial rights of appellants are not binding on a reviewing court. State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

When Commission's Orders Affirmed. — The rate order of the Commission will be affirmed if upon consideration of the whole record the court finds that the Commission's decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Commission May Determine Nature of Proceeding. — It is within the province of the Commission to determine whether a hearing is a general rate case or a complaint proceeding. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

And Such Determination Must Be Made as to Every Hearing. — It is necessary as a matter of procedure that a determination as to whether a hearing is a general rate case or a complaint proceeding be made in every hearing involving the establishment, modification or revocation of rates. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Determination of Commission as to Nature of Case Not Disturbed Absent Showing of Prejudice. — The findings of the Commission on whether a hearing is a general rate case or a complaint proceeding will not be disturbed in any case in the absence of a clear showing that the right of the parties have been prejudiced. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

As to implementation of 30-day notice requirement by rule requiring written notification, see State ex rel. N.C. Utils. Comm'n v. Atlantic C.L.R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

Error to Accept Design Criteria of Division of Water Quality. — It was error for the Utilities Commission to arbitrarily or subserviently accept, in place of its own determination upon the evidence before it, design criteria of the Division of Environmental Management [now Division of Water Quality] as the actual plant capacity currently needed for service to existing customers—and the beginning point for determining the appropriate additional "capacity allowance" in the rate base of plant which was not presently in service to the public, but was held for future use. State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 333 N.C. 195, 424 S.E.2d 133 (1993).

III. FIXING OF RATES, GENERALLY.

The word "rate," as used in the Public Utilities Act, refers not only to the monetary amount which each customer must ultimately pay, but also to the published method or schedule by which that amount is figured. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

"General Rate" Case. — Where the whole or a substantial portion of the rate structure of a public utility is being initially established or is under review, and where the required procedure under this section is being carried out, the hearing before the Commission to establish or revise the rates is referred to as a "general rate." State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

"Complaint Proceeding". — A hearing which involves a single rate or a small part of the rate structure is called a "complaint proceeding." It differs from a general rate case in that it deals with an emergency or change of circumstances which does not affect the entire rate structure and may be resolved without involving the procedure outlined in this section, and does not justify the expense and loss of time involved in such procedure. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

The "reasonable operating expenses," specified in subdivisions (b)(3) and (5) of this section, relate and must be directly connected to "the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period," as specified in subsection (b)(1). State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 333 N.C. 195, 424 S.E.2d 133 (1993).

Fuel Clause Subject to This Chapter. — It is the fuel clause, a formula for figuring certain monetary additions or subtractions to a customer's bill, not the ultimate amount so figured, which constitutes that part of the utility's published schedule subject to the provisions of the Public Utilities Act. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Section Applicable in Fixing or Revising Rate Schedules and Rate Classifications. — In fixing rate schedules and rate classifications, or in revising said rates and classifications or a substantial part thereof, the procedure indicated by this section must be observed. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Section May Not Apply Where Only One or a Few Rates Are Involved. — This section may not apply where a public utility has many rate schedules applying to many different classes of service customers, and only one rate or a few rates are involved in a petition for amendment, modification or rescission. Ordinarily it is not required that the utility's property be valued and that the provisions of this section be observed in such case. State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959); State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Section prescribes formula which Commission is required to follow in fixing rates for service to be charged by a public utility. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Formula Under Section. — The formula of the mandate of this section is: A x B=C (fair rate of return multiplied by the fair value of the properties equals the fair return in dollars). State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Steps Which Commission Must Take Prescribed by Section. — In order to assure the utility of earnings sufficient to attract capital and also in order to limit its charges for service to levels sufficient for that purpose, the legislature has prescribed in this section the steps which the Commission must take in fixing such charges. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Fixing of "reasonable and just" rates involves a balancing of shareholder and

consumer interests; the Utilities Commission must therefore set rates which will protect both the right of the public utility to earn a fair rate of return for its shareholders and ensure its financial integrity, while also protecting the right of the utility's intrastate customers to pay a retail rate which reasonably and fairly reflects the cost of service rendered on their behalf. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

The question of whether rates prescribed under this Chapter are so unreasonable and unjust to the company and its stockholders that they amount to an unconstitutional confiscation of a utility's property necessarily involves an inquiry as to what is reasonable and just for the public. The public cannot properly be subject to unreasonable rates in order simply that stockholders may earn dividends. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

Burden of Proof. — The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Rates to Be Based on Domestic Business. — The reasonableness of the rates to be fixed by the State must be decided with reference exclusively to what is just and reasonable in respect of domestic business. Hence, when a company operates in two or more states, the operations are treated as separate businesses for the purpose of rate regulation. State ex rel. Utils. Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

The Utilities Commission is empowered and directed to make reasonable and just rates as applied to the distribution and sale of power in this State and not otherwise, and such power cannot be directly controlled or weakened by conditions existent in other states, either from the action or nonaction of official bodies there or from dealings between private parties. To hold otherwise would, in its practical operation, be to withdraw or nullify the powers that this section professes to confer. State ex rel. Utils. Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

But Net Return Earned in Other States May Be Considered. — In fixing intrastate rates for a telephone company operating in several states, the Utilities Commission should take into consideration the net return such utility earns on its properties in such other states to the extent of not requiring customers in North Carolina, in order to maintain the utility's financial condition, to pay a substantially higher rate than permitted in other states. A substantial differential might be considered some evidence that the rates charged in this State are unreasonable and unjust to the local public. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Commission Need Not Guarantee Return Requested. — While the Utilities Commission is to fix rates that will enable the utility by sound management to pay all of its costs of operation and to have left over a fair return upon the fair value of its properties, it is not required to guarantee the return requested by the utility where the facts and circumstances warrant otherwise. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

Rate Increase Conforming with Interstate Rates Allowed by Interstate Commerce Commission. — An order of the Utilities Commission increasing intrastate rates of State carriers so that such rates would conform with an increase in interstate rates allowed by the Interstate Commerce Commission was invalid where such order was unsupported by proof of the fair value of the properties of the carriers used and useful in conducting their intrastate business, separate and apart from their interstate business. State ex rel. Utils. Comm'n v. State, 243 N.C. 12, 89 S.E.2d 727 (1955).

Objective of Rate Making. — The fixing of rates for service which will enable the utility to do the things enumerated in subsection (b)(4), and no more, is the ultimate objective of rate making. At best, the result of the complex rate making procedure is an approximation of this objective. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Rate making is, of necessity, a matter of estimate and prediction, since rates are set for the future. State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

The ultimate question in determining appropriate rates is: What is a reasonable rate to be charged by the particular utility company for the service it proposes to render in the immediate future? The determination of this question is for the Commission, in accordance with the direction of this section. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971); State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

A rate must not only be fair, just and

reasonable to the consumer, but fair, just and reasonable to the utility. State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

The rates established by the Commission must be fair to both the utility and the customer. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

What is a "just and reasonable" rate which will produce a fair return on the investment depends on: (1) the value of the investment, usually referred to in rate-making cases as the rate base, which earns the return; (2) the gross income received by the applicant from its authorized operations; (3) the amount to be deducted for operating expenses, which must include the amount of capital investment currently consumed in rendering the service; and (4) what rate constitutes a just and reasonable rate of return on the predetermined rate base. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954); State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959); State ex rel. N.C. Utils. Comm'n v. Piedmont Natural Gas Co., 254 N.C. 536, 119 S.E.2d 469 (1961); State ex rel. Utils. Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965); State ex rel. N.C. Utils. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

The Commission, in fixing a reasonable and just rate of charges for public service corporations, may make a fair estimated value of the property presently used, and in relation thereto consider the tax valuation of the plant. State ex rel. Corp. Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

In finding essential, ultimate facts, the Commission must consider all factors particularized in the statute and "all other facts that will enable it to determine what are reasonable and just rates, charges and tariffs." It must then arrive at its own independent conclusion, without reference to any specific formula, as to: (1) what constitutes a fair value, for rate-making purposes, of applicant's investment used in rendering intrastate service, the rate base, and; (2) what rate of return on the predetermined rate base will constitute a rate that is just and reasonable both to the applicant and to the public. While both original cost and replacement value are to be considered, neither constitutes a proper rate base. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954); State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959); State ex rel. N.C. Utils. Comm'n v. Piedmont Natural Gas Co., 254 N.C. 536, 119 S.E.2d 469 (1961); State ex rel. N.C. Utils. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

In setting rates, the Utilities Commission must consider not only those specific indicia of a utility's economic status set out in subsection (b) of this section, but also all other material facts of record which may have a significant bearing on the determination of reasonable and just rates. State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

Calculation of Requisite Additional Gross Revenue When Essential Facts Established. — When essential ultimate facts are established by findings of the Commission, the amount of additional gross revenue required to produce the desired net return becomes a mere matter of calculation. State ex rel. Utils. Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

The Commission must be given broad discretion with respect to the extent which it will hear evidence relating to a particular schedule when the basic question for consideration is: Does the utility need an increase in rates to function effectively or, conversely, can the utility continue to operate, provide efficient service to its customers, and make a fair return to the owners of its properties, or may it so function after a reduction in rates? State ex rel. Utils. Comm'n v. County of Harnett, 30 N.C. App. 24, 226 S.E.2d 515 (1976).

Additions for Used and Useful Plant. — Subsection (c) of this section only requires the Utilities Commission to consider post-test period changes in used and useful plant. It also requires the Commission to consider changes in costs and revenues. If the evidence does not show what changes there may be in matching costs and revenues, the Commission does not have to allow additions to the rate base for a used and useful plant. State ex rel. Utils. Comm'n v. Water Serv., Inc., 328 N.C. 299, 401 S.E.2d 353 (1991).

Rates charged by one telephone company do not, per se, constitute a standard by which to determine the reasonableness of those of another company, even when the territories served and operating conditions are similar. The probative value of such evidence is slight at best, but where there is evidence of substantial similarity of conditions, evidence of comparative rates may have some relevancy for use as a guide to the limits of the zone of reasonableness. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Subdivisions (b)(2) and (b)(3) and subsection (c) contemplate that the Commission will consider "probable future revenues and expenses" in setting rates for the future. Obviously, conditions do not remain static. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

The Commission can take into account

the future effect of inflation by fixing rates slightly in excess of that which is necessary to meet the test of reasonableness. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Determining a Utility's Capital Structure for Rate Making Purposes. — The Commission is not required, as a matter of law, to reduce the common equity component of a utility's capital structure by an amount equal to its investment in its nonregulated subsidiaries in determining the appropriate capital structure for rate-making purposes. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

Formula Not Unreasonably Discriminatory. — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the Industrial Sales Tracker Formula did not unreasonably discriminate between North Carolina Natural Gas Corporation's customer classes and these findings were supported by substantial evidence in light of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Efficiency of Operation. — Heat rate and capacity factor furnish convenient measuring devices by which to evaluate the overall efficiency with which a particular electrical utility system is operated, and the Utilities Commission should take into account the efficiency of a company's operation in fixing its rates in a general rate case as provided in this section, although plant efficiency as it bears upon fuel cost is not a factor to be considered in the limited and expedited proceeding provided for by G.S. 62-134(e) (now repealed). State ex rel. Utils. Comm'n v. VEPCO, 48 N.C. App. 453, 269 S.E.2d 657, cert. denied, 301 N.C. 531, 273 S.E.2d 462 (1980).

For present provisions as to increments based upon increase in cost of fuel, see G.S. 62-133.2.

Anticipated Tax Expense. — Rates for use of a utility's service are set at a level which will enable the company to pay, among other items, its anticipated tax expense. If, by virtue of some change in the tax law, it develops that the company did not incur the anticipated expense, for the payment of which it collected revenues in prior months, its rates for present and future service may not be cut, on that account, below what it otherwise would be entitled to charge for the present or future service. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

Fundamental Changes in Sources and Supply. — Where filings reflected decisions by natural gas company's management to make fundamental changes in its sources of supply of natural gas and to access substantial additional volumes of natural gas, the rate changes generated by these decisions were not of the nature of those to be allowed under former subsection (f) of this section but rather had to be considered and passed upon in a general rate case proceeding pursuant to subsections (a)-(e) of this section. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 106 N.C. App. 218, 415 S.E.2d 758 (1992), cert. denied, 332 N.C. 671, 424 S.E.2d 417 (1992).

Apportionment of Increases in Retail Natural Gas Rates. — Any increase in the retail rates attributable to charges by a wholesaler of natural gas for storage capacity must be apportioned in a general rate case pursuant to subsections (a) through (c) of this section. State ex rel. Utils. Comm'n v. CF Indus., Inc., 39 N.C. App. 477, 250 S.E.2d 716, cert. denied, 297 N.C. 180, 254 S.E.2d 39 (1979).

There is nothing in the applicable provisions of the Public Utilities Act which prohibits the use of a fossil fuel adjustment clause in the context of the factual circumstances which the utility and the Commission face in a given case. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

For a discussion of the operation of and the authorities supporting the use of fuel adjustment clauses, see State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

In considering whether fuel adjustment clause would ever operate to increase utility's rate of return, the Commission was entitled to act on the normal assumption in rate cases generally, there being no evidence to the contrary, that other costs of the utility would not decline but would probably increase or at least remain fairly constant. In the unlikely event that other costs of the utility should decline, the Commission, either on its own motion or that of another interested party, has plenary authority to intervene and make corrections in the utility's rate schedules including, if circumstances should require it, the abrogation of the fuel clause. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

As to the practice of rolling-together accounting data and allocating costs between jurisdictional and nonjurisdictional service, see State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

Shifting of Onus to Parent Corporation. — In view of the Utilities Commission's determination that unsound or "absentee" management decisions on the part of a utility, and parental domination on the part of an aluminum producing company that was both parent and customer, left the utility with insufficient resources to meet its steadily increasing public load and lacking in contractual power supply arrangements tailored to meet its public service needs at reasonable prices, it was well within the Commission's rate making authority to shift the onus of those managerial shortcomings from the pockets of utility's retail rate payers to the corporate offices of the aluminum producing company. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

Refund of Over-Collection. — The Commission erred by refunding utility's over-collection by deducting the amount of the deferred fuel account from the utility's annual rate increase, as this would, in effect, require the company to pay the refund annually for as long as the rates fixed in the case remained in effect. The Commission should have provided for a lump-sum refund (i.e., a onetime rate reduction) or a rate reduction over a period of time. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

A schedule of rates fixed by the Commission under the standard prescribed by the legislature is binding upon the interested parties and the courts, provided it is within the bounds of reason. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Rates which the Commission simply allows to go into effect may be challenged by interested parties or the Commission and after a hearing the Commission may order a refund if it finds the rates to be different from those established by the Commission and unjust or unreasonable. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

Retroactive rate making occurs when a rate is set so as to permit collection in the future for expenses attributable to past services. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983), aff'd, 313 N.C. 614, 332 S.E.2d 397 (1985), rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

It is not retroactive rate making for a corporation to be held responsible for a refund for the period prior to when it was declared a public utility. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983), aff'd, 313 N.C. 614, 332 S.E.2d 397 (1985), rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

Method Which Did Not Prefer State Customers over Foreign Customers Held Not to Violate Commerce Clause. — A provision in a Commission order that a "combined system's North Carolina public load has first call on the total electric energy output of the combined system, and to the extent that said output exceeds the requirements of the North Carolina public load, such excess will be available for sale and will be purchased by [the corporation of which the system was a wholly-owned subsidiary]" would violate the commerce clause. However, where the methodology used by the Commission allowed the combined system to recover the costs of the percentage of energy it used based on its percentage of the costs of the energy generated and purchased by the combined system, North Carolina customers would not be given a preference and no commerce clause violation would occur. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983), aff'd, 313 N.C. 614, 332 S.E.2d 397 (1985), rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

Reduction of Future Rate Held Not Retroactive Rate Making. — An order which did not reduce revenue to compensate in the future for what may have been an excessive rate in the past, but reduced the future rate for what it found was a more realistic investment credit tax amortization, is not retroactive rate making. State ex rel. Utils. Comm'n v. Public Serv. Co., 59 N.C. App. 448, 297 S.E.2d 119 (1982).

Court-Ordered Refund Is Not Retroactive Rate Making. — The Supreme Court has the power to direct the Commission to order refunds from rates established by final order of the Commission. This would not constitute retroactive rate making prohibited under the North Carolina Statutes. Retroactive rate making occurs when the utility is required to refund revenues collected, pursuant to the then lawfully established rates, for such past use. A rate has not been lawfully established simply because the Commission has ordered it. If the Commission makes an error of law in its order from which there is a timely appeal the rates put into effect by that order have not been "lawfully established" until the appellate courts have made a final ruling on the matter. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

The North Carolina Utilities Commission reviewed the capacity rate set by an arbitrator and determined that he did not properly take into account other potential sources of power, thus his assessment of avoided costs was unreasonably high, and its exclusion of expenses for capacity payments was merely the disallowance of the amount by which the contract rate exceeded power company's avoided costs; therefore the commission properly disallowed expenses for unreasonably high payments in accordance with this section. State ex rel. Utils. Comm'n v. North Carolina Power Comm'n, 338 N.C. 412, 450 S.E.2d 896

(1994), reh'g denied, 339 N.C. 743, 454 S.E.2d 269 (1995), cert. denied, 516 U.S. 1092, 116 S. Ct. 813, 133 L. Ed. 2d 758 (1996).

Evidence Not Sufficient. — Because of the lack of evidence justifying increase and because the Commission did not consider the future revenue potential, the decision of the Commission was not supported by competent, material, and substantial evidence. State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

IV. RATE BASE.

A. In General.

Rate Base Defined. — The "rate base" is the cost of the utility's property which is used and useful in providing service to the public. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

The general doctrine is that the rate base is made up of values used in furnishing the service. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

There Is But One Rate Base. — It is incorrect to speak of "the original cost rate base" and the "trended original cost rate base." There is but one rate base, namely, the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, which value the Commission must determine as of the end of the test period. The original cost of the properties is simply evidence to be considered in making this determination. The replacement cost, whether determined by use of trended cost indices or otherwise, is also but evidence of the fair value of the properties. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971); State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

It is the duty of the Commission to arrive at an independent rate base upon consideration of all factors, including cost, replacement and trended cost, and it is its duty to exercise its independent judgment in doing so. State ex rel. Utils. Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

When Companies Considered as Single, Integrated System for Rate Making. — Where two companies traded all their generation to TVA and received in exchange for this entitlements of energy which they divided as they pleased, the Commission could conclude from these facts that the two companies constitute a single, integrated system for rate making purposes. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983), aff'd, 313 N.C. 614, 332 S.E.2d 397 (1985), rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

What Operating Expenses May Be Considered. — This section limits the property upon which North Carolina consumers are required to pay a return to the property used and useful in providing intrastate service; when the provisions of (b)(1), (b)(3) and (c) are read in pari materia, it is apparent that the only operating expenses which the Utilities Commission may consider in setting intrastate rates for North Carolina public utilities are those incurred in the provision of service to a utility's North Carolina consumers. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

This section clearly provides that the rate base and allowable operating expenses of a utility are limited to those costs incurred in providing service to the company's North Carolina retail customers. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985).

Matching Revenues and Costs Required for Use of Post-Test Year Costs in Rate Base. — Where provider of water and sewer services asks that costs for post-test year use of plants be included in its rate base, the Utilities Commission may, under subsection (c) of this section, require the utility to show matching revenues and costs. State ex rel. Utils. Comm'n v. Water Serv., Inc., 328 N.C. 299, 401 S.E.2d 353 (1991).

What Property to Be Considered. — This section clearly contemplates that only that property of the utility which is devoted to the public use for which the utility has been granted a franchise is to be considered, both in arriving at the fair value rate base and in projecting probable future revenues and expenses. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

In a proceeding by a power company for an increase in the cash fares on its city bus system, the Commission was correct in considering the value only of the properties used and useful in connection with the operation of the bus system, without regard to the value of the electric properties of the power company. State ex rel. Utils. Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956).

Question Whether Property Is "Used and Useful" Is One of Fact. — The question of whether specific property is presently "used and useful" in rendering service is one of fact, to be determined by the Commission upon compe-

tent and substantial evidence. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985); State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

"Excess" Facilities Not "Used and Useful". — If facilities are found to be excess, as a matter of law, they can not be considered "used and useful" as that term is used in subdivision (b)(1), and cannot be included in the rate base. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989).

Property Not Presently Used to Its Full Capacity. — The fact that a transmission line, a building or a telephone company's central office equipment is not presently used to its full capacity does not necessarily justify the exclusion of any portion of it from the rate base on the theory that such portion is not presently "used and useful" in rendering service. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

While central office equipment might have provided at the end of the test period capacity in excess of the amount needed at that moment, there being no question raised that it was not in operation at that time, it was at that time property both used and useful by the utility in providing services to the public; therefore, the Commission had no authority to deduct any portion of its costs in arriving at the reasonable original cost of the property for consideration by it in making its ultimate determination of fair value. State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

The question for determination in connection with an alleged overbuilding of a utility plant is whether the properties in question can be deemed "used and useful" in rendering the service, as of the end of the test period. If not, they may not properly be included in the rate base. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Property Held for Future Use. — A telephone company, with central office equipment sufficient to serve any reasonably anticipated increase in customers, may not properly add to its rate base additional units of central office equipment merely because, in the long future, it hopes to have customers who will use it. This is especially true where the supplier of such equipment is an affiliated corporation, controlled by the same holding company which controls the telephone company. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

There is no merit in the contention that exclusion from the rate base of the value of property held by a public utility for future use amounts to confiscation of its property. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Classification as "Extraordinary Property Retirement" Held Error. — The classification of a physical plant that is not "used and useful" (and thus not includable in a rate base) as "extraordinary property retirement" and subject to recovery through amortization, has no legal basis. State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 333 N.C. 195, 424 S.E.2d 133 (1993).

Where, after finding a sewer connection to be "no longer used and useful" and erroneously concluding thereupon that it should be treated as extraordinary property retirement and amortized over a six-year period, the Utilities Commission directed the "unamortized balance" to be "included in rate base", the Commission simultaneously treated the unused property as rate base and reasonable operating expenses in direct violation of the ratemaking process. State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 333 N.C. 195, 424 S.E.2d 133 (1993).

Subdivision (b)(1) is designed to make utility customers finance reasonable construction costs arising after July 1, 1979, regardless of whether that construction becomes useful to the customers. State ex rel. Utils. Comm'n v. Conservation Council, 64 N.C. App. 266, 307 S.E.2d 375 (1983), modified on other grounds, 66 N.C. 456, 311 S.E.2d 617, rev'd in part, 312 N.C. 59, 320 S.E.2d 679 (1984).

The purpose of subdivision (b)(4a) is to prevent utility companies from obtaining a double recovery by capitalizing the allowance for funds used during construction after they have had construction work in progress expenses for the same construction included in the rate base. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

The Commission must include all reasonable construction work in progress expenditures in the rate base. The only matter left to the discretion of the Commission is whether such expenditures are reasonable and prudent. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

Only Reasonable Construction Work in Progress Expenditures Included. — The legislature mandates that the only expenditures for construction work in progress which can properly be included in rate base are reasonable expenditures. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983).

Under the "financial stability" requirement of subdivision (b)(1) of this section, construction work in progress may be included in a utility's rate base to the extent that the Commission determines that the inclusion is necessary to allow the utility to maintain a generally good overall financial status. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

Subdivision (b)(1) clearly commits to the discretion of the Commission the determination of what amount of construction work in progress, if any, to include in the utility's rate base. This discretion is tempered, however, by the statute's requirement that the expenditures be reasonable and prudent and that the Commission find that the inclusion is in the public interest and necessary to the financial stability of the utility in question. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

Including construction work in progress in rate base did not lessen rules and standards set by legislature. Reasonableness remains the standard. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983).

Evidence as to Construction Work in Progress. — To require the utility company to introduce evidence with respect to every item comprising construction work in progress would be an exercise in futility. The burden of proof would be unduly and unnecessarily burdensome and the rate-making process would become even more time consuming and difficult of administration. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983).

Evidence that utility's bond rating was in jeopardy of falling from an A rating to a BAA rating and that the inclusion of the additional construction work in progress was necessary to "stabilize" the company at its A rating level, along with other evidence, supported the Commission's finding that the inclusion of additional construction work in progress was necessary to the utility's financial stability. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

Evidence of whether the plant under construction will be completed within a reasonable time is pertinent to deciding if expenditures for such construction are reasonable and prudent. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

While it is the better practice for the Commission to specifically find that the construction will be completed within a reasonable time, the statute does not require it so long as there is evidence in the record that the plant would be completed within a reasonable time. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

Inclusion of Facility in Another State Absent North Carolina Certificate of Authority. — The Commission acted within the limits of its authority when it included Catawba Unit 1, located in South Carolina, in power company's rate base, even though no North Carolina certificate of necessity had been obtained prior to beginning construction thereof. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Inclusion of Ownership Interest in All Common Plant of Nuclear Power Station Held Proper. — The Commission acted within its authority when it included in power company's rate base the company's ownership interest in all of common plant of nuclear power station, despite argument that only half of the common plant should be associated with operating Unit 1, and that the other half should be classified as construction work in progress consistent with the Commission's treatment of not yet operational Unit 2. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Before 1977 amendment of subdivision (b)(1), utilities were not allowed to include construction work in progress (CWIP) in rate base. Instead, a utility would add together all of the costs incurred by a project each year and multiply that by the allowance for funds used during construction (AFUDC) rate. The AFUDC rate is a rate of interest which represents as nearly as possible the actual cost of money used for construction. The figure that results from multiplying the costs times the AFUDC rate is capitalized annually until the plant comes into service and is then recovered along with the original costs of the plant. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

Exclusion of Plant Under Construction. — A generating plant of a power company, half-completed at the end of the test period, or a half-completed line of telephone wire, cannot be deemed property "used in providing the service" "as of the end of the test period used in the hearing." Neither can it be deemed property "useful" in rendering the service at that time. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971), decided prior to 1977 amendment.

It was error for the Commission to include in the rate base of a public utility the value of the plant under construction at the end of the test period, and to make a pro forma adjustment to revenues by adding to the actual revenue earned in the test period "interest charged to construction," since the plant under construction was not in operation at the end of the test period. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971), decided prior to 1977 amendment.

A telephone plant under construction at the end of the test period is not property "used and useful" within the meaning of this section and is not to be included in the rate base. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972), decided prior to 1977 amendment.

Contributions in aid of utility construction must be excluded from rate base. State ex rel. Utils. Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975), decided prior to 1977 amendment.

The term "the public utility's property used and useful ... in providing the service" in subdivision (b)(1) was not intended by the legislature to include that portion of the utility plant in service represented by contributions made by the utility's patrons in aid of construction. State ex rel. Utils. Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975), decided prior to 1977 amendment.

It makes no difference whether contributions to utility company were made initially by customers or by land development companies, or whether some of the latter were closely related to the utility company. The controlling factor is whether the utility company's customers ultimately bore the cost of such contributions. State ex rel. Utils. Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975), decided prior to 1977 amendment.

"Contribution" Correctly Excluded. — The Utilities Commission did not err in excluding from the rate base of a water utility an amount representing the difference between the original cost of a water system constructed by the developers of a real estate subdivision and the price paid to such developers by the water utility, where the Commission found that such difference amounted to an indirect payment from the customers to the utility through the purchase of their lots, which allowed the original owners to sell the water system to the utility for less than the probable cost of installation. State ex rel. Utils. Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975), decided prior to 1977 amendment.

The Commission was not required to include a contributed plant in applicant's fair value rate base. State ex rel. Utils. Comm'n v. Heater Util., Inc., 26 N.C. App. 404, 216 S.E.2d 487, aff'd, 288 N.C. 457, 219 S.E.2d 56 (1975), decided prior to 1977 amendment.

When Addition to Plant May Be Added to Rate Base. — When the addition to plant is completed and put into service, the entire cost of it, including the cost of capital incurred in construction, is added to the rate base of the company. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971), decided prior to 1977 amendment.

Unnecessary Additions. — A utility may not justify an increase in its rates for service to its present customers by evidence of its present intent to build additions to its plant not reasonably considered necessary for adequate service, including proper reserve capacity, by the end of the time needed for the completion of such additions. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Value of franchise does not enter into computation of the utility's rate base. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The rate base should include working capital supplied by the company. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The utility's own funds reasonably invested in such materials and supplies and its cash funds reasonably so held for payment of operating expenses, as they become payable, fall within the meaning of the term "property used and useful in providing the service," and are a proper addition to the rate base on which the utility must be permitted to earn a fair rate of return. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

But such rate base should not include funds supplied by customers. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

As funds collected from customers and used by utility as working capital are not "the public utility's property" within the meaning of subsection (b)(1). State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

The utility is not entitled to include in its rate base funds which it has not provided but which it has been permitted to collect from its customers for the purpose of paying expenses at some future time and which it actually uses as working capital in the meantime. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Overcharge to Investment Does Not Directly Affect Rate Base. — Only those purchases for operating materials and supplies, including current maintenance, are chargeable to operating expense, and purchases for plant construction go into an account for investment in plant, not to operating expense, so that an overcharge, if any, to investment in plant does not affect the net operating income. While such overcharge would improperly add to the account for original cost of the plant, which is an item to be considered in computing the rate base, it actually would not affect the rate base directly, since the rate base is the fair value of the plant, not the cost of it. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Acceptance by Commission of "book value" or "cost less depreciation" as rate base is in conflict with the standard prescribed in the statute. The conclusion is inescapable that by accepting the book value as the rate base, it necessarily excluded consideration of present cost of replacement and all other factors from effective consideration. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Costs are presumed to be reasonable unless challenged. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

Excess of Fair Value over Original Cost Less Depreciation to Be Included in Rate Base. — This section contemplates that the excess of "fair value," ascertained by the Commission, over and above the original cost, less depreciation, shall be included in the rate base of the utility, just as if it were a realized profit invested in additional property used and useful in rendering service to the public. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Excess of Fair Value over Total Capital of Company. — The excess of "fair value" over the actual total capital of the company (debt capital, plus capital stock, plus actual surplus) is to be added to the equity component of the capital structure for the purpose of fixing rates under this section. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The Commission may reduce a utility's rate base by increasing its accumulated depreciation account as an offset to a pro forma adjustment by the utility in the same amount to depreciation expense. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

B. Fair Value.

Commission Must Consider Requirements of Section in Arriving at Fair Value of Property. — In arriving at the fair value of a public utility's property used and useful in providing the service rendered to its customers, the Commission is charged with the duty to consider the requirements set forth in this section, as well as other relevant factors. State ex rel. N.C. Utils. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

"Minimal Consideration" Inadequate. — The Commission may not brush aside one of the prescribed indicators of original cost and replacement cost by giving it "minimal consideration." State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Neither the Commission nor the Supreme Court may evade the mandate of this section by determining the number of dollars which would be a fair return on the original cost, depreciated, and then simply translating that amount into a percentage of "fair value." State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Meaning of "Value". — The term "value" in this section does not refer to the original or the replacement cost of the property or to the exchange or sales price it would command, as used or secondhand property, on the market. It has reference to the value of the property actually in use, serving its purpose as a part of a composite public utility, earning an income for its owner. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Value is not the price for which the property could be sold as used or secondhand property. It is not the sale or exchange value of the entire business as a going concern. It is not the same as the fair value to be awarded by a jury in a condemnation case. The concept of "fair value," as used with reference to a public utility's rate base, is unique to rate making. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Necessity for Determining Fair Value of Utility's Property. — The first step prescribed by subsection (b)(1), that of ascertaining the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, becomes of critical importance in the rate-making process, for only after the determination of this rate base can judgment be intelligently exercised fixing the rate of return which the utility is entitled to receive on the fair value of its property and fixing rates to be charged by the utility which are fair both to the public utility and to the consumer. State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Factors to Be Considered in Determining Fair Value. — This section contemplates a weighing of (1) the reasonable original cost, less depreciation, (2) the replacement cost, which may be determined by trending such reasonable depreciated cost to current cost levels or by any other reasonable method, and (3) any other relevant factor, by the Commission in the exercise of its own expert judgment in determining "fair value." State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

This section contemplates that, normally, the

Commission will ascertain the "fair value" of the properties at a point somewhere between the original cost, less depreciation, and the cost of replacement new, less depreciation. The Commission has the duty to weigh these evidences of "fair value" and may not disregard either, or brush either aside. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Fair Value Not Ascertainable by Mathematical Formula. — "Replacement cost" and "fair value" are not synonymous. Nor is "fair value" an arithmetical average of original cost and replacement cost, less depreciation, nor is it to be ascertained by the application of any mathematical formula. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Neither original cost, depreciated, nor replacement cost, depreciated is the measure of "fair value." They are indicators of "fair value" and their respective weights are to be determined by the Commission in its expert judgment. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Balancing of Factors by Commission in Determining Fair Value. — Having made properly supported findings, it is for the Commission, not the reviewing court, to determine, in its expert discretion and by the use of "balanced scales," the relative weights to be given these several factors in ascertaining the ultimate fact of "fair value." State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

It is the clear intent of subsection (b)(1) that the Commission, in considering the indicators of "fair value" which themselves are supported by competent and substantial evidence, shall use its own expert judgment as to the credibility of the evidence in the record and as to the weight to be given to it. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Necessity That Commission Review Management Decisions. — Review of management decisions by the Utilities Commission in a general rate case is not only entirely appropriate but even necessary, for poorly maintained equipment justifies a subtraction from both the original cost and the reproduction cost of existing plant before weighing these factors in ascertaining the present "fair value" rate base of the utility's properties as required by this section. State ex rel. Utils. Comm'n v. VEPCO, 48 N.C. App. 453, 269 S.E.2d 657, cert. denied, 301 N.C. 531, 273 S.E.2d 462 (1980).

Effect of Improper Plant Engineering and Maintenance. — Neither the original cost nor the reproduction cost may properly be taken as the present fair value of telephone properties which were improperly engineered, have not been properly maintained, and are consequently in need of extensive rehabilitation. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The fact that a plant or a unit thereof is not well adapted to, or is inappropriate for, its present and/or reasonably to be anticipated future use tends materially to reduce its value below its reproduction new cost. One of the forms of inappropriateness is inappropriate engineering layout. State ex rel. Utils. Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974).

The fair value of a new addition, when completed and in service, would almost certainly be found to be its total cost and, thereafter, would be found by considering such cost and the reproduction, or trended, cost, including interest during construction. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Method of Taking Inflation and Rising Cost of Plant Additions into Account. — An accepted method of taking inflation and rising cost of plant additions into account in rate making is to fix rates for service sufficient, presently, to bring to the company a rate of return, on its present rate base, slightly in excess of that which is necessary to meet the test of reasonableness. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Weight of Trended Cost Evidence. — In times of increased construction costs and decreased dollar value, trended cost evidence deserves weight in proportion to the accuracy of the tests and their intelligent application. State ex rel. Utils. Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965); State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Trended cost is useful only when it becomes necessary to fix the present value of facilities constructed when the cost was low and replacement has become expensive. State ex rel. Utils. Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Trended Cost Evidence Useful But Not Conclusive. — The trended cost takes into account the type of facility, its age, its original and replacement cost, terrain, location, its probable useful life, and other factors. Such evidence is not conclusive, but it does appear to be a useful guide in determining value of facilities. State ex. rel. Utils. Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

"Fair value" does not cover money stupidly, extravagantly, or corruptly spent and if a utility has been seriously overbuilt, or its promoters have been seriously overpaid, the law does not intend that its customers shall be saddled with the payment of interest on money that was thrown away. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

And a utility may not inflate its rate base by extravagance in purchasing equipment or constructing its plant. In this connection, it is immaterial whether such extravagance is due to careless improvidence or willful payment of exorbitant prices to an affiliate. On the other hand, the management of the business of a public utility, including the fixing of the prices which it pays for the construction and equipment of its plant and for its maintenance and operation, rests with its board of directors in the absence of clear mismanagement or abuse of discretion. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Credibility and weight of evidence in determination of "fair value" is for the Commission, not for a court, to determine. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 398, 206 S.E.2d 283 (1974).

It is not the meaning of subsection (b)(1) that, in the absence of expert opinion testimony as to the weight to be given the respective indicators of "fair value," the Commission must give them equal weight and find "fair value" by the mere striking of an arithmetic average of the indicators. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Having made findings of the original cost less depreciation and replacement cost less depreciation, the weight to be given those figures in reaching the ultimate finding of fair value is to be determined by the Commission, not by the reviewing court. State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

The Commission is not required to accept expert witness' opinion as to the weight to be given the original cost and replacement cost increments of fair value, even though there be no contrary expert testimony. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

This section does require expert testimony as to the weight which the Commissioner should give to original cost and to replacement cost factors in carrying out its mandate to "consider" these indicators of "fair value." State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Reviewing court may not properly disturb an order of the Commission merely because it would have given different weight to each of the indicators of "fair value." State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utils. Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

A reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

A finding of "fair value" by the Commission is not rendered immune to judicial review by Commission's declaration that, in reaching such finding, it followed no formula. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The mere recital by the Commission that it has considered all of the factors prescribed by this section in arriving at its ascertainment of "fair value" does not preclude the reviewing court from setting aside the finding of "fair value" where the record discloses that the Commission in fact failed to do so. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

When Commission's Finding of Fair Value May Be Set Aside. — The determination of the weight to be given each factor in its ascertainment of "fair value" is for the Commission, not the reviewing court. But if it is clear from the record that the Commission reached its finding of "fair value" by disregarding or giving minimal consideration to one of the enumerated factors, its finding of the ultimate fact of "fair value" may be set aside by the court on the ground of error of law in such ascertainment. Similarly, the finding of "fair value" may be set aside by the reviewing court if it clearly appears that the Commission has made its determination thereof by giving weight to a factor as to which there is no substantial evidence in the record, and likewise where the order of the Commission shows that it reached its determination of "fair value" by considering unspecified facts other than original cost and replacement cost depreciated. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Determination of Fair Value Upheld. — There was no reversible error in the Commission's determination that the fair value of the power company's properties, exclusive of the allowance for working capital, should be determined by giving a weighting of one third to replacement cost, depreciated, and two-thirds weighting to original cost, depreciated. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

C. Original Cost.

In fixing fair value, original cost is an item to be considered. State ex rel. Utils. Comm'n v. Public Serv. Co. of N.C., Inc., 257 N.C. 233, 125 S.E.2d 457 (1962).

But Is Only One Factor. — The establishment of the reasonable original cost of the property, as referred to in subsection (b)(1), is of significance only because reasonable original cost is one of several figures and factors which the statute requires the Commission to consider in arriving at fair value. State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Ordinarily, Price Actually Paid Is Considered Reasonable Original Cost. — Where a public utility's property has been purchased from a stranger, ordinarily the price actually paid by the utility would be considered its reasonable costs, though it would not necessarily be so. Even in such a case the Commission may find that the management of the utility acted improvidently or carelessly and paid a price greater than reasonable. State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Determining Reasonable Original Cost of Property Sold to Utility by Affiliated Corporation. — In determining the rate base, the fact that equipment or services are sold to the utility by an affiliated corporation does not alter the ultimate question for the Commission. That question is whether the prices paid by the utility are reasonable and, therefore, reflect the "reasonable original cost" of the properties. The only effect of the affiliation between the utility and its supplier is that such relationship calls for a close scrutiny by the Commission of the price paid by the utility. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

For purposes of determining a utilities rate base, when considering a purchase made from an affiliated company, the bargaining is not at arm's length and when the transaction is called in question, the burden is upon the utility to show that the price it paid was reasonable. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

In cases in which a substantial portion of a utility's property was acquired by purchase from an affiliated company, it becomes obligatory upon the Commission to scrutinize the prices paid and, to the extent it finds such prices unreasonable, to make adjustments in the utility's figures accordingly. This is all the more true where the affiliated supplier so dominates the market that its pricing policies may not be sufficiently controlled by normal competition. State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Where the prices paid by a telephone company to an affiliated manufacturing company are the same as those which the manufacturing company charges other affiliated companies to which it makes a majority of its sales, the Utilities Commission could properly determine the reasonableness of the prices charged by the manufacturing company by comparing its rate of return on common equity with the rates of return experienced by other manufacturing companies operating in similar fields. State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

D. Replacement Cost.

Necessity of Finding Replacement Cost. — Without a finding by the Commission of the replacement cost of a public utility's properties "used and useful in providing the service," the Commission's finding of "fair value" was affected by an error of law and, consequently, its finding of a fair rate of return on such "fair value" was so affected and was premature. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

While the consideration or weight to be given replacement cost, depreciated, in ascertaining "fair value" rests in the sound discretion of the Commission, the reviewing court cannot satisfactorily determine whether the Commission considered or weighed this element at all, or merely gave it minimal consideration, unless the Commission sets forth what it found this element to be. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Discounting Replacement Cost for Depreciation. — In determining "fair value," the Commission may discount the replacement cost new by the same percentage as that indicated by the total accumulated depreciation in arriving at the replacement cost factor, or, if there is evidence to support such a finding, may discount replacement cost new by a greater or a smaller amount on account of depreciation, including obsolescence. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

It is for the Commission to determine what weight to give to evidence as to replacement cost. State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Fair Value Usually Less Than Reconstruction Cost. — Ordinarily, the fair value of a utility's property is found to be less than the reconstruction cost of the property. State ex rel.

Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Fair Value Cannot Exceed Present Cost of Constructing Substitute. — The present "fair value" of a utility system of generating plants, transmission lines and distribution lines cannot exceed the present cost of constructing a substitute system of modern design, capable of generating and distributing the same quantity of power at less operating expense. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

V. OPERATING EXPENSES AND WORKING CAPITAL.

Reasonable Operating Expenses Must Be Ascertained. — In fixing rates to be charged by the public utility, the Commission is directed to ascertain, among other things, the public utility's reasonable operating expenses. State ex rel. Utils. Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98, cert. denied, 284 N.C. 124, 199 S.E.2d 663 (1973).

Term to Be Liberally Interpreted and Applied. — When a narrow construction of the operating expense element of a regulatory act would frustrate the purposes of the act, the term should be liberally interpreted and applied. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

A restrictive interpretation of the operating expense element of the rate-making formula would severely limit the ability of the Commission to act in the best interest of the consuming public in emergency situations. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Cost of collecting past-due accounts is an operating expense. State ex rel. Utils. Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973).

Cancellation Costs as Operating Expense. — There was no error in the Commission's authorization for utility to amortize costs associated with abandoned construction of nuclear power plant as operating expenses for rate making purposes; this action was within the commission's power and supported by competent, material, and substantial evidence. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Costs Held to Be Cancellation Costs. — Costs of the additional burden assured by one unit at nuclear power plant in anticipation of reducing the costs of the remaining three units, which were later cancelled, should have been treated as cancellation costs of the abandoned units, to be recovered as operating expenses through amortization. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989).

Tracking Rate Increases as Operating Expenses. — Tracking rate increases, designed to recover the reasonable costs of approved exploration projects, must be said to be operating expenses, if practical effect is to be given to this chapter, where the Commission has found that if no new supply source were obtained, the utilities would be unable to supply adequate service to their customers. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Cost of Service Calculation. — The Utilities Commission's ultimate conclusion that the peak and average cost-of-service methodology more properly allocates fixed costs between annual use and peak day utilization of the facilities than does the peak responsibility method or the imputed load factor method was supported by sufficient findings and competent, material and substantial evidence. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

As to constitutionality of permitting utilities to recover excess costs of exploration ventures through tracking rate increases, see State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Error to Add Interest Charged to Construction to Operating Revenue. — It was error for the Commission to add to the company's operating revenue for the best period interest charged to construction during the test period. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

"Depreciation" Defined. — Broadly speaking, depreciation is the loss not restored by current maintenance which is due to all the factors causing the ultimate retirement of the property. While property remains in the plant, the estimated depreciation rate is applied to the book cost and the resulting amounts are charged currently as expenses of operation. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Depreciation Deductions. — For rate-making purposes a public utility is allowed to deduct annually, as an operating expense, so much of its capital investment as is actually consumed during the current year in rendering the service required of it. But the cost represents the amount of the investment, and it is the actual cost, not theretofore recouped by depreciation deductions, that must constitute the base for this allowance. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954); State ex rel. Utils. Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

In establishing rates a public utility is entitled to deduct each year as an operating expense only such depreciation as represents the investment currently consumed and not provided against by maintenance. Thus the integrity of the investment is maintained, and this is all the utility has a right to demand. The rate should be fixed, as near as may be, so that it will extend over the usable life of the property being depreciated. Otherwise the allowance will be unjust either to the utility or to the public. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

The purpose of an annual allowance for depreciation and the resulting accumulation of a depreciation reserve is not, as is sometimes erroneously supposed, to provide the utility with a fund by which it may purchase a replacement for the property when it is worn out. The purpose of the allowance is to enable the utility to recover the cost of such property to it. State ex rel. Utils. Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

The rate of depreciation allowed by the federal government for income tax purposes is not necessarily the proper rate to be allowed for rate-making purposes. Indeed, for rate-making purposes it would ordinarily be excessive, especially in respect to buildings and like permanent improvements. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Depreciation Based on Original Cost. — Subdivision (b)(3) clearly directs that the annual allowance for depreciation of durable properties, such as a pipeline, be based upon the original cost of the property to the utility and not upon either its current fair value or the cost of installation borne by a former owner, such as the real estate developers in the present case. State ex rel. Utils. Comm'n v. Heater Util., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975).

An instruction that the current rather than the cost value of capital investment shall be used as the basis for estimating depreciation allowances is incorrect. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Using Property Which Has Been Fully Depreciated for Other Purposes. — It would be unfair to a utility not to take into consideration the present fair value of property now in use but which has been fully depreciated for other purposes. On the other hand, if the rate of depreciation allowed for rate-making purposes is in excess of the investment currently consumed, over and above maintenance costs, it is unfair to the public, for then the company is permitted to recover annually a part of its investment which is not currently consumed. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Transactions Between Utilities and Affiliated Supply Companies. — It is the duty of the Commission to look closely at transactions between utility operating companies and affiliated supply companies to be sure that the public is not required to pay rates based on excessive costs resulting from excessive profits earned by an unregulated supplier. State ex rel. Utils. Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The financial condition of a public utility and the demand for its bonds and securities which affect its capacity to compete on the open market for additional equity and debt capital are ordinarily material considerations in fixing rates. But these factors are of little moment where the applicant has available at all times a fund provided by its parent company from which it may borrow at will for needed improvements or enlargements. What it has to pay for its borrowings from this fund is of more importance. These are some of the "other facts" the statute requires the Commission to consider. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Capital Investment Determined as of Time Rates Are Effective. — Where a utility is currently investing large amounts of capital in expansion, the Utility Commission should determine the capital invested as of the time the rates fixed by it are to be effective, rather than the average net investment of the utility for the entire test year, since the rates fixed are prospective. State ex rel. N.C. Utils. Comm'n v. Piedmont Natural Gas Co., 254 N.C. 536, 119 S.E.2d 469 (1961).

Large Sum of Money on Hand for Working Capital. — When, in fixing rates which will produce a fair return on the investment of a utility, it is made to appear that it has on hand continuously a large sum of money it is using as working capital and to pay current bills for materials and supplies, that fact must be taken into consideration. And if the fund on hand is sufficient, no additional sum should be allowed at the expense of the public. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Where a public utility uses, for operating capital, moneys collected by it in taxes for the federal government which it is not required to pay to the federal government until a later date, the Utilities Commission should take such capital into consideration in fixing rates, which action is neither a condemnation nor a condonement of the practice. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Advance Billing Not Creditable to Working Capital Requirements. — In determining the local rates for a telephone company, the amounts paid to the company by its customers as a result of the company's practice of billing the customers one month in advance are not creditable to the company's working capital requirements. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Income Produced by Increase of Facilities. — In fixing the rate for a telephone company, the Utilities Commission must take into consideration the net income to be produced by the increase in the number of telephones in service at the end of any test period adopted by the Commission. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Exclusion of Expenditures Relating to Unsuccessful Expansion Attempt. — The Commission's conclusion that expenditures related to utility's unsuccessful attempt to expand its service area should be excluded from its cost of service was supported by substantial evidence and was neither arbitrary nor capricious. State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

Contractual Buy-Back Costs. — The Commission properly classified contractual buy-back costs of power company as operating expenses. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

VI. RATE OF RETURN.

Rate of Return Defined. — The "rate of return" is a percentage which the North Carolina Utilities Commission concludes should be earned on the rate base. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

The overall rate of return is a percentage which the Commission concludes the utility should be permitted to earn on its rate base, which is the cost of the utility's property used and useful in providing service to the public. The rate of return percentage is calculated by subtracting from the utility's revenues its cost of service and dividing the difference by the rate base. State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

Commission to Determine Fair Rate of Return. — It is for the Commission, not for the Supreme Court, to determine what is a fair rate of return. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974); State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Determination of Rate of Return. — Determining the effective rate of return for a particular North Carolina Natural Gas Corporation (NCNG) customer class involves a mathematical computation containing several components. The computation must be performed after the fact by utilizing the financial information for a given test year with adjustments made for any subsequent increase in rates. There are in the computation three basic components which must be ascertained. First, an allocation must be made to determine the portion of the total rate base applicable to each customer class. Likewise an allocation must be made to determine the cost of service or operating expenses applicable to each customer class. Finally, the revenues NCNG collected from each customer class for the test period, adjusted for any subsequent increase in rates, must also be determined. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

The formula for determining the rate of return for each customer class is as follows: Operating revenues less cost of service (operating expenses and taxes) divided by the rate base equals the rate of return. Thus, the rate of return for any particular customer class varies inversely with the amount of the rate base and the amount of the cost of service, and directly with the amount of the revenues, allocated to that customer class. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Consideration of Factors Held Proper. — With regard to investor risk, it was not improper for the Commission to consider the fact that a natural gas supply company was a "small but efficient and well managed natural gas utility." State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988).

The law permits the Commission to consider both size and management in assessing investor risk insofar as such risk may bear on an appropriate return on equity capital; a utility's small size may increase investor risk and justify a higher return. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988).

While efficient management should not justify a higher common equity rate of return, it is appropriate for the Commission to consider good management as a factor which reduces investor risk and militates in favor of a lower return on equity capital. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988).

Commission could properly consider increased risk to investors caused by the possible loss of customers who may switch to alternative fuels in its determination of the common equity rate of return for a natural gas supply company. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988).

What constitutes a fair rate of return on common equity is a conclusion of law, which must be predicated on adequate factual findings. State ex rel. Utils. Comm'n v. Public

Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

A public utility corporation is entitled to a just and reasonable rate of return based upon the fair value of the properties used and useful in rendering the service for which the rate is established. State ex rel. Utils. Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956).

Even though a utility contemplates no substantial expansion of its plant, and so presently does not contemplate the issuance of either stocks or bonds, it is, nevertheless, entitled to charge rates sufficient to enable it to earn a fair rate of return, as defined in subsection (b)(4), upon the fair value of its properties used and useful in rendering its service in this State. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977).

As to a "just and reasonable" rate, see Smyth v. Ames, 169 U.S. 466, 18 S. Ct. 418, 42 L. Ed. 819, modified, 171 U.S. 361, 18 S. Ct. 888, 43 L. Ed. 197 (1898); State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

What a "just and reasonable" rate of return is depends on several variables: (1) the rate base which earns the return; (2) the gross income received by the applicant from its authorized operations; (3) the amount to be deducted for operating expenses, which must include the amount of capital investment currently consumed in rendering the service; and (4) what rate constitutes a just and reasonable rate of return on the predetermined rate base. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 500 S.E.2d 693 (1998).

Reasonableness of Rate of Return Depends on Whether Property Is Fairly Valued. — Whether a 4%, 5%, or 6% return is just and reasonable depends very largely on whether the Commission has placed a fair value on the property of the utility which is used and useful in producing its revenue. State ex rel. Utils. Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

There is no fixed "fair rate of return" applicable to all utility companies, or to a single utility company at all times. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

"Fair rate of return" is one sufficient to enable the utility to attract, on reasonable terms, capital necessary to enable it to render adequate service. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

In this State the test of a fair rate of return is that laid down by the Supreme Court of the United States in Bluefield Waterworks & Imp. Co v. Public Serv. Comm'n, 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923), namely, if the company continues to earn such a rate of return, will it be able to attract on reasonable terms the capital it needs for the expansion of its service to the public? State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

The rate-making procedure prescribed in this section is designed to yield to the utility a return which will meet the test laid down in Bluefield Waterworks & Imp. Co v. Public Serv. Comm'n, 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923). State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Crucial Question as to Rate of Return. — To require the Commission in a general rate case to go into minute details with respect to each of the proposed increases and the possible inequalities which might be created thereby would distract its attention from the crucial question, namely: What is a fair rate of return on company's investment so as to enable it by sound management to pay a fair profit to its stockholders and to maintain and expand its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise? State ex rel. Utils. Comm'n v. County of Harnett, 30 N.C. App. 24, 226 S.E.2d 515 (1976).

What Dollar Return Contemplated. — Under this section a fair rate of return on the fair value of the properties used in rendering the service clearly contemplates the allowance of a greater dollar return than would be allowed if the rate base were the original cost, depreciated, of the same properties, assuming that the value of the properties has been enhanced by inflation. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Power company is entitled to earn same rate of return on fair value of its plant as on retained earnings which it has reinvested in its plant. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Absolute Accuracy Not Required. — Since the rate of return on the fair value of its properties which will enable a utility company to attract the capital it needs cannot be pinpointed with absolute accuracy, it is universally recognized that, for a utility rendering acceptable service, there is a zone of reasonableness extending over a few hundredths of one percent, within which a rate of return fixed by a regulatory commission will not be disturbed by the courts. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

It is impossible to fix rates which will give the utility each day a fair return, and no more, upon its plant in service on that day. The best that can be done, both from the standpoint of the company and from the standpoint of the person served, is to fix rates on the basis of a substantial period of time. Otherwise, rate hearings and adjustments would be a perpetual process. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Utility Not Entitled to Compensation for Past Deficit. — Failure of utility, in a previous period, to earn the anticipated return over and above its then expenses, does not authorize it to charge its present customers a rate higher than reasonable for present service in order to compensate for the past deficit. Prospective rate-making to recover unexpected past expense, or to refund expected past expense which did not materialize, is as improper as is retroactive rate-making. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

Effect of Rate of Return in Other State. — An inadequate return in Virginia would not of itself justify a rate increase in North Carolina, nor would a high rate of return in Virginia justify less than a fair and reasonable rate in North Carolina. State ex rel. Utils. Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

The Utilities Commission of this State does not have the right to fix less than a reasonable or fair rate of return on a telephone company's investment in North Carolina because the utilities commission in Virginia may have fixed rates in Virginia which, in the opinion of the Utilities Commission in this State, gives the company a reasonable return on its entire properties when its Virginia and North Carolina revenues are combined. State ex rel. Utils. Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Anticipated Rate of Return. — Adjusted revenue deductions are subtracted from adjusted revenues to determine what net operating income a company may anticipate under the previously established rates, in a period of the same length as the test period, during which all presently known conditions prevail. Such net operating income, divided by the rate base, gives the rate of return which the company may anticipate, on its properties used in rendering its service, under the previously established rates for service, in a period of the same length as the test period, throughout which all presently known conditions prevail. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Finding That New Rate Is Fair Tantamount to Finding Existing Rates Inadequate. — The finding that a new rate represented a fair rate of return on the fair value of a company's utility property is tantamount to a finding that the existing rates were inadequate. State ex rel. Utils. Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Less Than Fair Rate of Return Necessitates Raising of Rates. — If the rate of return derived from the previously established rates during the test period, adjusted pro forma, is less than a fair rate of return, this section requires the Commission to raise the company's rates for services, assuming that the quality of service is adequate. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

No Change in Rates May Be Justified. — If the rate of return derived from the previously established rates for service during the test period, adjusted pro forma, was fair, no change in the rates for service is justified. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Rate Reduction May Be Required. — If the rate of return derived from the previously established rates for service during the test period, adjusted pro forma, was in excess of a fair rate of return, the statute requires the Commission to reduce the rates for service. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Consideration of Expert Opinion Testimony. — The Commission must consider and weigh testimony of expert witnesses, on the question of the fair rate of return, in the light of its own adjustment, for rate-making purposes, of the utility's actual capital structure by its determination of the "fair value" of its properties. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The Commission may reject the uncontradicted testimony of a utility's expert witnesses as to the fair rate of return on the utility's common equity, and while the better practice is for the Commission to state its reasons for doing so in its order establishing a lower rate of return, it is not required to do so as a matter of law. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Previous findings are not res judicata, even as to what was a fair rate of return on common equity capital as of the dates of former orders, and such findings do not prevent the Commission from finding a lower return on common equity capital fair in a later case, even though the tide of inflation has continued to rise. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Its former allowance of a rate of return is not res judicata barring the Commission from fixing a lesser rate in a subsequent proceeding. State ex rel. Utils. Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Failure to Give Specific Findings of Fact Was An Error of Law. — The Commission was required to make specific findings showing what effect, if any, it gave to financing costs or down market protection, or both, in arriving at its common equity rate of return decision. Failure to do so constituted an error of law requiring a remand for further proceedings. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

Legitimate Justification for Maintaining Industrial and City Rates of Return. — The North Carolina Utilities Commission drew legitimate distinctions which justified its decision to maintain industrial and cities' rates of return at a higher level than residential and commercial and small industrial rates. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Rates of Return Reasonable and Did Not Discriminate. — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the approved rates of return were just and reasonable and did not unreasonably discriminate among the various classes of North Carolina Natural Gas Corporation customers and were supported by substantial evidence in view of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Evidence Held Sufficient to Support Commission's Determination of Rate of Return. — Where the Commission's order showed the Commission considered and gave weight to expert testimony, including that proffered by appellant's expert, and set forth proper factors to support conclusions regarding natural gas supplier's rate of return, the record was sufficient to show that the Commission's decision was supported by competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988).

Decision of Utilities Commission to accept an expert's recommendation of an 11.4% return on equity, based on the credibility and objectivity of his company-specific "discounted cash flow" analysis, was independently reached and supported by competent, material, and substantial evidence. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

The court may not substitute its judgment for that of the Commission even when it is of the opinion that the rate of return authorized by the Commission is inadequate. State ex rel. Utils. Comm'n v. Duke Power Co., 21 N.C. App. 89, 203 S.E.2d 404, rev'd on other grounds, 285 N.C. 377, 206 S.E.2d 269 (1974).

VII. TEST PERIOD.

Basic, underlying theory of using company's operating experience in a test period, recently ended, in fixing rates to be charged by it for its service in the near future is that rates for service, in effect throughout the test period, will, in the near future, produce the same rate of return on the company's property, used in rendering such service, as was produced by them on such property in the test period, adjusted for known changes in conditions. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971); State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Rates Fixed on Basis of Substantial Period of Time. — It is impossible to fix rates which will give the utility each day a fair return, and no more, upon its plant in service on that day. The best that can be done, both from the standpoint of the company and from the standpoint of the persons served, is to fix rates on the basis of a substantial period of time. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Test Period Fixed to Estimate Revenues and Operating Expenses. — For the purpose of making required estimates of the public utility's revenues and operating expenses, the customary and proper procedure is for the Commission to fix a test period of 12 months, ending, as close as practicable, before the opening of the hearing. State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

The factors used in fixing rates are to be determined as of the end of the test period. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

The plain language of subsection (c) merely provides that the components of the rate making formula are to be determined based on an historical test period, and do not require a nexus between operating expenses and "property used and useful." The statute reserves this requirement solely to the reasonable original cost of the public utility's property, the ratebase component which is described in subdivision (b)(1). State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Value of Property Determined as of End of Trial Period. — The Commission is required under subsection (c) to determine the fair value of the utility's property as of the end of the trial period, based on the plant and equipment in operation at that time. State ex rel. N.C. Utils. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966), decided prior to 1977 amendment.

Not by Averaging over Period. — The value of plant and service must be determined as of a specific date, the end of the test period, and not by averaging a group of periods or months within a period. State ex rel. Utils. Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d

479, rev'd on other grounds, 277 N.C. 205, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Adjustments for Abnormalities and Changes in Conditions. — The actual experience of the company during the test period, both as to revenues produced and as to operating expenses, is the basis for a reasonably accurate estimate of what may be anticipated in the near future if, but only if, appropriate pro forma adjustments are made for abnormalities which existed in the test period and for changes in conditions occurring during the test period. State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Operating revenue deductions (operating expenses, depreciation, taxes and all other proper deductions from revenue) for expenditures actually made in the test period are adjusted, pro forma, for changes in conditions during the test period, such as an increase in the wage rate, so that the result reflects what would have been the total of such deductions had the conditions, prevailing at the end of the test period, prevailed throughout it. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Pro forma adjustments to revenue are made to reflect what the revenues would have been in the test period, which is usually 12 months, had present conditions prevailed throughout that period, so that the result shows what revenues will be produced in 12 months by application of the previously established rates for service conditions existing at the end of the test period; i.e., at the date, nearest the present, for which data are available. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Subdivision (b)(3) and subsection (c) of this section, taken together, allow the Commission to make pro forma adjustments to revenue and expenses to reflect what their effect would have been had those future conditions prevailed throughout, or at the end of, the test period or to adjust for abnormalities and changes in conditions. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Provisions in this section compel the conclusion that the Utilities Commission is required to adjust test period data to reflect abnormalities which had a probable impact on the utility's revenues and expenses during the test period. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985).

This section requires the Commission to adjust test period data to reflect abnormalities which had a probable impact on the utility's revenues and expenses during the test period. This allows for a reasonably accurate estimate of what may be anticipated in the future. However, no pro forma adjustment is to be made unless the Commission finds that an abnormality having a probable impact on the utility's revenues and expenses existed during the test period. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

Since fuel costs comprise a large portion of a utility's expenses, the statutory mandate to normalize test period data includes a requirement that the Commission adjust the test period fuel costs for any abnormalities established by competent, material, and substantial evidence. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

Since the system nuclear capacity factor directly impacts upon the generation mix, which in turn affects fuel costs, any abnormality in the system nuclear capacity which is shown to have existed during the test year must be adjusted. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

Normalizing of Nuclear Capacity Factors for Test Periods. — Commission did not err by normalizing nuclear capacity factors for test periods to reflect the average lifetime nuclear capacity factors actually achieved by an electric utility as of the end of each of the test periods in question, where such factors did not vary significantly from the national average. State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 320 N.C. 1, 358 S.E.2d 35 (1987).

Commission did not improperly refuse to adjust its figure for revenues based on evidence of post-test year growth, even though it increased utility's operating expenses based on other post-test year evidence, where contrary to the Public Staff's contention, there was no correlation between the use of post-test year salary expenses and the utility's increase in customers, as the Commission in its order explained that the use of 1985 estimated salary expenditures was appropriate because it had ordered additional improvements and increased routine maintenance, and thus the increased allowance in operating expenses for salaries did not require any offsetting change in revenue. State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

Probable Future Revenues. — Subsection (c) clearly provides that the Commission is to include in the probable future revenues of the company only those revenues based on the plant and equipment in operation at the end of the test period. State ex rel. Utils. Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971), decided prior to 1977 amendment.

Estimates regarding probable future revenues and expenses must be based upon the utility's plant and equipment actually in operation at the end of the test period. State ex rel.

Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976), decided prior to 1977 amendment.

VIII. OTHER FACTS.

A. In General.

The plain meaning of subsection (d) of this section is that, after considering all other factors, considerations and adjustments specifically set forth in the various sections of the statute, the Commission must consider "all other material facts of record" which ought to be taken into consideration in setting rates which are reasonable and just. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Other Facts to Be Established by Evidence and Set Forth in Record. — The Legislature properly understood that, at times, other facts may exist, bearing on value and rates, which the Commission should take into account in addition to those specifically detailed in this section; it was contemplated that such facts be established by evidence, be found by the Commission, and be set forth in the record so that the utility might have them reviewed by the courts. State ex rel. Utils. Comm'n v. Public Serv. Co. of N.C., Inc., 257 N.C. 233, 125 S.E.2d 457 (1962); State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

"Other facts" which the Commission considers in determining the "fair value" of the utility's properties must be found and set forth in its order, so that the reviewing court may see what these elements are and determine the authority of the Commission to consider them as "relevant to the present fair value." State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The "other material facts of record" considered by the Commission under subsection (d) in fixing reasonable and just rates must be found and set forth in its order so that the reviewing court may see what these elements are. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Right to Consider "Other Facts" Limited. — This section gives the Commission the right to consider "all other material facts" that will enable it to determine what are reasonable and just rates, but this right is not a grant to roam at large in an unfenced field. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The right of the Commission to consider "all other material facts" is not a grant to roam at large in an unfenced field. State ex rel. Utils. Comm'n v. Public Serv. Co., 257 N.C. 233, 125 S.E.2d 457 (1962).

B. Quality and Adequacy of Service.

Subsection (d) of this section authorizes the Commission to consider quality of service as a factor in determining what constitutes just and reasonable rates to be charged by a utility. State ex rel. Utils. Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Evidence of service deficiencies provides other material facts of record which the Commission is required to consider in making its determination as to what are just and reasonable rates for the quality of service which the applicant utility is providing its customers. State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

Serious inadequacy of service, found by the Commission upon substantial evidence, is one of the facts which the Commission is required by this section to take into account in making a determination of rates. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971); State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

It was not the intent of the legislature to require the Commission to fix rates without any regard to the quality of the service rendered by the utility and thus to assure a "complacent monopoly" a "fair return upon the fair value of its properties" while it persists in rendering mediocre service and turns a deaf ear both to customer complaints and to Commission orders for improvement. On the contrary, the quality of the service rendered is, necessarily, a factor to be considered in fixing the "just and reasonable" rate therefor. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

This section lays down the procedure by which the Commission is to fix rates which will enable the utility "by sound management" to pay all of its costs of operation, including maintenance, depreciation and taxes, and have left a fair return upon the fair value of its properties, but this must be applied in the light of the provisions of this Chapter relating to the duty of the utility to render adequate service. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Serious inadequacy of a utility company's service, whether due to poor maintenance of its equipment or to other causes, is one of the facts which the Commission is required to take into account in determining what is a reasonable rate to be charged by the particular utility company for the service it proposes to render. State ex rel. Utils. Comm'n v. VEPCO, 48 N.C. App. 453, 269 S.E.2d 657, cert. denied, 301 N.C. 531, 273 S.E.2d 462 (1980).

Commission Is Not Required to Ignore Inadequate Service. — It is not reasonable to construe subsection (b) of this section to require the Commission to shut its eyes to "poor" and "substandard" service resulting from a company's willful or negligent failure to maintain its properties or to heed complaints from its subscribers when the Commission is called upon by the company to permit it to increase its rates for its inadequate service. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

But the Commission is not forbidden to grant a rate increase to a company whose service is inadequate, even though the inadequacy be due to a willful or negligent failure by the company to perform its duty. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

In a hearing upon an application by a telephone company for a rate increase in its franchise area, the Utilities Commission is authorized to grant the company an increase in the rates charged to its customers, notwithstanding a finding by the Commission that the quality of service rendered by the company was poor and substandard. State ex rel. Utils. Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Assuming adequate findings of fact, supported by competent, substantial evidence, there is nothing in the provisions of this Chapter which makes it unlawful for the Commission, in the exercise of its sound administrative discretion, to conclude that an increase in rates is warranted, notwithstanding existing service inadequacy due to the company's neglect of its properties, and that such increase is an appropriate step in the improvement of the service. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

Efficiency of Operations. — It is not only entirely appropriate but even necessary for the Commission to take into account the efficiency of the company's operations in fixing its rates in a general rate case as provided in this section. State ex rel. Utils. Comm'n v. Public Staff—North Carolina Utils. Comm'n, 58 N.C. App. 453, 293 S.E.2d 888 (1982), modified and aff'd, 309 N.C. 195, 306 S.E.2d 435 (1983).

Customer Should Not Be Required to Pay for Inefficiency. — If a utility fails to provide adequate service on account of inefficient management, rates should not be permitted which would require the customer to pay for this inefficiency. State ex rel. Utils. Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405, aff'd, 278 N.C. 235, 179 S.E.2d 419 (1971).

Subtraction for Consistently Poor Service in Ascertaining Fair Value. — Consistently poor service, attributable to defective or inadequate or poorly designed equipment or construction, justifies a subtraction from both the original cost and the reproduction cost of the existing plant before weighing these factors in ascertaining the present "fair value" of the properties. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Reduction of Rate Where Inadequate Service Due to Defective Equipment. — If inadequate service is attributable to defective, inadequate or poorly designed equipment or construction or obsolete equipment, then the Commission is justified in reducing the present fair value of the utilities' properties. In such a case, this is not a penalty, and a reduction of the rate arrived at by way of penalty for inadequate service is justified. State ex rel. Utils. Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974).

Poorly maintained equipment justifies a subtraction from both the original cost and the reproduction cost of existing plant before weighing these factors in ascertaining the present "fair value" rate base of the utility's properties as required by this section. Serious inadequacy of a utility company's service, whether due to poor maintenance of its equipment or to other causes, is one of the facts which the Commission is required to take into account in determining what is a reasonable rate to be charged by the particular utility company for the service it proposes to render. State ex rel. Utils. Comm'n v. Public Staff—North Carolina Utils. Comm'n, 58 N.C. App. 453, 293 S.E.2d 888 (1982), modified and aff'd, 309 N.C. 195, 306 S.E.2d 435 (1983).

Reduction of Rates Where Due to Bad Management. — When, upon substantial evidence, a public utility is found to be rendering grossly inadequate service, due to bad management and managerial indifference, and the rates presently charged by it yield a return sufficient to pay the interest on its indebtedness and a substantial dividend upon its stock, but less than that which would be deemed a fair return upon the fair value of its properties were the service adequate, the Utilities Commission may lawfully deny it authority to increase its rates for such service. State ex rel. Utils.

Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Inadequacy of service due not to the condition of the properties but to inefficient personnel, bad management and the indifference of a "complacent monopoly" does not relate to the value of the properties, but to the value of the service and to the reasonableness of the rates proposed to be charged therefor. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

If reduction from fair value of utilities' properties is because of inadequate service due to inefficient personnel and human error, then the reduction amounts to a penalty, and a further penalty for inadequate service by reduction of rate is not justified by statute or by decided cases. State ex rel. Utils. Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974).

Fuel Costs. — The requirement, for general rate cases, of an inquiry into the reasonableness of costs incurred extends to fuel costs incurred by the utility. State ex rel. Utils. Comm'n v. Public Staff—North Carolina Utils. Comm'n, 58 N.C. App. 480, 293 S.E.2d 880 (1982), rev'd on other grounds, 309 N.C. 195, 306 S.E.2d 435 (1983).

Finding Required as to Quality of Service. — The Commission may not lawfully ignore the duty imposed upon it by this section to consider the quality of service by reason of the company's poor service, nor does it discharge that duty by a mere statement that it has considered the matter, without showing the effect given to it. Such finding or conclusion is necessary to enable a reviewing court to determine whether the duty imposed by statute has been performed. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

If the Commission found the quality of a utility's service to fall short of the requirement in G.S. 62-131 that it be adequate, efficient and reasonable, then the Commission should make specific findings showing the effect of any such inadequacy upon its decision under this section. State ex rel. Utils. Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971), modified and aff'd, 281 N.C. 318, 189 S.E.2d 705 (1972).

The Commission must make a specific finding showing the effect it gave the relevant factor of consistently poor service, if it made a deduction from the original cost and reproduction cost of the existing plant on that account. State ex rel. Utils. Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529, rev'd on other grounds, 285 N.C. 671, 208 S.E.2d 681 (1974).

The Bluefield test assumes reasonably good service. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974). See notes under analysis line VI, Rate of Return.

§ 62-133.1. Small water and sewer utility rates.

(a) In fixing the rates for any water or sewer utility, the Commission may fix such rates on the ratio of the operating expenses to the operating revenues, such ratio to be determined by the Commission, unless the utility requests that such rates be fixed under G.S. 62-133(b). Nothing in this subsection shall be held to extinguish any remedy or right not inconsistent herewith. This subsection shall be in addition to other provisions of this Chapter which relate to public utilities generally, except that in cases of conflict between such other provisions, this section shall prevail for water and sewer utilities.

(b) A water or sewer utility may enter into uniform contracts with nonusers of its utility service within a specific subdivision or development for the payment by such nonusers to the utility of a fee or charge for placing or maintaining lines or other facilities or otherwise making and keeping such utility's service available to such nonusers; or such a utility may, by contract of assignment, receive the benefits and assume the obligations of uniform contracts entered into between the developers of subdivisions and the purchasers of lots in such subdivisions whereby such developer has contracted to make utility service available to lots in such subdivision and purchasers of such lots have contracted to pay a fee or charge for the availability of such utility service; provided, however, that the maximum nonuser rate shall be as established by contract, except that the contractual charge to nonusers of the utility service can never exceed the lawfully established minimum rate to user customers of the utility service. (1973, c. 956, s. 2.)

CASE NOTES

This section was enacted in direct response to the Utilities Commission's conclusion that nonusers were not "consumers" of the utility and that an "availability charge" could not be made to property owners solely because they owned land in an area served by the utility. State ex rel. N.C. Utils. Comm'n v. Transylvania Util. Co., 30 N.C. App. 336, 226 S.E.2d 824, cert. denied, 291 N.C. 179, 229 S.E.2d 692 (1976).

Section Proscribes Commission's Power. — By enacting this section, the General Assembly proscribed the Commission's power to disapprove charges called for in uniform contracts between utilities and nonuser property owners if the charges do not exceed those expressly authorized by the statute. State ex rel. N.C. Utils. Comm'n v. Transylvania Util. Co., 30 N.C. App. 336, 226 S.E.2d 824, cert. denied, 291 N.C. 179, 229 S.E.2d 692 (1976).

Components of Expenses Must Be Examined. — For rates to be reasonable, the figures from which they are derived must be reasonable. To uphold its statutory duty to establish reasonable rates, then, the Commission must examine each of the components going to make up a utility's expenses for reasonableness. State ex rel. Utils. Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Cited in State ex rel. Utils. Comm'n v. Heater Utils., Inc., 288 N.C. 457, 219 S.E.2d 56 (1975); State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

§ 62-133.2. Fuel and fuel-related charge adjustments for electric utilities.

(a) The Commission shall permit an electric public utility that generates electric power by fossil fuel or nuclear fuel to charge an increment or decrement as a rider to its rates for changes in the cost of fuel and fuel-related costs used in providing its North Carolina customers with electricity from the cost of fuel and fuel-related costs established in the electric public utility's previous general rate case on the basis of cost per kilowatt hour.

(a1) As used in this section, "cost of fuel and fuel-related costs" means all of the following:

(1) The cost of fuel burned.
(2) The cost of fuel transportation.
(3) The cost of ammonia, lime, limestone, urea, dibasic acid, sorbents, and catalysts consumed in reducing or treating emissions.
(4) The total delivered noncapacity related costs, including all related transmission charges, of all purchases of electric power by the electric public utility, that are subject to economic dispatch or economic curtailment.
(5) The capacity costs associated with all purchases of electric power from qualifying cogeneration facilities and qualifying small power production facilities, as defined in 16 U.S.C. § 796, that are subject to economic dispatch by the electric public utility.
(6) Except for those costs recovered pursuant to G.S. 62-133.8(h), the total delivered costs of all purchases of power from renewable energy facilities and new renewable energy facilities pursuant to G.S. 62-133.8 or to comply with any federal mandate that is similar to the requirements of subsections (b), (c), (d), (e), and (f) of G.S. 62-133.8.
(7) The fuel cost component of other purchased power.
(8) Cost of fuel and fuel-related costs shall be adjusted for any net gains or losses resulting from any sales by the electric public utility of fuel and other fuel-related costs components.
(9) Cost of fuel and fuel-related costs shall be adjusted for any net gains or losses resulting from any sales by the electric public utility of by-products produced in the generation process to the extent the costs of the inputs leading to that by-product are costs of fuel or fuel-related costs.

(a2) For those costs identified in subdivisions (4), (5), and (6) of subsection (a1) of this section, the annual increase in the aggregate amount of these costs that are recoverable by an electric public utility pursuant to this section shall not exceed two percent (2%) of the electric public utility's total North Carolina retail jurisdictional gross revenues for the preceding calendar year. The costs described in subdivisions (4), (5), and (6) of subsection (a1) of this section shall be recoverable from each class of customers as a separate component of the rider as follows:

(1) For the costs described in subdivision (4) of subsection (a1) of this section, the specific component for each class of customers shall be determined by allocating these costs among customer classes based on the electric public utility's North Carolina energy usage for the prior year, as determined by the Commission, until the Commission determines how these costs shall be allocated in a general rate case for the electric public utility commenced on or after January 1, 2008.

(2) For the costs described in subdivisions (5) and (6) of subsection (a1) of this section, the specific component for each class of customers shall be determined by allocating these costs among customer classes based on the electric public utility's North Carolina peak demand for the prior year, as determined by the Commission, until the Commission determines how these costs shall be allocated in a general rate case for the electric public utility commenced on or after January 1, 2008.

(a3) Notwithstanding subsections (a1) and (a2) of this section, for an electric public utility that has fewer than 150,000 North Carolina retail jurisdictional customers as of December 31, 2006, the costs identified in subdivisions (1), (2), (6), and (7) of subsection (a1) of this section and the fuel cost component, as may be modified by the Commission, of electric power purchases identified in subdivision (4) of subsection (a1) of this section shall be recovered through the increment or decrement rider approved by the Commission pursuant to this section. For the costs identified in subdivision (6) of subsection (a1) of this section that are incurred on or after January 1, 2008, the annual increase in the amount of these costs shall not exceed one percent (1%) of the electric public utility's total North Carolina retail jurisdictional gross revenues for the preceding calendar year. These costs described in subdivision (6) of subsection (a1) of this section shall be recoverable from each class of customers as a separate component of the rider. For the costs described in subdivision (6) of subsection (a1) of this section, the specific component for each class of customers shall be determined by allocating these costs among customer classes based on the electric public utility's North Carolina peak demand for the prior year, as determined by the Commission, until the Commission determines how these costs shall be allocated in a general rate case for the electric public utility commenced on or after January 1, 2008.

(b) The Commission shall conduct a hearing within 12 months of each electric public utility's last general rate case order to determine whether an increment or decrement rider is required to reflect actual changes in the cost of fuel and fuel-related costs over or under the cost of fuel and fuel-related costs on a kilowatt-hour basis in base rates established in the electric public utility's last preceding general rate case. Additional hearings shall be held on an annual basis but only one hearing for each electric public utility may be held within 12 months of the last general rate case.

(c) Each electric public utility shall submit to the Commission for the hearing verified annualized information and data in such form and detail as the Commission may require, for an historic 12-month test period, relating to:

(1) Cost of fuel and fuel-related costs used in each generating facility owned in whole or in part by the utility.

(2) Fuel procurement practices and fuel inventories for each facility.

(3) Burned cost of fuel used in each generating facility.
(4) Plant capacity factor for each generating facility.
(5) Plant availability factor for each generating plant.
(6) Generation mix by types of fuel used.
(7) Sources and fuel cost component of purchased power used.
(8) Recipients of and revenues received for power sales and times of power sales.
(9) Test period kilowatt-hour sales for the utility's total system and on the total system separated for North Carolina jurisdictional sales.
(10) Procurement practices and inventories for: fuel burned and for ammonia, lime, limestone, urea, dibasic acid, sorbents, and catalysts consumed in reducing or treating emissions.
(11) The cost incurred at each generating facility of fuel burned and of ammonia, lime, limestone, urea, dibasic acid, sorbents, and catalysts consumed in reducing or treating emissions.
(12) Any net gains or losses resulting from any sales by the electric public utility of fuel or other fuel-related costs components.
(13) Any net gains or losses resulting from any sales by the electric public utility of by-products produced in the generation process to the extent the costs of the inputs leading to that by-product are costs of fuel or fuel-related costs.

(d) The Commission shall provide for notice of a public hearing with reasonable and adequate time for investigation and for all intervenors to prepare for hearing. At the hearing the Commission shall receive evidence from the utility, the Public Staff, and any intervenor desiring to submit evidence, and from the public generally. In reaching its decision, the Commission shall consider all evidence required under subsection (c) of this section as well as any and all other competent evidence that may assist the Commission in reaching its decision including changes in the cost of fuel consumed and fuel-related costs that occur within a reasonable time, as determined by the Commission, after the test period is closed. The Commission shall incorporate in its cost of fuel and fuel-related costs determination under this subsection the experienced over-recovery or under-recovery of reasonable costs of fuel and fuel-related costs prudently incurred during the test period, based upon the prudent standards set pursuant to subsection (d1) of this section, in fixing an increment or decrement rider. Upon request of the electric public utility, the Commission shall also incorporate in this determination the experienced over-recovery or under-recovery of costs of fuel and fuel-related costs through the date that is 30 calendar days prior to the date of the hearing, provided that the reasonableness and prudence of these costs shall be subject to review in the utility's next annual hearing pursuant to this section. The Commission shall use deferral accounting, and consecutive test periods, in complying with this subsection, and the over-recovery or under-recovery portion of the increment or decrement shall be reflected in rates for 12 months, notwithstanding any changes in the base fuel cost in a general rate case. The burden of proof as to the correctness and reasonableness of the charge and as to whether the cost of fuel and fuel-related costs were reasonably and prudently incurred shall be on the utility. The Commission shall allow only that portion, if any, of a requested cost of fuel and fuel-related costs adjustment that is based on adjusted and reasonable cost of fuel and fuel-related costs prudently incurred under efficient management and economic operations. In evaluating whether cost of fuel and fuel-related costs were reasonable and prudently incurred, the Commission shall apply the rule adopted pursuant to subsection (d1) of this section. To the extent that the Commission determines that an increment or decrement to the rates of the utility due to changes in the cost of fuel and fuel-related costs over or under base fuel costs established in the preceding general rate case is just and reasonable, the Commission shall order that the increment or decrement become effective for all sales of electricity and remain in effect until changed in a subsequent general rate case or annual proceeding under this section.

(d1) Within one year after ratification of this act, for the purposes of setting cost of fuel and fuel-related costs rates, the Commission shall adopt a rule that establishes prudent standards and procedures with which it can appropriately measure management efficiency in minimizing cost of fuel and fuel-related costs.

(e) If the Commission has not issued an order pursuant to this section within 180 days of a utility's submission of annual data under subsection (c) of this section, the utility may place the requested cost of fuel and fuel-related costs adjustment into effect. If the change in rate is finally determined to be excessive, the utility shall make refund of any excess plus interest to its customers in a manner ordered by the Commission.

(f) Nothing in this section shall relieve the Commission from its duty to consider the reasonableness of the cost of fuel and fuel-related costs in a general rate case and to set rates reflecting reasonable cost of fuel and fuel-related costs pursuant to G.S. 62-133. Nothing in this section shall invalidate or preempt any condition adopted by the Commission and accepted by the utility in any proceeding that would limit the recovery of costs by any electric public utility under this section.

(g) On July 1 of every odd-numbered year, the Utilities Commission shall provide a report to the Joint Legislative Utility Review Committee summarizing the proceedings conducted pursuant to this section during the preceding two years. (1981 (Reg. Sess., 1982), c. 1197, s. 1; 1987, c. 677, ss. 1, 5; 1989, c. 15, s. 1; 1991, c. 129, s. 1; 1995, c. 15, ss. 1, 2; 2007-397, s. 5.)

Editor's Note. — Session Laws 1987, c. 677, ss. 2 and 3 provide: "The enactment of this act shall be construed as clarifying rather than changing the meaning of G.S. 62-133.2 as it was previously worded and as construed by the Utilities Commission in Commission Rule R8-55 so that electric utilities will recover only their reasonable fuel expenses prudently incurred, including the fuel cost component of purchased power, with no over-recovery or under-recovery, in a manner that will serve the public interest.

"Until the Commission has formally adopted a rule as prescribed by subsection (d1) of G.S. 62-133.2 all fuel charge adjustment proceedings shall be heard and decided pursuant to the applicable provisions of subsection (a), (b), (c), (d), (e) and (f) of G.S. 62-133.2 and Commission Rule R8-55."

Session Laws 1995, c. 15, s. 2 was codified as subsection (g) of this section at the direction of the Revisor of Statutes.

Session Laws 2007-397, s. 14, provides: "The Utilities Commission shall submit to the Governor, the Environmental Review Commission, and the Joint Legislative Utility Review Committee a report on the actual results of the cost allocations established pursuant to G.S. 62-133.8(h), as enacted by Section 2 of this act, G.S. 62-133.9(e) and G.S. 62-133.9(f), as enacted by Section 4 of this act, and G.S. 62-133.2(a2) and G.S.62-133.2(a3), as enacted by Section 5 of this act, during the preceding two fiscal years on or before 1 October of odd-numbered years. The Utilities Commission shall submit the first report required by this section no later than 1 October 2009."

Session Laws 2007-397, s. 15 contains a severability clause.

Session Laws 2007-397, s. 16, provides, in part: "Section 5 of this act becomes effective 1 January 2008 provided that (i) the provisions of G.S. 62-133.2, as amended by Section 5 of this act, apply only to fuel and fuel-related costs incurred on and after 1 January 2008 regardless of the test period established by the Utilities Commission, and (ii) the costs described in G.S. 62-133.2(a1)(3) that are incurred on and after the date this act becomes law shall be recoverable as provided in G.S. 62-133.2 as amended by Section 5 of this act."

Effect of Amendments. — Session Laws 2007-397, s. 5, effective January 1, 2008, rewrote subsection (a); added subsections (a1) through (a3); rewrote subsection (b); inserted "public" in subsection (c); in subdivision (c)(1), substituted "Cost" for "Purchased cost" and inserted "and fuel-related costs"; added subdivisions (c)(10) through (c)(13); rewrote subsection (d); in subsection (d1), substituted "cost of fuel and fuel-related costs rates," for "fuel rates," and substituted "cost of fuel and fuel-related" for "fuel" at the end; in the first sentence of subsection (e), substituted "180 days" for "120 days" and substituted "cost of fuel and fuel-related costs" for "fuel"; rewrote subsections (f) and (g); and made minor stylistic changes throughout. For further clarification of the effective date, see the Editor's note.

CASE NOTES

This section was enacted by the General Assembly in order to eliminate undesirable limitations which existed under former G.S. 62-134(e). State ex rel. Utils. Comm'n v. Thornburg, 84 N.C. App. 482, 353 S.E.2d 413 (1987).

Subsections (a) and (d) Compared. — Subsection (a) of this section defines what decision the Commission is authorized to make, while subsection (d) of this section directs how the Commission should reach its decision. State ex rel. Utils. Comm'n v. Thornburg, 84 N.C. App. 482, 353 S.E.2d 413 (1987).

True-Ups for Past over or Under Recoveries Not Authorized. — This section was not intended by the General Assembly to authorize true-ups for past over-recoveries or under-recoveries of fuel costs or the fuel component of purchased power of electric utilities. State ex rel. Utils. Comm'n v. Thornburg, 84 N.C. App. 482, 353 S.E.2d 413 (1987).

By enacting subsection (d) of this section, the General Assembly did not modify the judicially adopted rule prohibiting retroactive rate making, heretofore extant in this State, so as to authorize the Utilities Commission to employ an Experience Modification Factor in connection with an electric utility's fuel charge adjustment proceedings in order to provide for a "true-up" of the utility's past over-recoveries or under-recoveries of fuel costs. Subsection (d) does not authorize such a "true-up" system. State ex rel. Utils. Comm'n v. Thornburg, 84 N.C. App. 482, 353 S.E.2d 413 (1987).

Applied in State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983).

Cited in State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

§ 62-133.3: Repealed by Session Laws 1995, c. 27, s. 5.

§ 62-133.4. Gas cost adjustment for natural gas local distribution companies.

(a) Rate changes for natural gas local distribution companies occasioned by changes in the cost of natural gas supply and transportation may be determined under this section rather than under G.S. 62-133(b), (c), or (d).

(b) From time to time, as changes in the cost of natural gas require, each natural gas local distribution company may apply to the Commission for permission to change its rates to track changes in the cost of natural gas supply and transportation. The Commission may, without a hearing, issue an order allowing such rate changes to become effective simultaneously with the effective date of the change in the cost of natural gas or at any other time ordered by the Commission. If the Commission has not issued an order under this subsection within 120 days after the application, the utility may place the requested rate adjustment into effect. If the rate adjustment is finally determined to be excessive or is denied, the utility shall make refund of any excess, plus interest as provided in G.S. 62-130(e), to its customers in a manner ordered by the Commission. Any rate adjustment under this subsection is subject to review under subsection (c) of this section.

(c) Each natural gas local distribution company shall submit to the Commission information and data for an historical 12-month test period concerning the utility's actual cost of gas, volumes of purchased gas, sales volumes, negotiated sales volumes, and transportation volumes. This information and data shall be filed on an annual basis in the form and detail and at the time required by the Commission. The Commission, upon notice and hearing, shall compare the utility's prudently incurred costs with costs recovered from all the utility's customers that it served during the test period. If those prudently incurred costs are greater or less than the recovered costs, the Commission shall, subject to G.S. 62-158, require the utility to refund any overrecovery by credit to bill or through a decrement in its rates and shall permit the utility to recover any deficiency through an increment in its rates.

(d) Nothing in this section prohibits the Commission from investigating and changing unreasonable rates as authorized by this Chapter, nor does it prohibit the Commission from disallowing the recovery of any gas costs not prudently incurred by a utility.

(e) As used in this section, the word "cost" or "costs" shall be defined by Commission rule or order and may include all costs related to the purchase and transportation of natural gas to the natural gas local distribution company's system. (1991, c. 598, s. 8.)

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc., 142 N.C. App. 127, 542 S.E.2d 247, 2001 N.C. App. LEXIS 39 (2001).

§ 62-133.5. Alternative regulation, tariffing, and deregulation of telecommunications utilities.

(a) Any local exchange company, subject to the provisions of G.S. 62-110(f1), that is subject to rate of return regulation pursuant to G.S. 62-133 or a form of alternative regulation authorized by subsection (b) of this section may elect to have the rates, terms, and conditions of its services determined pursuant to a form of price regulation, rather than rate of return or other form of earnings regulation. Under this form of price regulation, the Commission shall, among other things, permit the local exchange company to determine and set its own depreciation rates, to rebalance its rates, and to adjust its prices in the aggregate, or to adjust its prices for various aggregated categories of services, based upon changes in generally accepted indices of prices. Upon application, the Commission shall, after notice and an opportunity for interested parties to be heard, approve such price regulation, which may differ between local exchange companies, upon finding that the plan as proposed (i) protects the affordability of basic local exchange service, as such service is defined by the Commission; (ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards that the Commission may adopt; (iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and (iv) is otherwise consistent with the public interest. Upon approval, and except as provided in subsection (c) of this section, price regulation shall thereafter be the sole form of regulation imposed upon the electing local exchange company, and the Commission shall thenceforth regulate the electing local exchange company's prices, rather than its earnings. The Commission shall issue an order denying or approving the proposed plan for price regulation, with or without modification, not more than 90 days from the filing of the application. However, the Commission may extend the time period for an additional 90 days at the discretion of the Commission. If the Commission approves the application with modifications, the local exchange company subject to such approval may accept the modifications and implement the proposed plan as modified, or may, at its option, (i) withdraw its application and continue to be regulated under the form of regulation that existed immediately prior to the filing of the application; (ii) file another proposed plan for price regulation; or (iii) file an application for a form of alternative regulation under subsection (b) of this section. If the initial price regulation plan is approved with modifications and the local exchange company files another plan pursuant to part (ii) of the previous sentence, the Commission shall issue an order denying or approving the proposed plan for price regulation, with or without modifications, not more than 90 days from that filing by the local exchange company.

(b) Any local exchange company that is subject to rate of return regulation pursuant to G.S. 62-133 and which elects not to file for price regulation under the provisions of subsection (a) above may file an application with the Commission for forms of alternative regulation, which may differ between companies and may include, but are not limited to, ranges of authorized returns, categories of services, and price indexing. Upon application, the Commission shall approve such alternative regulatory plan upon finding that the plan as proposed (i) protects the affordability of basic local exchange service, as such service is defined by the Commission; (ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards established by the Commission; (iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and (iv) is otherwise consistent with the public interest. The Commission shall issue an order denying or approving the proposed plan with or without modification, not more than 90 days from the filing of the application. However, the Commission may extend the time period for an additional 90 days at the discretion of the Commission. If the Commission approves the application with modifications, the local exchange company subject to such approval may, at its option, accept the modifications and implement the proposed plan as modified or may, at its option, (i) withdraw its application and continue to be regulated under the form of regulation that existed at the time of filing the application; or (ii) file an application for another form of alternative regulation. If the initial plan is approved with modifications and the local exchange company files another plan pursuant to part (ii) of the previous sentence, the Commission shall issue an order denying or approving the proposed plan, with or without modifications, not more than 90 days from that filing by the local exchange company.

(c) Any local exchange company subject to price regulation under the provisions of subsection (a) of this section may file an application with the Commission to modify such form of price regulation or for other forms of regulation. Any local exchange company subject to a form of alternative regulation under subsection (b) of this section may file an application with the Commission to modify such form of alternative regulation. Upon application, the Commission shall approve such other form of regulation upon finding that the plan as proposed (i) protects the affordability of basic local exchange service, as such service is defined by the Commission; (ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards established by the Commission; (iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and (iv) is otherwise consistent with the public interest. If the Commission disapproves, in whole or in part, a local exchange company's application to modify its existing form of price regulation, the company may elect to continue to operate under its then existing plan previously approved under this subsection or subsection (a) of this section.

(c1) In determining whether a price regulation plan is otherwise consistent with the public interest, the Commission shall not consider the local exchange company's past or present earnings or rates of return.

(d) Any local exchange company subject to price regulation under the provisions of subsection (a) of this section, or other alternative regulation under subsection (b) of this section, or other form of regulation under subsection (c) of this section shall file tariffs for basic local exchange service and toll switched access services stating the terms and conditions of the services and the applicable rates. However, fees charged by such local exchange companies applicable to charges for returned checks shall not be tariffed or otherwise regulated by the Commission. The filing of any tariff changing the terms and conditions of such services or increasing the rates for such services shall be presumed valid and shall become effective, unless otherwise suspended by the Commission for a term not to exceed 45 days, 14 days after filing. Any tariff reducing rates for basic local exchange service or toll switched access service shall be presumed valid and shall become effective, unless otherwise suspended by the Commission for a term not to exceed 45 days, seven days after filing. Any local exchange company subject to price regulation under the provisions of subsection (a) of this section, or other alternative regulation under subsection (b) of this section, or other form of regulation under subsection (c) of this section may file tariffs for services other than basic local exchange services and toll switched access services. Any tariff changing the terms and conditions of such services or increasing the rates for an existing service or establishing the terms, conditions, or rates for a new service shall be presumed valid and shall become effective, unless otherwise suspended by the Commission for a term not to exceed 45 days, 14 days after filing. Any tariff reducing the rates for such services shall be presumed valid and shall become effective, unless otherwise suspended by the Commission for a term not to exceed 45 days, seven days after filing. In the event of a complaint with regard to a tariff filing under this subsection, the Commission may take such steps as it deems appropriate to assure that such tariff filing is consistent with the plan previously adopted pursuant to subsection (a) of this section, subsection (b) of this section, or subsection (c) of this section.

(e) Any allegation of anticompetitive activity by a competing local provider or a local exchange company shall be raised in a complaint proceeding pursuant to G.S. 62-73.

(f) Notwithstanding the provisions of G.S. 62-140, or any Commission rule or regulations: (i) the Commission shall permit a local exchange company or a competing local provider to offer competitive services with flexible pricing arrangements to business customers pursuant to contract and shall permit other flexible pricing options; and (ii) local exchange companies and competing local providers may provide a promotional offering for any tariffed service or tariffed offering by giving one day's notice to the Commission, but no Commission approval of the notice is required. Promotional offerings of any nontariffed service may be implemented without notice to the Commission or Commission approval. Carriers offering promotions of regulated services that are available for resale must provide a means for interested parties to receive notice of each promotional offering of regulated service, including the duration of the offering, at least one business day prior to the effective date of the promotional offering. Furthermore, local exchange companies and competing local providers may offer special promotions and bundles of new or existing service or products without the obligation to identify or convert existing customers who subscribe to the same or similar services or products. The Commission's complaint authority under G.S. 62-73 and subsection (e) of this section is applicable to any promotion or bundled service offering filed or offered under this subsection.

(g) The following sections of Chapter 62 of the General Statutes shall not apply to local exchange companies subject to price regulation under the terms of subsection (a) of this section: G.S. 62-35(c), 62-45, 62-51, 62-81, 62-111, 62-130, 62-131, 62-132, 62-133, 62-134, 62-135, 62-136, 62-137, 62-139, 62-142, and 62-153.

(h) Notwithstanding any other provision of this Chapter, a local exchange company that is subject to rate of return regulation or subject to another form of regulation authorized under this section and whose territory is open to competition from competing local providers may elect to have its rates, terms, and conditions for its services determined pursuant to the plan described in this subsection by filing notice of its intent to do so with the Commission. The election is effective immediately upon filing. A local exchange company shall not be permitted to make the election under this section unless it commits to provide stand-alone basic residential lines to rural customers at rates comparable to those rates charged to urban customers for the same service.

(1) Definitions. — The following definitions apply in this subsection:
  a. Local exchange company. — The same meaning as provided in G.S. 62-3(16a).
  b. Open to competition from competing local providers. — Both of the following apply:
    1. G.S. 62-110(f1) applies to the franchised area and to local exchange and exchange access services offered by the local exchange company.
    2. The local exchange company is open to interconnection with competing local providers that possess a certificate of public convenience and necessity issued by the Commission. The Commission is authorized to resolve any disputes concerning whether a local exchange company is open to interconnection under this section.
  c. Single-line basic residential service. — Single-line residential flat rate basic voice grade local service with touch tone within a traditional local calling area that provides access to available emergency services and directory assistance, the capability to access interconnecting carriers, relay services, access to operator services, and one annual local directory listing (white pages or the equivalent).
  d. Stand-alone basic residential line. — Single-line basic residential service that is billed on a billing account that does not also contain another service, feature, or product that is sold by the local exchange company or an affiliate of the local exchange company and is billed on a recurring basis on the local exchange company's bill.

(2) Beginning on the date that the local exchange company's election under this subsection becomes effective, the local exchange company shall continue to offer stand-alone basic residential lines to all customers who choose to subscribe to that service, and the local exchange company may increase rates for those lines annually by a percentage that does not exceed the percentage increase over the prior year in the Gross Domestic Product Price Index as reported by the United States Department of Commerce, Bureau of Economic Analysis, unless otherwise authorized by the Commission. With the sole exception of ensuring the local exchange company's compliance with the preceding sentence, the Commission shall not:
  a. Impose any requirements related to the terms, conditions, rates, or availability of any of the local exchange company's stand-alone basic residential lines.
  b. Otherwise regulate any of the local exchange company's stand-alone basic residential lines.

(3) Except to the extent provided in subdivision (2) of this subsection, beginning on the date the local exchange company's election under this subsection becomes effective, the Commission shall not do either of the following:
  a. Impose any requirements related to the terms, conditions, rates, or availability of any of the local exchange company's retail services.
  b. Otherwise regulate any of the local exchange company's retail services.

(4) A local exchange company's election under this subsection does not affect the obligations or rights of an incumbent local exchange carrier, as that term is defined by section 251(h) of the Federal Telecommunications Act of 1996 (Act), under sections 251 and 252 of the Act or any Federal Communications Commission regulation relating to sections 251 and 252 of the Act, nor does it affect any authority of the Commission to act in accordance with federal or State laws or regulations, including those granting authority to set rates, terms, and conditions for access to unbundled network elements and to arbitrate and enforce interconnection agreements.

(5) A local exchange company's election under this subsection does not prevent a consumer from seeking the assistance of the Public Staff of the North Carolina Utilities Commission to resolve a complaint with that local exchange company, as provided in G.S. 62-73.1.

(6) A local exchange company's election under this subsection does not affect the Commission's jurisdiction concerning the following:
  a. Enforce federal requirements on the local exchange company's marketing activities. However, the Commission may not adopt, impose, or enforce other requirements on the local exchange company's marketing activities.
  b. The telecommunications relay service pursuant to G.S. 62-157.
  c. The Life Line or Link Up programs consistent with Federal Communications Commission rules, including, but not limited to, 47 C.F.R. § 54.403(a)(3), as amended from time to time, and relevant orders of the North Carolina Utilities Commission.
  d. Universal service funding pursuant to G.S. 62-110(f1).
  e. Carrier of last resort obligations pursuant to G.S. 62-110.
  f. The authority delegated to it by the Federal Communications Commission to manage the numbering resources involving that local exchange company.

(i) To the extent applicable, a competing local provider authorized by the Commission to do business under the provisions of G.S. 62-110(f1) may also elect to have its rates, terms, and conditions for its services determined pursuant to the plan described in subsection (h) of this section.

(j) Notwithstanding any other provision of this Chapter, the Commission has jurisdiction over matters concerning switched access and intercarrier compensation of a local exchange company that has elected to operate under price regulation, as well as a local exchange carrier or competing local provider operating under any form of regulation covered under this Article or G.S. 62-110(f1).

(k) To evaluate the affordability and quality of local exchange service provided to consumers in this State, a local exchange company or competing local provider offering basic local residential exchange service that elects to have its rates, terms, and conditions for its services determined pursuant to the plan described in subsection (h) of this section shall make an annual report to the General Assembly on the state of its company's operations. The report shall be due 30 days after the close of each calendar year and shall cover the period from January 1 through December 31 of the preceding year. The Joint Legislative Utility Review Committee must review the annual reports and decide whether to recommend that the General Assembly take corrective action in response to those reports. The report shall include the following:

(1) An analysis of telecommunications competition by the local exchange company or competing local provider, including access line gain or loss and the impact on consumer choices from enactment of the Consumer Choice and Investment Act of 2009.

(2) An analysis of service quality based on customer satisfaction studies from enactment of the Consumer Choice and Investment Act of 2009.

(3) An analysis of the level of local exchange rates from enactment of the Consumer Choice and Investment Act of 2009. (1995, c. 27, s. 6; 2003-91, s. 2; 2007-157, s. 1; 2009-238, ss. 1-4; 2009-570, s. 36.)

Editor's Note. — Session Laws 1995, c. 27, s. 6.1, effective July 1, 1995, provides that beginning on October 1, 1997, and every two years thereafter, the utilities Commission and the Public Staff shall each provide a report to the Joint Legislative Utility Review Committee that summarizes procedures conducted pursuant to this act during the preceding two years.

Subsection (d), as added by Session Laws 2003-91, s. 2, was redesignated as subsection (c1) at the direction of the Revisor of Statutes.

The preamble to Session Laws 2009-238, provides: "Whereas, the technology used to provide communications services has evolved and continues to evolve at an ever-increasing pace; and

"Whereas, the resulting competition between traditional telephone service providers, cable companies offering communications services, Voice-over Internet Protocol (VoIP) providers, wireless communications service providers, and other communications service providers promotes and continues to promote additional consumer choices for these services; and

"Whereas, traditional telephone service providers remain subject to certain antiquated statutory and regulatory restrictions that do not apply to other communications service providers; and

"Whereas, this disparity may deprive consumers of traditional telephone companies of the full range of timely and competitive options and offerings that otherwise would be available to them; and

"Whereas, the General Assembly finds that relaxing certain restrictions for traditional telephone companies will relieve consumers of unnecessary costs and burdens, encourage investment, and promote timely deployment of more innovative offerings at more competitive prices for customers; and

"Whereas, in order to make the full range of competitive options and offerings available to consumers of communications services while maintaining inflation-based price controls for those existing customers who currently receive and wish to continue receiving only stand-alone basic residential lines from traditional telephone companies, the General Assembly hereby enacts the 'Consumer Choice and Investment Act of 2009'; Now, therefore,"

The definitions in subdivision (h)(1), as added by Session Laws 2009-238, s. 1, have been set out in alphabetical order at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2009-238, ss. 1-4, effective June 30, 2009, added subsections (h) through (k).

Session Laws 2009-570, s. 36, effective August 28, 2009, substituted "Department of Commerce, Bureau of Economic Analysis," for "Department of Labor, Bureau of Labor Statistics" in the introductory paragraph of subdivision (h)(2).

§ 62-133.6. Environmental compliance costs recovery.

(a) As used in this section:

(1) "Coal-fired generating unit" means a coal-fired generating unit, as defined by 40 Code of Federal Regulations § 96.2 (July 1, 2001 Edition), that is located in this State and has the capacity to generate 25 or more megawatts of electricity.

(2) "Environmental compliance costs" means only those capital costs incurred by an investor-owned public utility to comply with the emissions limitations set out in G.S. 143-215.107D that exceed the costs required to comply with 42 U.S.C. § 7410(a)(2)(D)(i)(I), as implemented by 40 Code of Federal Regulations § 51.121 (July 1, 2001 Edition), related federal regulations, and the associated State or Federal Implementation Plan, or with 42 U.S.C. § 7426, as implemented by 40 Code of Federal Regulations § 52.34 (July 1, 2001 Edition) and related federal regulations. The term "environmental compliance costs" does not include:

a. Costs required to comply with a final order or judgment rendered by a state or federal court under which an investor-owned public utility is found liable for a failure to comply with any federal or state law, rule, or regulation for the protection of the environment or public health.

b. The net increase in costs, above those proposed by the investor-owned public utility as part of its plan to achieve compliance with the emissions limitations set out in G.S. 143-215.107D, that are necessary to comply with a settlement agreement, consent decree, or similar resolution of litigation arising from any alleged failure to comply with any federal or state law, rule, or regulation for the protection of the environment or public health.

c. Any criminal or civil fine or penalty, including court costs imposed or assessed for a violation by an investor-owned public utility of any federal or state law, rule, or regulation for the protection of the environment or public health.

d. The net increase in costs, above those proposed by the investor-owned public utility as part of its plan to achieve the emissions limitations set out in G.S. 143-215.107D, that are necessary to comply with any limitation on emissions of oxides of nitrogen (NOx) or sulfur dioxide (SO2) that are imposed on an individual coal-fired generating unit by the Environmental Management Commission or the Department of Environment and Natural Resources to address any nonattainment of an air quality standard in any area of the State.

(3) "Investor-owned public utility" means an investor-owned public utility, as defined in G.S. 62-3.

(b) The investor-owned public utilities shall be allowed to accelerate the cost recovery of their estimated environmental compliance costs over a seven-year period, beginning January 1, 2003 and ending December 31, 2009. For purposes of this subsection, an investor-owned public utility subject to the provisions of subsections (b) and (d) of G.S. 143-215.107D shall amortize environmental compliance costs in the amount of one billion five hundred million dollars ($1,500,000,000) and an investor-owned public utility subject to the provisions of subsections (c) and (e) of G.S. 143-215.107D shall amortize environmental compliance costs in the amount of eight hundred thirteen million dollars ($813,000,000). During the rate freeze period established in subsection (e) of this section, the investor-owned public utilities shall, at a minimum, recover through amortization seventy percent (70%) of the environmental compliance costs set out in this subsection. The maximum amount for each investor-owned public utility's annual accelerated cost recovery during the rate freeze period shall not exceed one hundred fifty percent (150%) of the annual levelized environmental compliance costs set out in this subsection. The amounts to be amortized pursuant to this subsection are estimates of the environmental compliance costs that may be adjusted as provided in this section. The General Assembly makes no judgment as to whether the actual environmental compliance costs will be greater than, less than, or equal to these estimated amounts. These estimated amounts do not define or limit the scope of the expenditures that may be necessary to comply with the emissions limitations set out in G.S. 143-215.107D.

(c) The investor-owned public utilities shall file their compliance plans, including initial cost estimates, with the Commission and the Department of Environment and Natural Resources not later than 10 days after the date on which this section becomes effective. The Commission shall consult with the Secretary of Environment and Natural Resources and shall consider the advice of the Secretary as to whether an investor-owned public utility's proposed compliance plan is adequate to achieve the emissions limitations set out in G.S. 143-215.107D.

(d) Subject to the provisions of subsection (f) of this section, the Commission shall hold a hearing to review the environmental compliance costs set out in subsection (b) of this section. The Commission may modify and revise those costs as necessary to ensure that they are just, reasonable, and prudent based on the most recent cost information available and determine the annual cost recovery amounts that each investor-owned public utility shall be required to record and recover during calendar years 2008 and 2009. In making its decisions pursuant to this subsection, the Commission shall consult with the Secretary of Environment and Natural Resources to receive advice as to whether the investor-owned public utility's actual and proposed modifications and permitting and construction schedule are adequate to achieve the emissions limitations set out in G.S. 143-215.107D. The Commission shall issue an order pursuant to this subsection no later than December 31, 2007.

(e) Notwithstanding G.S. 62-130(d) and G.S. 62-136(a), the base rates of the investor-owned public utilities shall remain unchanged from the date on which this section becomes effective through December 31, 2007. The Commission may, however, consistent with the public interest:

(1) Allow adjustments to base rates, or deferral of costs or revenues, due to one or more of the following conditions occurring during the rate freeze period:

a. Governmental action resulting in significant cost reductions or requiring major expenditures including, but not limited to, the cost of compliance with any law, regulation, or rule for the protection of the environment or public health, other than environmental compliance costs.

b. Major expenditures to restore or replace property damaged or destroyed by force majeure.

c. A severe threat to the financial stability of the investor-owned public utility resulting from other extraordinary causes beyond the reasonable control of the investor-owned public utility.

d. The investor-owned public utility persistently earns a return substantially in excess of the rate of return established and found reasonable by the Commission in the investor-owned public utility's last general rate case.

(2) Approve any reduction in a rate or rates applicable to a customer or class of customers during the rate freeze period, if requested to do so by an investor-owned public utility that is subject to the emissions limitations set out in G.S. 143-215.107D.

(f) In any general rate case initiated to adjust base rates effective on or after January 1, 2008, the investor-owned public utility shall be allowed to recover its actual environmental compliance costs in accordance with Article 7 of this Chapter less the cumulative amount of accelerated cost recovery recorded pursuant to subsection (b) of this section.

(g) Consistent with the public interest, the Commission is authorized to approve proposals submitted by an investor-owned public utility to implement optional, market-based rates and services, provided the proposal does not increase base rates during the period of time referred to in subsection (e) of this section.

(h) Nothing in this section shall prohibit the Commission from taking any actions otherwise appropriate to enforce investor-owned public utility compliance with applicable statutes or Commission rules or to order any appropriate remedy for such noncompliance allowed by law.

(i) An investor-owned public utility that is subject to the emissions limitations set out in G.S. 143-215.107D shall submit to the Commission and to the Department of Environment and Natural Resources on or before April 1 of each year a verified statement that contains all of the following:

(1) A detailed report on the investor-owned public utility's plans for meeting the emissions limitations set out in G.S. 143-215.107D.

(2) The actual environmental compliance costs incurred by the investor-owned public utility in the previous calendar year, including a

description of the construction undertaken and completed during that year.

(3) The amount of the investor-owned public utility's environmental compliance costs amortized in the previous calendar year.

(4) An estimate of the investor-owned public utility's environmental compliance costs and the basis for any revisions of those estimates when compared to the estimates submitted during the previous year.

(5) A description of all permits required in order to comply with the provisions of G.S. 143-215.107D for which the investor-owned public utility has applied and the status of those permits or permit applications.

(6) A description of the construction related to compliance with the provisions of G.S. 143-215.107D that is anticipated during the following year.

(7) A description of the applications for permits required in order to comply with the provisions of G.S. 143-215.107D that are anticipated during the following year.

(8) The results of equipment testing related to compliance with G.S. 143-215.107D.

(9) The number of tons of oxides of nitrogen (NOx) and sulfur dioxide (SO2) emitted during the previous calendar year from the coal-fired generating units that are subject to the emissions limitations set out in G.S. 143-215.107D.

(10) The emissions allowances described in G.S. 143-215.107D(i) that are acquired by the investor-owned public utility that result from compliance with the emissions limitations set out in G.S. 143-215.107D.

(11) Any other information requested by the Commission or the Department of Environment and Natural Resources.

(j) The Secretary shall review the information submitted pursuant to subsection (i) of this section and determine whether the investor-owned public utility's actual and proposed modifications and permitting and construction schedule are adequate to achieve the emissions limitations set out in G.S. 143-215.107D and shall advise the Commission as to the Secretary's findings and recommendations.

(k) Any information, advice, findings, recommendations, or determinations provided by the Secretary pursuant to this section shall not constitute a final agency decision within the meaning of Chapter 150B of the General Statutes and shall not be subject to review under that Chapter. (2002-4, s. 9.)

Cross References. — As to limitations on emissions of oxides of nitrogen and sulfur dioxide from certain coal-fired generating units, see G.S. 143-215.107D.

Editor's Note. — Session Laws 2002-4, ss. 10-14, as amended by Session Laws 2006-79, s. 12, provide: "It is the intent of the General Assembly that the State use all available resources and means, including negotiation, participation in interstate compacts and multistate and interagency agreements, petitions pursuant to 42 U.S.C. § 7426, and litigation to induce other states and entities, including the Tennessee Valley Authority, to achieve reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) comparable to those required by G.S. 143-215.107D, as enacted by Section 1 of this act, on a comparable schedule. The State shall give particular attention to those states and other entities whose emissions negatively impact air quality in North Carolina or whose failure to achieve comparable reductions would place the economy of North Carolina at a competitive disadvantage.

"The Environmental Management Commission shall study the desirability of requiring and the feasibility of obtaining reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) beyond those required by G.S. 143-215.107D, as enacted by Section 1 of this act. The Environmental Management Commission shall consider the availability of emissions reduction technologies, increased cost to consumers of electric power, reliability of electric power supply, actions to reduce emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) taken by states and other entities whose emissions negatively impact air quality in North Carolina or whose failure to achieve comparable reductions would place the economy of North Carolina at a competitive disadvantage, and the effects that these reductions would have on public health, the environment, and natural resources, including visibility. In its conduct of this study, the Environmental Management Commission may consult with the Utilities Commission and the Public Staff. The Environmental Management Commission shall report its findings and recommendations to the General Assembly and the Environmental Review Commission annually beginning 1 September 2007.

"The General Assembly anticipates that measures implemented to achieve the reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required by G.S. 143-215.107D, as enacted by Section 1 of this act, will also result in significant reductions in the emissions of mercury from coal-fired generating units. The Division of Air Quality of the Department of Environment and Natural Resources shall study issues related to monitoring emissions of mercury and the development and implementation of standards and plans to implement programs to control emissions of mercury from coal-fired generating units. The Division shall evaluate available control technologies and shall estimate the benefits and costs of alternative strategies to reduce emissions of mercury. The Division shall annually report its interim findings and recommendations to the Environmental Management Commission and the Environmental Review Commission beginning 1 September 2003. The Division shall report its final findings and recommendations to the Environmental Management Commission and the Environmental Review Commission no later than 1 September 2005. The costs of implementing any air quality standards and plans to reduce the emission of mercury from coal-fired generating units below the standards in effect on the date this act becomes effective, except to the extent that the emission of mercury is reduced as a result of the reductions in the emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required to achieve the emissions limitations set out in G.S. 143-215.107D, as enacted by Section 1 of this act, shall not be recoverable pursuant to G.S. 62-133.6, as enacted by Section 9 of this act.

"The Division of Air Quality of the Department of Environment and Natural Resources shall study issues related to the development and implementation of standards and plans to implement programs to control emissions of carbon dioxide (CO2) from coal-fired generating units and other stationary sources of air pollution. The Division shall evaluate available control technologies and shall estimate the benefits and costs of alternative strategies to reduce emissions of carbon dioxide (CO2). The Division shall annually report its interim findings and recommendations to the Environmental Management Commission and the Environmental Review Commission beginning 1 September 2003. The Division shall report its final findings and recommendations to the Environmental Management Commission and the Environmental Review Commission no later than 1 September 2005. The costs of implementing any air quality standards and plans to reduce the emission of carbon dioxide (CO2) from coal-fired generating units below the standards in effect on the date this act becomes effective, except to the extent that the emission of carbon dioxide (CO2) is reduced as a result of the reductions in the emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required to achieve the emissions limitations set out in G.S. 143-215.107D, as enacted by Section 1 of this act, shall not be recoverable pursuant to G.S. 62-133.6, as enacted by Section 9 of this act.

"On or before 1 June of each year, the Department of Environment and Natural Resources and the Utilities Commission shall report on the implementation of this act to the Environmental Review Commission and the Joint Legislative Utility Review Committee. The first report required by this section shall be submitted no later than 1 June 2003."

Session Laws 2006-79, s. 12, amended Session Laws 2002-4, s. 11, to change the date on which the Environmental Management Commission shall begin reporting annually its findings and recommendations to the General Assembly and the Environmental Review Commission from 1 September 2005 until 1 September 2007.

Session Laws 2002-4, s. 15, contains a severability clause.

Session Laws 2005-442, ss. 1 through 12, as amended by Session Laws 2006-73, s. 1, as amended by Session Laws 2008-81, s. 1, and as amended by Session Laws 2009-306, s. 1, provide as follows: "SECTION 1. Commission Established; Membership. — The Legislative Commission on Global Climate Change is hereby established. The Commission shall consist of 34 members as follows:

"(1) Nine members appointed by the President Pro Tempore of the Senate.

"(2) Nine members appointed by the Speaker of the House of Representatives.

"(3) The President of Duke Power or the President's designee.

"(4) The President of Progress Energy or the President's designee.

"(5) The President of the North Carolina Citizens for Business and Industry or the President's designee.

"(6) The President of the Manufacturers and

Chemical Industry Council of North Carolina or the President's designee.

"(7) The President of the North Carolina Farm Bureau Federation or the President's designee.

"(8) The President of the North Carolina Forestry Association or the President's designee.

"(9) The Southeast Regional Director of Environmental Defense or the Regional Director's designee.

"(10) The Executive Director of the Southern Alliance for Clean Energy or the Executive Director's designee.

"(11) The Executive Director of the North Carolina Coastal Federation or the Executive Director's designee.

"(12) The Executive Director of the North Carolina Conservation Council or the Executive Director's designee.

"(13) The Dean of the Nicholas School of the Environment and Earth Sciences, Duke University, or the Dean's designee.

"(14) The Dean of the College of Agriculture and Life Sciences at North Carolina State University or the Dean's designee.

"(15) The Dean of the School of Agriculture and Environmental Sciences at North Carolina Agricultural and Technical State University or the Dean's designee.

"(16) The Director of the Carolina Environmental Program at the University of North Carolina at Chapel Hill or the Director's designee.

"(17) The Distinguished Research Professor (with expertise in sea level change), Department of Geology at East Carolina University.

"(18) The North Carolina State Climatologist.

"SECTION 2. Cochairs. — The Commission shall have two cochairs, one designated by the President Pro Tempore of the Senate and one designated by the Speaker of the House of Representatives from among their respective appointees. The Commission shall meet upon the call of the cochairs.

"SECTION 3. Quorum. — A quorum of the Commission shall consist of 18 members.

"SECTION 4. Vacancies. — Any vacancy on the Commission shall be filled by the original appointing authority.

"SECTION 5. Purpose and Duties. — The Commission shall have the following purposes and duties:

"(1) The Commission shall conduct an in-depth examination of issues related to global climate change. This examination shall include all of the following:

"a. A review of current scientific literature on the possible natural and anthropogenic causes of global climate change.

"b. A review of actions taken by the federal government and by other states to address global warming.

"c. An examination of the emissions of greenhouse gases from within the State and the extent to which reductions in the emissions of these gases in the State, region, nation, and worldwide could be expected to affect global climate change.

"d. An evaluation of the economic opportunities for the State that may result from international, national, and State action to address global climate change and the emerging carbon market.

"e. The potential impacts of global climate change on the citizens, natural resources, and economy of the State, including agriculture, travel and tourism, recreation, coastal real estate, insurance, and other economic sectors.

"f. The costs of any action taken by the State to address global climate change on individuals, individual households, local governments, businesses, educational institutions, agricultural operations, the State government, and other institutions and economic sectors.

"The benefits of any action taken by or within the State or other states and at the national or international levels to address global climate change on individuals, individual households, local governments, businesses, educational institutions, agricultural operations, the State government, and other institutions and economic sectors.

"(2) If, in the course of its examination, the Commission determines that it would be appropriate and desirable for the State to establish a global warming pollutant reduction goal, the Commission may develop a recommended global warming pollutant reduction goal for the State.

"(3) In conducting its examination of global climate change, the Commission shall consider and integrate the findings and recommendations of the study of issues related to the development and implementation of standards and plans to control emissions of carbon dioxide required by Section 13 of S.L. 2002-4.

"(4) Based on its examination of global climate change, the Commission shall develop findings and recommendations, including any legislative proposals it determines to be appropriate, for consideration by the General Assembly.

"SECTION 6. Additional Duties. — The Commission may work cooperatively with other state and national governments to organize a forum on global climate change, including its causes, impacts, challenges, and opportunities in the southeastern United States. The Commission may also work cooperatively with other State agencies with respect to the agencies' areas of responsibilities regarding greenhouse gas emissions and climate change.

"SECTION 7. Expenses of Members. — Members of the Commission shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate.

"SECTION 8. Staff. — Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional staff to the Commission to aid in its work.

"SECTION 9. Consultants. — The Commission may hire consultants to assist with the study as provided in G.S. 120-32.02(b).

"SECTION 10. Meetings. — The Commission may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Commission.

"SECTION 11. Reports. — The Commission may submit interim reports at its discretion. The Commission shall submit a final report, including any findings and recommendations, to the General Assembly and the Environmental Review Commission on or before October 1, 2010, at which time the Commission shall terminate.

"SECTION 12. Funding. — From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the purpose of conducting the study provided for in this Part."

CASE NOTES

General Rate Proceeding Preempted. — G.S. 62-133.6(e) simply allows the legislature to preempt the North Carolina Utilities Commission's ability to compel a general rate case by freezing rates until 31 December 2007; the North Carolina Utilities Commission properly dismissed a complaint regarding rates and a petition to initiate a general rate proceeding filed against an energy corporation by a customers association. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 163 N.C. App. 46, 592 S.E.2d 221, 2004 N.C. App. LEXIS 253 (2004), cert. denied, 358 N.C. 739, — S.E.2d — (2004), cert. dismissed, 358 N.C. 739, 602 S.E.2d 682 (2004).

§ 62-133.7. Customer usage tracking rate adjustment mechanisms for natural gas local distribution company rates.

In setting rates for a natural gas local distribution company in a general rate case proceeding under G.S. 62-133, the Commission may adopt, implement, modify, or eliminate a rate adjustment mechanism for one or more of the company's rate schedules, excluding industrial rate schedules, to track and true-up variations in average per customer usage from levels approved in the general rate case proceeding. The Commission may adopt a rate adjustment mechanism only upon a finding by the Commission that the mechanism is appropriate to track and true-up variations in average per customer usage by rate schedule from levels adopted in the general rate case proceeding and that the mechanism is in the public interest. (2007-227, s. 1.)

Editor's Note. — Session Laws 2007-227, s. 2, provides: "The Utilities Commission shall report to the Joint Legislative Utility Review Committee on the orders issued pursuant to G.S. 62-133.7 and the results obtained under those orders, as well as results obtained from the customer usage tracking component of the Commission's order issued in Docket G-9, Sub 499. The first report shall be delivered not later than July 1, 2008, and cover the period beginning with the effective date of this act [July 18, 2007] and ending June 1, 2008. Thereafter, the Commission shall report as required by the Committee."

Session Laws 2007-227, s. 3, made this section effective July 18, 2007.

Session Laws 2007-397, s. 14, provides: "The Utilities Commission shall submit to the Governor, the Environmental Review Commission, and the Joint Legislative Utility Review Committee a report on the actual results of the cost allocations established pursuant to G.S. 62-133.7(h), as enacted by Section 2 of this act, G.S. 62-133.8(e) and G.S. 62-133.8(f), as enacted by Section 4 of this act, and G.S. 62-133.2(a2) and G.S.62-133.2(a3), as enacted by Section 5 of this act, during the preceding two fiscal years on or before 1 October of odd-numbered years. The Utilities Commission shall submit the first report required by this section no later than 1 October 2009."

§ 62-133.8. Renewable Energy and Energy Efficiency Portfolio Standard (REPS).

(a) Definitions. — As used in this section:

(1) "Combined heat and power system" means a system that uses waste heat to produce electricity or useful, measurable thermal or mechanical energy at a retail electric customer's facility.

(2) "Demand-side management" means activities, programs, or initiatives undertaken by an electric power supplier or its customers to shift the timing of electricity use from peak to nonpeak demand periods. "Demand-side management" includes, but is not limited to, load management, electric system equipment and operating controls, direct load control, and interruptible load.

(3) "Electric power supplier" means a public utility, an electric membership corporation, or a municipality that sells electric power to retail electric power customers in the State.

(4) "Energy efficiency measure" means an equipment, physical, or program change implemented after January 1, 2007, that results in less energy used to perform the same function. "Energy efficiency measure" includes, but is not limited to, energy produced from a combined heat and power system that uses nonrenewable energy resources. "Energy efficiency measure" does not include demand-side management.

(5) "New renewable energy facility" means a renewable energy facility that either:

a. Was placed into service on or after January 1, 2007.

b. Delivers or has delivered electric power to an electric power supplier pursuant to a contract with NC GreenPower Corporation that was entered into prior to January 1, 2007.

c. Is a hydroelectric power facility with a generation capacity of 10 megawatts or less that delivers electric power to an electric power supplier.

(6) "Renewable energy certificate" means a tradable instrument that is equal to one megawatt hour of electricity or equivalent energy supplied by a renewable energy facility, new renewable energy facility, or reduced by implementation of an energy efficiency measure that is used to track and verify compliance with the requirements of this section as determined by the Commission. A "renewable energy certificate" does not include the related emission reductions, including, but not limited to, reductions of sulfur dioxide, oxides of nitrogen, mercury, or carbon dioxide.

(7) "Renewable energy facility" means a facility, other than a hydroelectric power facility with a generation capacity of more than 10 megawatts, that either:

a. Generates electric power by the use of a renewable energy resource.

b. Generates useful, measurable combined heat and power derived from a renewable energy resource.

c. Is a solar thermal energy facility.

(8) "Renewable energy resource" means a solar electric, solar thermal, wind, hydropower, geothermal, or ocean current or wave energy resource; a biomass resource, including agricultural waste, animal waste, wood waste, spent pulping liquors, combustible residues, combustible liquids, combustible gases, energy crops, or landfill methane; waste heat derived from a renewable energy resource and used to produce electricity or useful, measurable thermal energy at a

retail electric customer's facility; or hydrogen derived from a renewable energy resource. "Renewable energy resource" does not include peat, a fossil fuel, or nuclear energy resource.

(b) Renewable Energy and Energy Efficiency Standards (REPS) for Electric Public Utilities. —

(1) Each electric public utility in the State shall be subject to a Renewable Energy and Energy Efficiency Portfolio Standard (REPS) according to the following schedule:

Calendar Year	**REPS Requirement**
2012	3% of 2011 North Carolina retail sales
2015	6% of 2014 North Carolina retail sales
2018	10% of 2017 North Carolina retail sales
2021 and thereafter	12.5% of 2020 North Carolina retail sales

(2) An electric public utility may meet the requirements of this section by any one or more of the following:

a. Generate electric power at a new renewable energy facility.

b. Use a renewable energy resource to generate electric power at a generating facility other than the generation of electric power from waste heat derived from the combustion of fossil fuel.

c. Reduce energy consumption through the implementation of an energy efficiency measure; provided, however, an electric public utility subject to the provisions of this subsection may meet up to twenty-five percent (25%) of the requirements of this section through savings due to implementation of energy efficiency measures. Beginning in calendar year 2021 and each year thereafter, an electric public utility may meet up to forty percent (40%) of the requirements of this section through savings due to implementation of energy efficiency measures.

d. Purchase electric power from a new renewable energy facility. Electric power purchased from a new renewable energy facility located outside the geographic boundaries of the State shall meet the requirements of this section if the electric power is delivered to a public utility that provides electric power to retail electric customers in the State; provided, however, the electric public utility shall not sell the renewable energy certificates created pursuant to this paragraph to another electric public utility.

e. Purchase renewable energy certificates derived from in-State or out-of-state new renewable energy facilities. Certificates derived from out-of-state new renewable energy facilities shall not be used to meet more than twenty-five percent (25%) of the requirements of this section, provided that this limitation shall not apply to an electric public utility with less than 150,000 North Carolina retail jurisdictional customers as of December 31, 2006.

f. Use electric power that is supplied by a new renewable energy facility or saved due to the implementation of an energy efficiency measure that exceeds the requirements of this section for any calendar year as a credit towards the requirements of this section in the following calendar year or sell the associated renewable energy certificates.

(c) Renewable Energy and Energy Efficiency Standards (REPS) for Electric Membership Corporations and Municipalities. —

(1) Each electric membership corporation or municipality that sells electric power to retail electric power customers in the State shall be

subject to a Renewable Energy and Energy Efficiency Portfolio Standard (REPS) according to the following schedule:

Calendar Year	**REPS Requirement**
2012	3% of 2011 North Carolina retail sales
2015	6% of 2014 North Carolina retail sales
2018 and thereafter	10% of 2017 North Carolina retail sales

(2) An electric membership corporation or municipality may meet the requirements of this section by any one or more of the following:
  a. Generate electric power at a new renewable energy facility.
  b. Reduce energy consumption through the implementation of demand-side management or energy efficiency measures.
  c. Purchase electric power from a renewable energy facility or a hydroelectric power facility, provided that no more than thirty percent (30%) of the requirements of this section may be met with hydroelectric power, including allocations made by the Southeastern Power Administration.
  d. Purchase renewable energy certificates derived from in-State or out-of-state renewable energy facilities. An electric power supplier subject to the requirements of this subsection may use certificates derived from out-of-state renewable energy facilities to meet no more than twenty-five percent (25%) of the requirements of this section.
  e. Acquire all or part of its electric power through a wholesale purchase power agreement with a wholesale supplier of electric power whose portfolio of supply and demand options meets the requirements of this section.
  f. Use electric power that is supplied by a new renewable energy facility or saved due to the implementation of demand-side management or energy efficiency measures that exceeds the requirements of this section for any calendar year as a credit towards the requirements of this section in the following calendar year or sell the associated renewable energy certificates.

(d) Compliance With REPS Requirement Through Use of Solar Energy Resources. — For calendar year 2018 and for each calendar year thereafter, at least two-tenths of one percent (0.2%) of the total electric power in kilowatt hours sold to retail electric customers in the State, or an equivalent amount of energy, shall be supplied by a combination of new solar electric facilities and new metered solar thermal energy facilities that use one or more of the following applications: solar hot water, solar absorption cooling, solar dehumidification, solar thermally driven refrigeration, and solar industrial process heat. The terms of any contract entered into between an electric power supplier and a new solar electric facility or new metered solar thermal energy facility shall be of sufficient length to stimulate development of solar energy; provided, the Commission shall develop a procedure to determine if an electric power supplier is in compliance with the provisions of this subsection if a new solar electric facility or a new metered solar thermal energy facility fails to meet the terms of its contract with the electric power supplier. As used in this subsection, "new" means a facility that was first placed into service on or after January 1, 2007. The electric power suppliers shall comply with the requirements of this subsection according to the following schedule:

Calendar Year	Requirement for Solar Energy Resources
2010	0.02%
2012	0.07%
2015	0.14%
2018	0.20%

(e) Compliance With REPS Requirement Through Use of Swine Waste Resources. — For calendar year 2018 and for each calendar year thereafter, at least two-tenths of one percent (0.2%) of the total electric power in kilowatt hours sold to retail electric customers in the State shall be supplied, or contracted for supply in each year, by swine waste. The electric power suppliers, in the aggregate, shall comply with the requirements of this subsection according to the following schedule:

Calendar Year	Requirement for Swine Waste Resources
2012	0.07%
2015	0.14%
2018	0.20%

(f) Compliance With REPS Requirement Through Use of Poultry Waste Resources. — For calendar year 2014 and for each calendar year thereafter, at least 900,000 megawatt hours of the total electric power sold to retail electric customers in the State shall be supplied, or contracted for supply in each year, by poultry waste combined with wood shavings, straw, rice hulls, or other bedding material. The electric power suppliers, in the aggregate, shall comply with the requirements of this subsection according to the following schedule:

Calendar Year	Requirement for Poultry Waste Resources
2012	170,000 megawatt hours
2013	700,000 megawatt hours
2014	900,000 megawatt hours

(g) Control of Emissions. — As used in this subsection, Best Available Control Technology (BACT) means an emissions limitation based on the maximum degree a reduction in the emission of air pollutants that is achievable for a facility, taking into account energy, environmental, and economic impacts and other costs. A biomass combustion process at any new renewable energy facility that delivers electric power to an electric power supplier shall meet BACT. The Environmental Management Commission shall determine on a case-by-case basis the BACT for a facility that would not otherwise be required to comply with BACT pursuant to the Prevention of Significant Deterioration (PSD) emissions program. The Environmental Management Commission may adopt rules to implement this subsection. In adopting rules, the Environmental Management Commission shall take into account cumulative and secondary impacts associated with the concentration of biomass facilities in close proximity to one another. In adopting rules the Environmental Management Commission shall provide for the manner in which a facility that would not otherwise be required to comply with BACT pursuant to the PSD emissions programs shall meet the BACT requirement.

(h) Cost Recovery and Customer Charges. —

(1) For the purposes of this subsection, the term "incremental costs" means all reasonable and prudent costs incurred by an electric power supplier to:

a. Comply with the requirements of subsections (b), (c), (d), (e), and (f) of this section that are in excess of the electric power supplier's avoided costs other than those costs recovered pursuant to G.S. 62-133.9.

b. Fund research that encourages the development of renewable energy, energy efficiency, or improved air quality, provided those costs do not exceed one million dollars ($1,000,000) per year.

c. Comply with any federal mandate that is similar to the requirements of subsections (b), (c), (d), (e), and (f) of this section that exceed the costs that the electric power supplier would have incurred under those subsections in the absence of the federal mandate.

(2) All reasonable and prudent costs incurred by an electric power supplier to comply with any federal mandate that is similar to the requirements of subsections (b), (c), (d), (e), and (f) of this section, including, but not limited to, the avoided costs associated with a federal mandate that exceeds the avoided costs that the electric power supplier would have incurred pursuant to subsections (b), (c), (d), (e), and (f) of this section in the absence of the federal mandate, shall be recovered by the electric power supplier in an annual rider charge assessed in accordance with the schedule set out in subdivision (4) of this subsection increased by the Commission on a pro rata basis to allow for full and complete recovery of all reasonable and prudent costs incurred to comply with the federal mandate.

(3) Except as provided in subdivision (2) of this subsection, the total annual incremental cost to be incurred by an electric power supplier and recovered from the electric power supplier's retail customers shall not exceed an amount equal to the per-account annual charges set out in subdivision (4) of this subsection applied to the electric power supplier's total number of customer accounts determined as of December 31 of the previous calendar year. An electric power supplier shall be conclusively deemed to be in compliance with the requirements of subsections (b), (c), (d), (e), and (f) of this section if the electric power supplier's total annual incremental costs incurred equals an amount equal to the per-account annual charges set out in subdivision (4) of this subsection applied to the electric power supplier's total number of customer accounts determined as of December 31 of the previous calendar year. The total annual incremental cost recoverable by an electric power supplier from an individual customer shall not exceed the per-account charges set out in subdivision (4) of this subsection except as these charges may be adjusted in subdivision (2) of this subsection.

(4) An electric power supplier shall be allowed to recover the incremental costs incurred to comply with the requirements of subsections (b), (c), (d), (e), and (f) of this section and fund research as provided in subdivision (1) of this subsection through an annual rider not to exceed the following per-account annual charges:

Customer Class	**2008-2011**	**2012-2014**	**2015 and thereafter**
Residential per account	$10.00	$12.00	$34.00
Commercial per account	$50.00	$150.00	$150.00
Industrial per account	$500.00	$1,000.00	$1,000.00

(5) The Commission shall adopt rules to establish a procedure for the annual assessment of the per-account charges set out in this subsection to an electric public utility's customers to allow for timely recovery of all reasonable and prudent costs of compliance with the requirements of subsections (b), (c), (d), (e), and (f) of this section and to fund research as provided in subdivision (1) of this subsection. The Commission shall ensure that the costs to be recovered from individual customers on a per-account basis pursuant to subdivisions (2) and (3) of this subsection are in the same proportion as the per-account annual charges for each customer class set out in subdivision (4) of this subsection.

(i) Adoption of Rules. — The Commission shall adopt rules to implement the provisions of this section. In developing rules, the Commission shall:

(1) Provide for the monitoring of compliance with and enforcement of the requirements of this section.

(2) Include a procedure to modify or delay the provisions of subsections (b), (c), (d), (e), and (f) of this section in whole or in part if the Commission determines that it is in the public interest to do so. The procedure adopted pursuant to this subdivision shall include a requirement that the electric power supplier demonstrate that it made a reasonable effort to meet the requirements set out in this section.

(3) Ensure that energy credited toward compliance with the provisions of this section not be credited toward any other purpose, including another renewable energy portfolio standard or voluntary renewable energy purchase program in this State or any other state.

(4) Establish standards for interconnection of renewable energy facilities and other nonutility-owned generation with a generation capacity of 10 megawatts or less to an electric public utility's distribution system; provided, however, that the Commission shall adopt, if appropriate, federal interconnection standards.

(5) Ensure that the owner and operator of each renewable energy facility that delivers electric power to an electric power supplier is in substantial compliance with all federal and state laws, regulations, and rules for the protection of the environment and conservation of natural resources.

(6) Consider whether it is in the public interest to adopt rules for electric public utilities for net metering of renewable energy facilities with a generation capacity of one megawatt or less.

(7) Develop procedures to track and account for renewable energy certificates, including ownership of renewable energy certificates that are derived from a customer owned renewable energy facility as a result of any action by a customer of an electric power supplier that is independent of a program sponsored by the electric power supplier.

(j) Report. — No later than October 1 of each year, the Commission shall submit a report on the activities taken by the Commission to implement, and by electric power suppliers to comply with, the requirements of this section to the Governor, the Environmental Review Commission, and the Joint Legislative Utility Review Committee. The report shall include any public comments received regarding direct, secondary, and cumulative environmental impacts of the implementation of the requirements of this section. In developing the report, the Commission shall consult with the Department of Environment and Natural Resources.

(k) Tracking of Renewable Energy Certificates. — No later than July 1, 2010, the Commission shall develop, implement, and maintain an Internet Web site for the online tracking of renewable energy certificates in order to verify the compliance of electric power suppliers with the REPS requirements of this section and to facilitate the establishment of a market for the purchase and sale of renewable energy certificates. (2007-397, s. 2(a); 2009-475, s. 14(a).)

Editor's Note. — Session Laws 2007-397, s. 2(a), enacted this section as G.S. 62-133.7. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2007-397, s. 2(b), provides that the Commission shall submit the first report required by G.S. 62-133.8(j), as enacted by subsection (a) of this section, no later than October 1, 2008.

Session Laws 2007-397, s. 3, provides: "If the federal government imposes requirements similar to those set out in G.S. 62-133.8 on electric power suppliers in the State, the Utilities Commission shall determine the applicability of federal and State requirements so as to apply the more stringent requirements except to the extent that State requirements may be specifically preempted by federal law. The Commission shall adopt rules to establish a procedure as an alternative to the procedure set out in G.S. 62-133 to annually adjust the rates of electric public utilities to allow timely recovery of all reasonable costs of compliance with the federal and State requirements pursuant to G.S. 62-133.8(h), as enacted by Section 2 of this act. In adopting rules to establish the procedure, the Commission shall incorporate the provisions of this act in accordance with this section and the public interest."

Session Laws 2007-397, s. 14, provides: "The Utilities Commission shall submit to the Governor, the Environmental Review Commission, and the Joint Legislative Utility Review Committee a report on the actual results of the cost allocations established pursuant to G.S. 62-133.8(h), as enacted by Section 2 of this act, G.S. 62-133.9(e) and G.S. 62-133.9(f), as enacted by Section 4 of this act, and G.S. 62-133.2(a2) and G.S.62-133.2(a3), as enacted by Section 5 of this act, during the preceding two fiscal years on or before 1 October of odd-numbered years. The Utilities Commission shall submit the first report required by this section no later than 1 October 2009."

Session Laws 2007-397, s. 15 contains a severability clause.

Session Laws 2007-397, s. 16, made this section effective January 1, 2008, and provides: "The provisions of Section 2 of this act that provide for the recovery of costs incurred under Section 2 apply only to costs that are incurred on and after 1 January 2008."

Session Laws 2009-451, s. 9.14(d), provides: "The energy generated by the wind turbines constructed pursuant to this act shall be allocated between The University of North Carolina and a third party with which The University enters into a contract pursuant to subsection (a) of this section. The allocation shall be determined by written agreement between the parties. For the purposes of this demonstration project, for every 1 megawatt-hour (MWh) generated by the project, The University shall receive one renewable energy certificate (REC), including all environmental attributes, benefits, and credits. The third party described in subsection (a) of this section shall be deemed to have received 3.0 RECs for every 1 MWh of electricity generated by the project solely in order to meet the obligations of the NC Renewable Energy and Energy Efficiency Portfolio Standard (REPS) of G.S. 62-133.8(b) and shall not be subject to the provisions of G.S. 62.133.8(h)."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Session Laws 2009-475, s. 14(b) and (c), provides: "(b) The North Carolina Utilities Commission shall use available funds for the 2009-2010 fiscal year to implement this section.

"(c) The Energy Policy Council and the North Carolina Utilities Commission shall jointly study and design an online renewable energy certificates trading exchange to facilitate the establishment of a market for purchase and sale of renewable energy certificates. The study shall explore how to implement an exchange that will not require appropriated funds from the State and shall examine all costs to the consumer. The Energy Policy Council and the North Carolina Utilities Commission shall report their findings and recommendations to the General Assembly by April 1, 2010."

Session Laws 2009-475, s. 15, provides: "The General Assembly finds that it is in the public interest of the State of North Carolina to ensure expeditious awards of ARRA funds to maximize the economic recovery impact of the ARRA. It is the policy of the State to provide fair regulation, oversight, and transparency for the use of ARRA funds and to quickly and efficiently complete the awards of grants and contracts under the ARRA. It is also the policy of this State that, due to the historic level of federal and State oversight of ARRA grant and contract awards, restraint should be exercised in the granting of legal and injunctive relief that might forestall awards to programs and contractors."

Effect of Amendments. — Session Laws 2009-475, s. 14(a), effective February 17, 2009, added subsection (k).

§ 62-133.9. Cost recovery for demand-side management and energy efficiency measures.

(a) The definitions set out in G.S. 62-133.8 apply to this section. As used in this section, "new," used in connection with demand-side management or energy efficiency measure, means a demand-side management or energy efficiency measure that is adopted and implemented on or after January 1, 2007, including subsequent changes and modifications.

(b) Each electric power supplier shall implement demand-side management and energy efficiency measures and use supply-side resources to establish the least cost mix of demand reduction and generation measures that meet the electricity needs of its customers. An electric membership corporation or municipality that qualifies as an electric power supplier may satisfy the requirements of this section through its purchases from a wholesale supplier of electric power that uses supply-side resources and demand-side management to meet all or a portion of the supply needs of its members and their retail customers, and that, by aggregating and promoting demand-side management and energy efficiency measures for its members, meets the requirements of this section.

(c) Each electric power supplier to which G.S. 62-110.1 applies shall include an assessment of demand-side management and energy efficiency in its resource plans submitted to the Commission and shall submit cost-effective demand-side management and energy efficiency options that require incentives to the Commission for approval.

(d) The Commission shall, upon petition of an electric public utility, approve an annual rider to the electric public utility's rates to recover all reasonable and prudent costs incurred for adoption and implementation of new demand-side management and new energy efficiency measures. Recoverable costs include, but are not limited to, all capital costs, including cost of capital and depreciation expenses, administrative costs, implementation costs, incentive payments to program participants, and operating costs. In determining the amount of any rider, the Commission:

(1) Shall allow electric public utilities to capitalize all or a portion of those costs to the extent that those costs are intended to produce future benefits.

(2) May approve other incentives to electric public utilities for adopting and implementing new demand-side management and energy efficiency measures. Allowable incentives may include:
  a. Appropriate rewards based on the sharing of savings achieved by the demand-side management and energy efficiency measures.
  b. Appropriate rewards based on capitalization of a percentage of avoided costs achieved by demand-side management and energy efficiency measures.
  c. Any other incentives that the Commission determines to be appropriate.

(e) The Commission shall determine the appropriate assignment of costs of new demand-side management and energy efficiency measures for electric public utilities and shall assign the costs of the programs only to the class or classes of customers that directly benefit from the programs.

(f) None of the costs of new demand-side management or energy efficiency measures of an electric power supplier shall be assigned to any industrial customer that notifies the industrial customer's electric power supplier that, at the industrial customer's own expense, the industrial customer has implemented at any time in the past or, in accordance with stated, quantified goals for demand-side management and energy efficiency, will implement alternative demand-side management and energy efficiency measures and that the industrial customer elects not to participate in demand-side management or energy efficiency measures under this section. The electric power supplier that provides electric service to the industrial customer, an industrial customer that receives electric service from the electric power supplier, the Public Staff, or the Commission on its own motion, may initiate a complaint proceeding before the Commission to challenge the validity of the notification of nonparticipation. The procedures set forth in G.S. 62-73, 62-74, and 62-75 shall govern any such complaint. The provisions of this subsection shall also apply to commercial customers with significant annual usage at a threshold level to be established by the Commission.

(g) An electric public utility shall not charge an industrial or commercial customer for the costs of installing demand-side management equipment on the customer's premises if the customer provides, at the customer's expense, equivalent demand-side management equipment.

(h) The Commission shall adopt rules to implement this section.

(i) The Commission shall submit to the Governor and to the Joint Legislative Utility Review Committee a summary of the proceedings conducted pursuant to this section during the preceding two fiscal years on or before September 1 of odd-numbered years. (2007-397, s. 4(a).)

Editor's Note. — Session Laws 2007-397, s. 4(a), enacted this section as G.S. 62-133.8. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2007-397, s. 4(b), provides that the Utilities Commission shall submit the first report required by G.S. 62-133.9(i), as enacted by subsection (a) of this section, no later than September 1, 2009.

Session Laws 2007-397, s. 4(c), provides: "The Utilities Commission shall prepare an analysis of whether rate structures, policies, and measures, including decoupling, in place in other states and countries that promote a mix of generation involving renewable energy sources and demand reduction should be implemented in this State. The Commission shall submit this analysis to the Governor, Environmental Review Commission, and the Joint Legislative Utility Review Committee no later than 1 September 2008."

Session Laws 2007-397, s. 14, provides: "The Utilities Commission shall submit to the Governor, the Environmental Review Commission, and the Joint Legislative Utility Review Committee a report on the actual results of the cost allocations established pursuant to G.S. 62-133.8(h), as enacted by Section 2 of this act, G.S. 62-133.9(e) and G.S. 62-133.9(f), as enacted by Section 4 of this act, and G.S. 62-133.2(a2) and G.S.62-133.2(a3), as enacted by Section 5 of this act, during the preceding two fiscal years on or before 1 October of odd-numbered years. The Utilities Commission shall submit the first report required by this section no later than 1 October 2009."

Session Laws 2007-397, s. 15 contains a severability clause.

Session Laws 2007-397, s. 16, made this section effective August 20, 2007, and provides: "The provisions of Section 4 of this act that provide for the recovery of costs incurred under Section 4 apply only to costs that are incurred on and after the date that this act becomes law."

§ 62-133.10. Retention of fuel and fuel-related cost savings associated with the purchase or construction of a carbon offset facility.

(a) The Commission shall permit an electric public utility that purchases or constructs a carbon offset facility to adjust its fuel and fuel-related costs in G.S. 62-133.2 to retain the North Carolina retail allocation of the system fuel and fuel-related cost savings resulting from the purchase or construction of the facility, not to exceed the annual revenue requirement associated with the allocated North Carolina retail portion of the facility as determined using the cost of service methodology approved by the Commission in the utility's last general rate case.

(b) For purposes of this section, "carbon offset facility" means a facility in this State that meets all of the following:

(1) The facility is purchased or constructed by an electric public utility between July 1, 2009, and July 1, 2014.
(2) The facility uses solar electric, solar thermal, wind, hydropower, geothermal, or ocean current or wave energy to generate electricity or equivalent BTUs.
(3) The electricity or equivalent BTUs produced by the facility will displace electric generation so as to reduce greenhouse gas emissions from existing fossil fuel fired generating facilities used by the utility to meet the electricity needs of its North Carolina customers.

(c) An electric public utility seeking the adjustment authorized by this section first shall file with the Commission a petition requesting a determination that the facility the utility proposes to purchase or construct is a carbon offset facility. The utility shall include in its petition all of the following information in such form and detail as the Commission may require:

(1) Description and location of the facility.
(2) The benefit of the facility.
(3) A list of all necessary permitting and approvals and their status.
(4) Purchase or construction schedule, with in-service or completion date.
(5) Projected costs to purchase or construct and the annual revenue requirement for the facility.
(6) Projected annual generation output of the facility and information detailing how the generation projections were calculated.
(7) Information demonstrating that the operation of the facility will displace electric generation resulting in a reduction of greenhouse gas emissions from existing fossil fuel fired facilities used by the utility to meet the electricity needs of its North Carolina customers.
(8) The projected fuel and fuel-related cost savings the utility seeks to retain and how the savings were calculated.

(d) Upon the filing of the petition, the Public Staff shall conduct an investigation and shall file a report with the Commission setting forth the results of its investigation and stating whether the facility is a carbon offset facility. The Public Staff's report shall be filed not later than 45 days after the date the petition was filed, unless the Commission grants an extension of time not to exceed 15 days for good cause shown. Other interested persons may file comments in response to the utility's petition and the Public Staff's report not later than 15 days after the Public Staff files its report. The Commission shall enter an order either granting or denying the petition not later than 105 days after the date the petition was filed. A finding by the Commission that the facility is a carbon offset facility shall establish that the utility's decision to purchase or construct the facility is reasonable and prudent.

(e) Nothing in this section shall be construed to exempt an electric public utility from obtaining all applicable permits and certificates, including a certificate of public convenience and necessity required by G.S. 62-110.1. An electric public utility shall file annual cost and schedule updates with the Commission until the purchase or construction of an approved carbon offset facility is completed.

(f) Upon placement into service of an approved carbon offset facility, the electric public utility shall, in addition to the information and data provided under G.S. 62-133.2, submit the following in conjunction with its application for a fuel and fuel-related charge adjustment:

(1) A calculation of the annual revenue requirement associated with the carbon offset facility.

(2) Information demonstrating the specific items of costs associated with the carbon offset facility's annual revenue requirement are reasonable and prudent.

(3) The fuel and fuel-related cost savings resulting from operation of the carbon offset facility.

(4) Actual generation output of the carbon offset facility, including a demonstration and quantification of how this generation displaced electric generation resulting in reduced greenhouse gas emissions from existing fossil fuel fired facilities used by the utility to meet the electricity needs of its North Carolina customers during the test year.

(g) The Commission shall approve an estimate of the projected fuel and fuel-related cost savings and an annual revenue requirement for an approved facility, as appropriate, in each G.S. 62-133.2 proceeding. The Commission also may approve a true-up procedure for the projected fuel and fuel-related cost savings. In the first G.S. 62-133.2 proceeding conducted after the approved facility is placed in service, the Commission shall determine the reasonable and prudent cost of the facility for ratemaking purposes. The revenue requirement associated with the facility shall include but not be limited to: depreciation; operating and maintenance costs; applicable taxes; and a return on investment, net of accumulated depreciation, accumulated deferred income taxes, and other applicable savings or adjustments. The rate of return on investment shall be based on the then current capital structure, embedded cost of preferred stock, and embedded cost of debt of the public utility net of appropriate income taxes, and the cost of common equity approved in the public utility's then most recent general rate case.

(h) The Commission shall authorize the electric public utility to utilize deferral accounting for the fuel and fuel-related cost savings realized in conjunction with the operation of an approved facility. The Commission shall, by rule or order, approve the terms and conditions of the deferral accounting.

(i) The annual revenue requirement of the approved facility in excess of the annual fuel and fuel-related cost savings shall be deemed recovered through the utility's then current base rates.

(j) The adjustment authorized by this section shall terminate upon the establishment of new rates in the electric public utility's next general rate case following the placement into service and inclusion into base rates of the approved facility. (2009-390, s. 2.)

Editor's Note. — Session Laws 2009-390, s. 4, made this section effective July 31, 2009.

Session Laws 2009-390, s. 1(a), provides: "The General Assembly makes the following findings:

"(1) In 2002, North Carolina enacted S.L. 2002-4, the Clean Smokestacks Act, with the goal of improving air quality in the State.

"(2) With the enactment of the Clean Smokestacks Act, North Carolina became a national leader in multipollutant air emissions reduction strategies and has experienced significant reductions in oxides of nitrogen (NOx) and sulfur dioxide (SO2), and, as a co-benefit, mercury.

"(3) Duke Energy and Progress Energy, the investor-owned public utilities governed by the Clean Smokestacks Act, actively participated in the negotiations that led to the enactment of the Clean Smokestacks Act and recommended substantial emissions reductions requirements and an aggressive timeline for achieving compliance with those requirements.

"(4) Both Duke Energy and Progress Energy have produced emissions reductions greater than and sooner than required by the Clean Smokestacks Act.

"(5) The retirement of coal-fired generating units and installation of generating units that use natural gas as the primary fuel will reduce emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) more than would the installation of sulfur dioxide (SO2) emissions controls on the coal-fired generating units.

"(6) The retirement of coal-fired generating units and installation of generating units that use natural gas as the primary fuel will reduce emissions of carbon dioxide (CO2) and mercury (Hg) significantly more than would the installation of sulfur dioxide (SO2) emissions controls on the coal-fired generating units.

"(7) The retirement of coal-fired generating units that are owned and operated by Progress Energy and located in eastern North Carolina and the installation of generating units that use natural gas as their primary fuel to replace them will reduce emissions of oxides of nitrogen (NOx), sulfur dioxide (SO2), carbon dioxide (CO2), and mercury (Hg) more than would the installation of sulfur dioxide (SO2) emissions controls on the older coal-fired generating units."

§ 62-134. Change of rates; notice; suspension and investigation.

(a) Unless the Commission otherwise orders, no public utility shall make any changes in any rate which has been duly established under this Chapter, except after 30 days' notice to the Commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The public utility shall also give such notice, which may include notice by publication, of the proposed changes to other interested persons as the Commission in its discretion may direct. All proposed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection. The Commission, for good cause shown in writing, may allow changes in rates without requiring the 30 days' notice, under such conditions as it may prescribe. All such changes shall be immediately indicated upon its schedules by such public utility.

(b) Whenever there is filed with the Commission by any public utility any schedule stating a new or revised rate or rates, the Commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates. Pending such hearing and the decision thereon, the Commission, upon filing with such schedule and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than 270 days beyond the time when such rate or rates would otherwise go into effect. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate shall go into effect at the end of such period. After hearing, whether completed before or after the rate goes into effect, the Commission may make such order with respect thereto as would be proper in a proceeding instituted after it had become effective.

(c) At any hearing involving a rate changed or sought to be changed by the public utility, the burden of proof shall be upon the public utility to show that the changed rate is just and reasonable.

(d) Notwithstanding the provisions of this Article, any public utility engaged solely in distributing electricity to retail customers, which electricity has been purchased at wholesale rates from another public utility, an electric membership corporation or a municipality, may in its discretion, and without the necessity of public hearings as in this section is otherwise provided, elect to adopt the same retail rates to customers charged by the public utility, electric membership corporation or municipality from whom the wholesale power is purchased for the same service, unless the North Carolina Utility Commission finds upon a hearing, either on its own initiative or upon complaint, that the rate of return earned by such utility upon the basis of such rates is unjust and unreasonable. In such a proceeding the burden of proof shall be upon the electrical distribution company.

(e) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1197, s. 2.

(f) The Commission may adopt rules prescribing the information and exhibits required to be filed with any applications, or tariff for an increase in utility rates, including but not limited to all of the evidence or proof through the end of the test period which the utility will rely on at any hearing on such increase, and the Commission may suspend such increase until such data, information or exhibits are filed, in addition to the time provided for suspension of such increase in other provisions of this Chapter.

(g) The provisions of this section shall not be applicable to bus companies or to their rates, fares or tariffs.

(h) Notwithstanding the requirements of subsections (a) and (b) of this section, the Commission may, in lieu of fixing specific rates or tariffs for competitive services offered by a public utility defined in G.S. 62-3(23)a6, adopt practices and procedures to permit pricing flexibility, detariffing services, or both. In exercising its authority to permit pricing flexibility, detariffing of services, or both, the Commission shall first determine that the service is competitive. After a determination that the service is competitive, the Commission shall consider the following in deciding whether to permit pricing flexibility, detariffing of services, or both:

(1) The extent to which competing telecommunications services are available from alternative providers in the relevant geographic or service market;
(2) The market share, growth in market share, ease of entry, and affiliations of alternative providers;
(3) The size and number of alternative providers and the ability of such alternative providers to make functionally equivalent or substitute services readily available at competitive rates and on competitive terms and conditions;
(4) Whether the exercise of Commission authority produces tangible benefits to consumers that exceed those available by reliance on market forces;
(5) Whether the exercise of Commission authority inhibits the public utility from competing with unregulated providers of functionally equivalent telecommunications services;
(6) Whether the existence of competition tends to prevent abuses, unjust discrimination or excessive charges for the service or facility offered;
(7) Whether the public utility would gain an unfair advantage in its competitive activities; and
(8) Any other relevant factors protecting the public interest.

(i) On motion of any interested party and for good cause shown, the Commission shall hold hearings prior to adopting any pricing flexibility or detariffing of services permitted under this section. The Commission may also revoke a determination made under this section when the Commission determines, after notice and opportunity to be heard, that the public interest requires that the rates and charges for the service be more fully regulated.

(j) Notwithstanding the provisions of G.S. 62-140, the Commission may permit public utilities subject to subsection (h) of this section to offer competitive services to business customers upon agreement between the public utility and the customer provided the services are compensatory and cover the costs of providing the service. (1933, c. 307, s. 7; 1939, c. 365, s. 3; 1941, c. 97; 1945, c. 725; 1947, c. 1008, s. 24; 1949, c. 1132, s. 22; 1959, c. 422; 1963, c. 1165, s. 1; 1971, c. 551; 1973, c. 1444; 1975, c. 243, s. 8; c. 510, c. 867, s. 7; 1981 (Reg. Sess., 1982), c. 1197, s. 2; 1985, c. 676, s. 15(3); 1989, c. 112, s. 3.)

Cross References. — As to fuel charge adjustments for electric utilities, see G.S. 62-133.2.

Legal Periodicals. — For survey of 1977 law on public utility rate regulation, see 56 N.C.L. Rev. 847 (1978).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1024 (1981).

CASE NOTES

I. In General.
II. Suspension of Rate Changes.
III. Rate Changes Based on Fuel Costs Under Former Subsection (e).

I. IN GENERAL.

Ex Parte Order Allowing Effectuation of Fuel Adjustment Clause Held Constitutional. — An order entered ex parte allowing a utility to effectuate a fuel adjustment clause did not, in view of the procedures available to contest such action, violate N.C. Const., Art. I, § 19. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Limits on Commission's Authority. — The Commission is a creation of the legislature and, in fixing rates to be charged by public utilities, exercises the legislative function. It has no authority except that given to it by statute. A fortiori, the Commission has no authority to permit that which is forbidden by this section or to extend a previously granted rate increase which former subsection (e) declared terminated. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

Power to Refrain from Prescribing Conditions. — The power to prescribe conditions under subsection (a), like the power to suspend rate changes, includes the power to refrain from prescribing them. Thus the Commission by its affirmative order may allow applied-for rate changes to become immediately effective, conditionally or unconditionally. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Authority to Enter Interim Orders. — G.S. 62-135 and this section clearly authorize the Commission to permit rate schedule changes applied for by a utility to be placed into effect on an interim basis before hearing and final determination. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

The Utilities Commission had authority to enter an interim order allowing a power company's initially requested rate increase to go into effect pending final determination of the case, subject to the refund with interest of any portion of the increase ultimately determined to be excessive. State ex rel. Utils. Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

Petition to Be Determined on Basis of Facts Existing When Increase Effective. — The Utilities Commission must determine a petition for an increase in telephone rates on the basis of the facts existing at the time such increase is effective. State ex rel. N.C. Utils. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

And Not on Basis of Subsequent Events. — The Utilities Commission cannot consider events occurring subsequent to the date certain rates went into effect, to ascertain what were proper rates on that date. State ex rel. N.C. Utils. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

If a subsequent change in conditions warrants a new rate, such new rate must relate to the date of change. State ex rel. N.C. Utils. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

Transfer of Exchanges to Subsidiary During Pendency of Petition. — Where a telephone company, during the pendency of its petition for an increase in rates, transfers part of its exchanges to a subsidiary, the Utilities Commission, in the exercise of its discretion, may make the subsidiary a formal party and treat the original petition as a joint petition for a uniform system of rates; or it may make the subsidiary a party and fix proper rates for the subsidiary's exchanges and for the original petitioner's exchanges. State ex rel. N.C. Utils. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

The parties must be accorded an opportunity to be heard with respect to the effect, if any, a subsequent change in conditions had on the rate structure, and a denial of such opportunity would be a deprivation of due process. State ex rel. N.C. Utils. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

The Commission's findings, supported by substantial evidence, may not properly be set aside by the reviewing court merely because a different conclusion could have been reached upon the evidence. State ex rel. Utils. Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

Decision Upheld Unless Assailable Under G.S. 62-94(b). — The decision of the Commission with regard to rates for public utilities will be upheld by the Court of Appeals on appeal unless it is assailable on one of the grounds enumerated in G.S. 62-94(b). State ex rel. Utils. Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

For discussion of procedure to be followed in request for coal adjustment clause prior to 1975 enactment of former subsection (e), see State ex rel. Utils. Comm'n v. Edmisten, 26 N.C. App. 662, 217 S.E.2d 201 (1975), aff'd, 291 N.C. 361, 230 S.E.2d 671 (1976).

Applied in State ex rel. N.C. Utils. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210 (1966); State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Morgan, 16 N.C. App. 453, 192 S.E.2d 842 (1972); State ex rel. Utils. Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972); State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 361, 230 S.E.2d 671 (1976); State ex rel. Utils. Comm'n

v. Edmisten, 291 N.C. 477, 232 S.E.2d 199 (1977); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 478, 232 S.E.2d 200 (1977).

Cited in Senior Citizens Clubs v. Duke Power Co., 425 F. Supp. 411 (W.D.N.C. 1976); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976); State ex rel. Comm'r of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977); State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office, 294 N.C. 60, 241 S.E.2d 324 (1978); State ex rel. Utils. Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979); State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. Conservation Council, 64 N.C. App. 266, 307 S.E.2d 375 (1983); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 64 N.C. App. 609, 307 S.E.2d 803 (1983); State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985); State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993).

II. SUSPENSION OF RATE CHANGES.

Language of Subsection (b) Is Permissive. — While the language of subsection (b) gives the Commission authority to suspend changes in rates subject to the time limitation imposed, it does not require that it do so. The language is permissive, not mandatory. State ex rel. Utils. Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

The power granted the Commission by subsection (b) to suspend a requested change in rates is a discretionary one which the Commission may, but need not, exercise. State ex rel. Utils. Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

Authority to Suspend Rates for Lesser Period. — The authority to suspend rates for not more than 270 days clearly includes the power to suspend them for some lesser period. State ex rel. Utils. Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Power to Suspend Portion of Change for Lesser Period. — The discretionary power granted the Commission by subsection (b) to suspend a proposed change in rates for a period not longer than 270 days clearly includes the lesser power to suspend a portion of the change for some lesser period. State ex rel. Utils. Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

Suspension of Rates May Be Withdrawn or Modified. — Nothing in this section indicates a legislative intent that once the Commission exercises its discretionary power and suspends rates, it thereby necessarily exhausts its authority in that regard, so as thereafter to be precluded from withdrawing or modifying the suspension. State ex rel. Utils. Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

It is entirely consistent with the statutory procedure contemplated by this section that upon the filing with the Commission by a utility of a new or revised rate, the Commission, if it exercises its discretion to suspend such rate, should (1) act promptly and suspend the rate for up to the maximum period it is permitted to do so; (2) hold a preliminary hearing, if the Commission should deem this desirable, to receive additional evidence and information; and (3) in the clearer light furnished by the additional information so acquired, reconsider its original order and either modify it or cancel it altogether. State ex rel. Utils. Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

Implicit within the discretionary authority granted to determine whether and for how long to suspend is the discretion to cancel or modify a suspension once it has been made, and nothing in the language of this section suggests that the legislature intended that the Commission could exercise the discretionary authority granted it only if it did so on an all-or-nothing, once-and-for-all basis. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

III. RATE CHANGES BASED ON FUEL COSTS UNDER FORMER SUBSECTION (E).

The purpose of the expedited fuel proceeding was to allow a utility to change its rates based solely on fluctuations in fuel costs. The reasonableness of the utility's based fuel costs are not to be considered. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

From a review of the language, purpose and history of former subsection (e), it can be concluded that the legislature intended that the Utilities Commission consider in the fuel adjustment proceedings only the fluctuations in the price of fossil fuels — oil, coal and natural gas — used by the utility in the production of electric power in its own generating units. The legislature did not intend to include in the expedited hearing proceedings the myriad of issues relating to purchased or interchange power which necessarily require closer scrutiny. Subsequent action by the legislature in enacting G.S. 62-133.2, which makes express provision for the consideration of such issues in the general rate cases, has now made its intent clear. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983).

Former subsection (e) dealt specifically with the continuation of previously granted rate increases based solely on the increased cost of fuel. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

Former subsection (e) did not roll back electric power rates. On the contrary, it authorized the Commission, after hearing, to incorporate into the basic rates of the utility, chargeable on and after September 1, 1975, an increase determined by the then cost of coal. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

Heat Rate and Plant Availability Not Bases for Determination Under Former Subsection (e). — Pursuant to former subsection (e) of this section, a public utility could apply to the Utilities Commission for authority to increase its rates and charges based solely upon the increased cost of fuel used in the generation of electric power, and the Commission, on its own motion or upon request of an interested rate payor, could consider and determine a decrease in rates or charges based solely upon a decrease in the cost of fuel; therefore, insofar as the Commission considered and passed upon the cost of fuel used by defendant in the generation of electric power during the periods in question by considering the reasonableness of the prices paid by defendant for such fuel, it acted within the scope of the statutorily prescribed procedure, but insofar as the Commission considered and based its determination upon such factors as defendant's heat rate and plant availability in these proceedings, it went beyond the scope of the procedure authorized by former subsection (e). State ex rel. Utils. Comm'n v. VEPCO, 48 N.C. App. 453, 269 S.E.2d 657, cert. denied, 301 N.C. 531, 273 S.E.2d 462 (1980).

Plant Efficiency Not Considered in Proceedings Under Former Subsection (e). — Heat rate and capacity factor furnish convenient measuring devices by which to evaluate the overall efficiency with which a particular electrical utility system is operated, and the Utilities Commission should take into account the efficiency of a company's operation in fixing its rates in a general rate case as provided in G.S. 62-133. However, plant efficiency as it bears upon fuel cost was not a factor to be considered in the limited and expedited proceeding provided for by former subsection (e) of this section. State ex rel. Utils. Comm'n v. VEPCO, 48 N.C. App. 453, 269 S.E.2d 657, cert. denied, 301 N.C. 531, 273 S.E.2d 462 (1980).

Commission's Decision Held Improper. — Commission's "decision" that the legislature, in enacting former subsection (e), did not intend to deny the utility "recovery of its July and August 1975 fuel expenses actually incurred" was not an interpretation of the statute but a nullification of it, which was beyond the authority of the Commission. The wisdom and fairness of the legislature's determination, clearly expressed, may not be reviewed by the Commission, or even by the courts in the absence of a constitutional question. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

§ 62-135. Temporary rates under bond.

(a) Notwithstanding an order of suspension of an increase in rates, any public utility except a common carrier may, subject to the provisions of subsections (b), (c) and (d) hereof, put such suspended rate or rates into effect upon the expiration of six months after the date when such rate or rates would have become effective, if not so suspended, by notifying the Commission and its consumers of its action in making such increase not less than 10 days prior to the day when it shall be placed in effect; provided, however, that utilities engaged in the distribution of utility commodities bought at wholesale by the utility for distribution to consumers may put such suspended rate or rates, to the extent occasioned by changes in the wholesale rate of such utility commodity, into effect at the expiration of 30 days after the date when such rate or rates would become effective if not so suspended; provided that no rate or rates shall be left in effect longer than one year unless the Commission shall have rendered its decision upon the reasonableness thereof within such period. This section to become effective July 1, 1963.

(b) No rate or rates placed in effect pursuant to this section shall result in an increase of more than twenty percent (20%) on any single rate classification of the public utility.

(c) No rate or rates shall be placed in effect pursuant to this section until the public utility has filed with the Commission a bond in a reasonable amount approved by the Commission, with sureties approved by the Commission, or an undertaking approved by the Commission, conditioned upon the refund in a manner to be prescribed by order of the Commission, to the persons entitled thereto of the amount of the excess plus interest from the date that such rates were put into effect, if the rate or rates so put into effect are finally determined to be excessive. The amount of said interest shall be determined pursuant to G.S. 62-130(e).

(d) If the rate or rates so put into effect are finally determined to be excessive, the public utility shall make refund of the excess plus interest to its customers within 30 days after such final determination, and the Commission shall set forth in its final order the terms and conditions for such refund. If such refund is not paid in accordance with such order, any persons entitled to such refund may sue therefor, either jointly or severally, and be entitled to recover, in addition to the amount of the refund, all court costs and reasonable attorney fees for the plaintiff, to be fixed by the court. (1933, c. 307, s. 7; 1959, c. 422; 1963, c. 1165, s. 1; 1981, c. 461, s. 2.)

CASE NOTES

Purpose. — This section was enacted for the purpose of minimizing the effect of the unavoidable time lag between the filing of an application by a utility company for an increase in its rates for service and the entry of an order of the Commission finding such increase proper. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

This section is a direct exercise of the police power of the State by the legislature itself. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

This section prevails over a private contract in conflict therewith. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Prior contracts between a power company and the municipalities do not bar the power company from putting different rates into effect pursuant to this section, pending final determination by the Commission. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

But Power Company May Not at Will Disregard Such Contract. — The mere existence in the Commission of authority to increase the rates previously specified in a municipal contract does not authorize a power company at its own will to disregard such contract and to charge the other party thereto a higher rate. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Conditions for Putting Proposed Rates into Effect. — This section authorizes the utility to put its proposed rates into effect after the passage of six months from the filing of its application, if no order has been entered by the Commission determining the validity of the proposed rates and if the utility company files its undertaking, approved by the Commission, for a refund of any portion of such rates ultimately disapproved by the Commission. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Rate Changes on Interim Basis Permitted. — G.S. 62-134 and this section clearly authorize the Commission to permit rate schedule changes applied for by a utility to be placed into effect on an interim basis before hearing and final determination. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Preference as to Interests of Current Customers. — The power of the Commission to suspend a rate increase under investigation for a six months' period gives an absolute preference for that period to the interest of current customers in paying no more than they have been paying for the electricity they consume. Senior Citizens Clubs v. Duke Power Co., 425 F. Supp. 411 (W.D.N.C. 1976), aff'd, 425 U.S. 928, 96 S. Ct. 1658, 48 L. Ed. 2d 172 (1976).

Conditional Preference as to Future Customers. — If increases may be suspended for longer periods, the interest of a utility's future customers may be impaired by the lack of adequate capacity to serve their needs. Thus, under this section, after lapse of the six-month period during which the interest of present customers has an absolute preference, a conditional preference is given to the interest of future customers by permitting the implementation of the increase subject to mandatory refund to the extent that the implemented increase is larger than the rates ultimately approved by the Commission. Senior Citizens

Clubs v. Duke Power Co., 425 F. Supp. 411 (W.D.N.C. 1976), aff'd, 425 U.S. 928, 96 S. Ct. 1658, 48 L. Ed. 2d 172 (1976).

Implementation of rate increase without Commission's approval does not involve state action under 42 U.S.C. § 1983. Senior Citizens Clubs v. Duke Power Co., 425 F. Supp. 411 (W.D.N.C. 1976), aff'd, 425 U.S. 928, 96 S. Ct. 1658, 48 L. Ed. 2d 172 (1976).

Municipality Not Entitled to Temporary Restraining Order. — Where a public service company has filed bond with the Utilities Commission and has obtained authority from the Commission to put into effect an increase in rates in the territory served by it, a municipal corporation is not entitled to a temporary order restraining the service company from putting the rates into effect within the municipality upon the assertion that the increase in rates was contrary to contractual provisions in the franchise granted the public service company by the city, since an adequate and efficient remedy is afforded the city and its inhabitants by suit upon the bond in the event the increase in rate was not justified in law, and therefore the municipality could not suffer irreparable injury. City of Durham v. Public Serv. Co., 257 N.C. 546, 126 S.E.2d 315 (1962).

Applied in State ex rel. Utils. Comm'n v. Edmisten, 26 N.C. App. 613, 216 S.E.2d 743 (1975).

Cited in State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976); State ex rel. Comm'r of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

§ 62-136. Investigation of existing rates; changing unreasonable rates; certain refunds to be distributed to customers.

(a) Whenever the Commission, after a hearing had after reasonable notice upon its own motion or upon complaint of anyone directly interested, finds that the existing rates in effect and collected by any public utility are unjust, unreasonable, insufficient or discriminatory, or in violation of any provision of law, the Commission shall determine the just, reasonable, and sufficient and nondiscriminatory rates to be thereafter observed and in force, and shall fix the same by order.

(b) All municipalities in the State are deemed to be directly interested in the rates and service of public utilities operating in such municipalities, and may institute or participate in proceedings before the Commission involving such rates or service. Any municipality may institute proceedings before the Commission to eliminate unfair and unreasonable discrimination in rates or service by any public utility between such complainant or its inhabitants and any other municipality or its inhabitants, and the Commission shall, upon complaint, after hearing afforded to the public utility affected and to all municipalities affected, have authority to remove such discrimination.

(c) If any refund is made to a distributing company operating as a public utility in North Carolina of charges paid to the company from which the distributing company obtains the energy, service or commodity distributed, the Commission may, in cases where the charges have been included in rates paid by the customers of the distributing company, require said distributing company to distribute said refund plus interest among the distributing company's customers in a manner prescribed by the Commission. The amount of said interest shall be determined pursuant to G.S. 62-130(e). (Ex. Sess. 1913, c. 20, s. 7; C.S., s. 1083; 1933, c. 134, s. 8; c. 307, s. 8; 1937, c. 401; 1941, c. 97; 1963, c. 1165, s. 1; 1981, c. 460, s. 1.)

CASE NOTES

Subsection (a) refers to rate fixing as envisioned by G.S. 62-133. State ex rel. Utils. Comm'n v. Edmisten, 30 N.C. App. 459, 227 S.E.2d 593, rev'd on other grounds, 291 N.C. 451, 232 S.E.2d 184 (1976).

Tax Reform Benefits Passed on to Ratepayers by Rulemaking Rather Than Ratemaking Procedure. — Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 (TRA-86) through a rulemaking procedure rather than a ratemaking procedure. State ex rel. Utils.

Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

The Commission may not fix rates retroactively so as to make them collectible for past service. State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

The Utilities Commission exceeded its statutory authority in requiring a manufacturer to pay a surcharge for emergency natural gas used by the manufacturer prior to the date that the tariff including the surcharge became effective, even though the supplier did not bill the manufacturer for such gas until after the tariff became effective. A rate is fixed or allowed when it becomes effective pursuant to G.S. 62-130(a), and rates must be fixed prospectively from their effective date. Subsection (a) of this section provides that the commission shall determine rates to be thereafter observed and in force. The commission may not fix rates retroactively so as to make them collectible for past services. State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 42 N.C. App. 606, 257 S.E.2d 439 (1979), cert. denied, 299 N.C. 124, 261 S.E.2d 926 (1980).

Commission's Order Was Not Retroactive. — Where Utilities Commission's order merely required North Carolina Natural Gas (NCNG) to abide by the rate structure in existence at the time the two percent (2%) monies were collected from T-1 customers, the Commission's order did not constitute unlawful retroactive rate making. State ex rel. Utils. Comm'n v. North Carolina Natural Gas Corp., 323 N.C. 630, 375 S.E.2d 147 (1989).

The Commission may investigate rates upon the request of any person directly interested. It may hear evidence as to the reasonableness of the maximum rates fixed by law or by the Commission, and establish such rates as it may deem just. The authority conferred upon the Commission is plenary. Corporation Comm'n ex rel. Raleigh Granite Co. v. Atlantic C.L.R.R., 187 N.C. 424, 121 S.E. 767 (1924).

As to authority of the Commission, on its own motion or that of another interested party, to intervene and make corrections in the utility's rate schedules, including, if circumstances should require it, the abrogation of the fuel clause, see State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Refunds to Customers. — The wording of this section clearly requires that refunds be made to the customers who paid the charges, and that these refunds be contingent upon practicability. State ex rel. Utils. Comm'n v. Public Serv. Co., 56 N.C. App. 448, 289 S.E.2d 82 (1982), aff'd, 307 N.C. 474, 299 S.E.2d 425 (1983).

Under the 1981 amendment, the Commission is empowered to order the distribution of supplier refunds to either current or past customers, utilizing whatever method the Commission deems most appropriate. State ex rel. Utils. Comm'n v. Public Serv. Co., 307 N.C. 474, 299 S.E.2d 425 (1983).

Under the 1981 amendment to subsection (c), it is no longer required that the refund be practicable and that the utility have a reasonable return exclusive of the refund in order for the Commission to direct a customer refund. Moreover, the statute no longer provides for distribution of the refunds to customers in proportion to their payment of the charges refunded. State ex rel. Utils. Comm'n v. Public Serv. Co., 307 N.C. 474, 299 S.E.2d 425 (1983).

Prior to the 1981 amendment, the legislature intended for the refunds to be made in proportion to each customer's usage in the refund period during which he paid excess charges. There was no language in the statute requiring distribution by customer class. State ex rel. Utils. Comm'n v. Public Serv. Co., 307 N.C. 474, 299 S.E.2d 425 (1983).

Prior to the 1981 amendment, subsection (c) of this section required that refunds be distributed only to those individuals who actually paid the overcharges. State ex rel. Utils. Comm'n v. Public Serv. Co., 307 N.C. 474, 299 S.E.2d 425 (1983).

All refunds received after May 28, 1981, will be governed by the 1981 amendment to subsection (c); 1981 Session Laws, c. 460, s. 1. State ex rel. Utils. Comm'n v. Public Serv. Co., 307 N.C. 474, 299 S.E.2d 425 (1983).

Subsection (c) speaks in terms of when the refund is received by the utilities, not to the period of time to which the refunds relate. State ex rel. Utils. Comm'n v. Public Serv. Co., 307 N.C. 474, 299 S.E.2d 425 (1983).

Subsection (c) of this section more specifically applies to supplier refunds received by natural gas distributing utilities than did former subsection (f) of G.S. 62-133 and is the proper statute to be applied in determining the appropriate distribution of these supplier refunds. State ex rel. Utils. Comm'n v. Public Serv. Co., 307 N.C. 474, 299 S.E.2d 425 (1983).

Distribution of refunds received by a utility after the effective date of the statute (January 1, 1964) are governed by subsection (c). State ex rel. Utils. Comm'n v. Public Serv. Co., 307 N.C. 474, 299 S.E.2d 425 (1983).

Former subsection (f) of G.S. 62-133 dealt only with rate changes, while subsection (c) of this section, specifically sets forth the criteria pursuant to which refunds should be distributed. State ex rel. Utils. Comm'n v. Public Serv. Co., 307 N.C. 474, 299 S.E.2d 425 (1983).

Refunds to the local distribution company come under the supervision of the Commission until such time as it makes a determination with regard to the disposition of the refunds, pursuant to subsection (c), creating rights on behalf of the customers, and until that time, the utilities customers have no vested interest in the refunds. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

"Complaint Proceeding". — A hearing which involves a single rate or a small part of the rate structure of a public utility is called a "complaint proceeding." It differs from a general rate case in that it deals with an emergency or change of circumstances which does not affect the entire rate structure of the utility and may be resolved without involving the procedure outlined in G.S. 62-133, and does not justify the expense and loss of time involved in such procedure. State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

"General Rate" Case. — A proceeding in which a utility seeks an increase in rates for classes of customers providing its major source of revenue in order to provide funds assertedly necessary for continued operation is a general rate case and not a complaint proceeding, even though the increase is not requested for all classes of customers. State ex rel. Utils. Comm'n v. Tidewater Natural Gas Co., 259 N.C. 558, 131 S.E.2d 303 (1963).

Applied in State ex rel. Utils. Comm'n v. Public Serv. Co., 59 N.C. App. 448, 297 S.E.2d 119 (1982); State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

Cited in Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974); State ex rel. Utils. Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838 (1980); State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

§ 62-137. Scope of rate case.

In setting a hearing on rates upon its own motion, upon complaint, or upon application of a public utility, the Commission shall declare the scope of the hearing by determining whether it is to be a general rate case, under G.S. 62-133, or whether it is to be a case confined to the reasonableness of a specific single rate, a small part of the rate structure, or some classification of users involving questions which do not require a determination of the entire rate structure and overall rate of return. The procedures established in this section shall not be required when pricing alternatives permitted under G.S. 62-134(h) and (j) are adopted. (1963, c. 1165, s. 1; 1989, c. 112, s. 4.)

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

CASE NOTES

This section is inapplicable to proceedings conducted under G.S. 62-90(c), since their scope is limited by statute to the exceptions on which the particular appeal of a final order or decision is based, leaving the Commission without authority to declare such a hearing a general rate case or complaint proceeding. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

The question of whether a case "is to be a general rate case" under the terms of this section is a mixed question of law and fact. As to such questions, courts should be hesitant to disturb the commission's expert determination with regard to the nature of the case presented, particularly when its determination is made prior to hearing and for the initial purpose of setting the scope of the hearing and the resulting amount of information which the public utility will be required to furnish. Even at that stage, however, the commission's determination must be supported by "competent, material and substantial evidence in view of the entire record as submitted." State ex rel. Utils. Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

Tax Reform Benefits Passed on to Ratepayers by Rule Making Rather Than Rate Making Procedure. — Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 (TRA-86) through a rule making procedure rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

Since there was no provision in the rule at issue that if tax rates went up the utilities could raise rates just as they were lowered by the reduced tax rates, Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978) does not approve the rule making process for the purpose of adjusting rates, nor is there any statutory authority for the proposition that rates may be adjusted by some other method beyond those set out in G.S. 62-133 or 62-136 and this section.

Applied in State ex rel. Utils. Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972); State ex rel. Utils. Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972); State ex rel. Utils. Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234 (1980); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982); State ex rel. Utils. Comm'n v. Edmisten, 314 N.C. 122, 333 S.E.2d 453 (1985); In re Petition of Utils., Inc., 147 N.C. App. 182, 555 S.E.2d 333, 2001 N.C. App. LEXIS 1141 (2001).

Cited in State ex rel. Utils. Comm'n v. Beatties Ford Util., Inc., 21 N.C. App. 213, 203 S.E.2d 649 (1974); State ex rel. Utils. Comm'n v. County of Harnett, 30 N.C. App. 24, 226 S.E.2d 515 (1976); State ex rel. Utils. Comm'n v. VEPCO, 48 N.C. App. 453, 269 S.E.2d 657 (1980); State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. Public Staff-N.C. Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989); State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 500 S.E.2d 693 (1998).

§ 62-138. Utilities to file rates, service regulations and service contracts with Commission; publication; certain telephone service prohibited.

(a) Under such rules as the Commission may prescribe, every public utility, except as permitted under G.S. 62-134(h) and (j):

(1) Shall file with the Commission all schedules of rates, service regulations and forms of service contracts, used or to be used within the jurisdiction of the Commission; and

(2) Shall keep copies of such schedules, service regulations and contracts open to public inspection. Except, if there is a sufficient likelihood that a public utility defined in G.S. 62-3(23)a.6. may suffer a competitive disadvantage if the rates for a specific competitive service are disclosed, the Commission may waive the public disclosure of the rates. The Commission may revoke the disclosure waiver upon a showing that the competitive disadvantage no longer exists.

(b) Every common carrier of passengers shall file with the Commission, print, and keep open for public inspection schedules showing all rates for the transportation of passengers in intrastate commerce and all services in connection therewith between points on its own routes and between points on its own routes and points on the routes of other such common carriers, and if it establishes joint rates with other common carriers, it shall include in its schedules so filed such joint rates.

(c) Every irregular route common carrier of household goods shall file with the Commission, print, and keep open for public inspection schedules showing all rates for the transportation of household goods in intrastate commerce between points within the area of its authorized operation, and if it establishes joint rates with other common carriers, it shall include in its schedules so filed such joint rates between points within the area of its own authorized operation and points on the line or route of such other common carriers.

(c1) Any person who, though exempt from Commission regulation under Public Law 103-305, agrees to joint line rates or routes as authorized by Public Law 103-305 may file with the Commission, print, and keep open for public inspection schedules showing all such joint rates for the transportation of property in intrastate commerce, and all connected services, between all points the person serves.

(d) The schedules required by this section shall be published, filed, and posted in such form and manner and shall contain such information as the Commission may prescribe; and the Commission is authorized to reject any schedule filed with it which is not in compliance with this section. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) No public utility, unless otherwise provided by this Chapter, shall engage in service to the public unless its rates for such service have been filed and published in accordance with the provisions of this section.

(f) Under such rules as the Commission may prescribe, every electric membership corporation operating within this State shall file with the Commission, for information purposes, all rates, schedules of rates, charges, service regulations, and forms of service contracts, used or to be used within the State, and shall keep copies of such schedules, rates, charges, service regulations, and contracts open to public inspection.

(g) No public utility may offer or maintain telephone service to any subscriber to such service who has in use or proposes to place in use equipment which will enable said subscriber to observe or monitor telephone calls directed to or placed by said subscriber unless said subscriber shall agree that such equipment shall be used in conformity with the standards for the use of such equipment adopted by the Commission. (1899, c. 164, s. 7; Rev., s. 1109; 1907, c. 217, s. 5; C.S., s. 1074; 1933, c. 134, s. 8; c. 307, s. 4; 1941, c. 97; 1947, c. 1008, s. 25; 1949, c. 1132, s. 23; 1959, c. 209; 1963, c. 1165, s. 1; 1965, c. 287, s. 7; 1977, c. 799; 1989, c. 112, s. 5; 1995, c. 523, s. 6.)

Legal Periodicals. — For survey of 1977 law on common carriers, see 56 N.C.L. Rev. 853 (1978).

CASE NOTES

Use of Availability Charge in Rate Schedule for Recreational Subdivision. — The Utilities Commission has jurisdiction and authority to allow the use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utils. Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Landowners in a recreational subdivision who pay availability charges are "consumers" or stand in a consumer-like relationship to the utility providing water service. State ex rel. Utils. Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Contractual obligation to provide water service to a recreational subdivision as well as the actual delivery thereof directly affect a utility's ability to function as a utility. State ex rel. Utils. Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

§ 62-139. Rates varying from schedule prohibited; refunding overcharge; penalty.

(a) No public utility shall directly or indirectly, by any device whatsoever, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility than that prescribed by the Commission, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed by the Commission.

(b) Any public utility in the State which shall willfully charge a rate for any public utility service in excess of that prescribed by the Commission, and which shall omit to refund the same within 30 days after written notice and demand of the person overcharged, unless relieved by the Commission for good cause shown, shall be liable to him for double the amount of such overcharge, plus a penalty of ten dollars ($10.00) per day for each day's delay after 30 days from such notice or date of denial or relief by the Commission, whichever is later. Such overcharge and penalty shall be recoverable in any court of competent jurisdiction. (1903, c. 590, ss. 1, 2; Rev., ss. 2642, 2643, 2644; Ex. Sess. 1913, c.

20, ss. 5, 12; C.S., ss. 1082, 1086, 3514; 1933, c. 134, s. 8; c. 307, s. 5; 1941, c. 97; 1963, c. 1165, s. 1; 1989, c. 112, s. 6.)

Cross References. — As to venue of actions against railroad, see G.S. 1-81. As to charging higher rates after rates reestablished upon reconsideration, see G.S. 62-132.

CASE NOTES

Constitutionality of Former Section. — Under the Interstate Commerce Act, as amended, Congress, in exercise of the constitutional powers conferred on it, has taken entire control of rates upon interstate shipments of goods, and former G.S. 60-110 was inoperative as to such shipments. Blalock Hdwe. Co. v. Seaboard Air Line Ry., 170 N.C. 395, 86 S.E. 1025 (1915).

Former G.S. 60-110, prohibiting freight charges in excess of printed tariffs, was not unconstitutional as in violation of U.S. Const., Amend. XIV or the commerce clause of said Constitution and the acts passed in pursuance thereof. Efland v. Southern Ry., 146 N.C. 135, 59 S.E. 355 (1907); Raleigh Iron Works v. Southern Ry., 148 N.C. 469, 62 S.E. 595 (1908). But see Blalock Hdwe. Co. v. Seaboard Air Line Ry., 170 N.C. 395, 86 S.E. 1025 (1915).

Assurance of Equal Service as Basis for Regulation. — A fundamental basis for the regulation of public utilities is to assure that once monopoly powers have been granted, the utility will provide all of its customers similarly situated with service on a reasonably equal basis. State ex rel. N.C. Utils. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960).

Claim for Relief Where Disputed Rates "Established" May Exist Under Section. — An appropriate claim for relief where the disputed rates are "established" by the Commission may exist under G.S. 62-140 which prohibits unreasonable discrimination by public utilities, or under this section which prohibits a utility from receiving more compensation for services than the amount prescribed by the Commission. Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990).

Telephone Company Proscribed from Furnishing Free Service, etc., to Municipalities. — The Utilities Commission properly proscribes a telephone company from furnishing service to certain municipalities within its territory free or at a reduced rate, and contractual agreements of a telephone company to do so in consideration for franchise rights to use the streets, alleys and roads in such municipalities for its pole line and underground conduits are void, since such concessions constitute discrimination against other customers similarly situated. State ex rel. N.C. Utils. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960).

Electric Rate Based on Old Contract Upheld. — Where, at the termination of a contract between city and electric company, city officials were doubtful whether it would be advantageous to adopt the new schedule of the electric company, and elected to take current on basis from month to month, it was held that the electric company was not exacting an unlawful rate by billing the city for current on rates contained in the old contract rather than under the new schedule. City of High Point v. Duke Power Co., 34 F. Supp. 339 (M.D.N.C. 1940), aff'd, 120 F.2d 866 (4th Cir. 1941).

Freight Rates Need Not Be Same for Both Directions. — In shipments to a great distance, special circumstances, such as flow of traffic, may justify a higher rate between two points in one direction than in the opposite; and in an action for recovery of the penalty for excessive freight rates, it was error for the judgment below in effect to charge the jury that such tariff rate published between the two points for freight moving in an opposite direction to that of the shipment in question was conclusive, and that they should be governed in their verdict as to the overcharge accordingly. James H. Scull & Co. v. Atlantic C.L.R.R., 144 N.C. 180, 56 S.E. 876 (1907).

Freight Charge on Undelivered Shipment. — Where defendant collected freight charges, for an entire shipment, as invoiced and originally billed, and the sum of 96 cents was paid as freight on that part of the shipment which was "short" and not delivered, this was an overcharge; failure to refund such overcharge after the 60 days allowed for investigation rendered defendant liable for the statutory penalty. Cottrell v. Railroad, 141 N.C. 383, 54 S.E. 288 (1906).

Collection of Surcharge Before Tariff Became Effective. — The Utilities Commission exceeded its statutory authority in requiring a manufacturer to pay a surcharge for emergency natural gas used by the manufacturer prior to the date that the tariff including the surcharge became effective, even though the supplier did not bill the manufacturer for such gas until after the tariff became effective. A rate is fixed or allowed when it becomes effective pursuant to G.S. 62-130(a) and rates must be fixed prospectively from their effective date. Section 62-136(a) provides that the commission shall determine rates to be thereafter observed and in force. The commission may not fix rates retroactively so as to make them collectible for past services. State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 42 N.C. App. 606, 257 S.E.2d 439 (1979), cert. denied, 299 N.C. 124, 261 S.E.2d 926 (1980).

Penalty Enforceable Though Charges Small. — The penalty fixed by former G.S. 60-110 to enforce the duty of a carrier in regard to proper charges for transporting freight and refund of overcharges, which penalty could not in any event exceed $100.00, was enforceable for a default established against defendant, even though the particular transportation charges might appear disproportionately small. It is on failure to return small amounts wrongfully overcharged that penalties are especially required. In large matters the claimant can better afford the cost of litigation. Efland v. Southern Ry., 146 N.C. 129, 59 S.E. 359 (1907).

Recovery of Excess Caused by Error in Tariff Distance Table. — Where carriers charged rates in accordance with the published tariffs on file, but because of error in the tariff distance table the charges were excessive, the shippers could recover the excess charged by petition before the Utilities Commission, the remedy by civil action under former G.S. 60-110, 62-138 and this section to recover overcharges and penalties being the proper remedy only when the charges were collected in excess of the published tariffs. State ex rel. N.C. Utils. Comm'n v. Norfolk S. Ry., 249 N.C. 477, 106 S.E.2d 681 (1959).

Agent as Party Aggrieved. — Where, under agreement with his principal, the agent of a manufacturer was obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he paid its unlawful charges on a shipment, he was the party aggrieved, and could maintain his action to recover the excess, and also the penalty when settlement was not made within 60 days. Tilley v. Southern Ry., 172 N.C. 363, 90 S.E. 309 (1916).

What Demand Must Specify. — Where carrier demanded and received an unlawful freight charge for a shipment, and the party aggrieved made written demand of the carrier for payment of the overcharge, as required by the statute, it was not necessary, in order to maintain an action for the penalty imposed upon the carrier failing to settle in 60 days, that the written demand specify the penalty, or that demand therefor be made in the justice's court or alleged in the complaint filed on appeal therefrom. Tilley v. Southern Ry., 172 N.C. 363, 90 S.E. 309 (1916).

Separate Demands in Same Envelope. — The mere fact that plaintiff enclosed separate written demands in the same envelope, and gave an aggregate amount thereof, in a letter accompanying them, did not affect the demands, when the overcharges were separate and distinct, demand was made specifically as to each and was accompanied separately with the paid freight bill and duplicate bill of lading, and each demand was complete in itself; such was a compliance with the provisions of the statute. Efland v. Southern Ry., 146 N.C. 129, 59 S.E. 359 (1907).

Overcharge was Wilful. — Trial court properly ordered campground owners to pay tenants $ 10.00 per day for every day between 2 December 2005 and 16 October 2006 as a penalty for overcharges, as provided for in G.S. 62-139(b). The owners were a public utility and their action in overcharging tenants was wilful. Shepard v. Bonita Vista Props., L.P., 191 N.C. App. 614, 664 S.E.2d 388, 2008 N.C. App. LEXIS 1489 (2008).

Burden of Proving Overcharge. — The burden is upon the plaintiff to show that a freight rate charged and collected by a carrier was in excess of its tariff required of the carrier to be published, when he seeks to recover this excess and the statutory penalty; hence, where the shipment was routed over one line of connecting carriers and the tariff filed by the carrier over another route was shown, no evidence was afforded as to the rate of the actual route of the shipment, and, in the absence of further evidence, a judgment as of nonsuit was proper. Blalock Hdwe. Co. v. Seaboard Air Line Ry., 170 N.C. 395, 86 S.E. 1025 (1915).

Cited in Eaton Corp. v. Public Serv. Co., 99 N.C. App. 174, 392 S.E.2d 404 (1990).

§ 62-140. Discrimination prohibited.

(a) No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The Commission may determine any questions of fact arising under this section; provided that it shall not be an unreasonable preference or advantage or constitute discrimination against any person, firm or corporation or general rate payer for telephone utilities to contract with motels, hotels and hospitals to pay reasonable commissions in connection with the handling of intrastate toll calls charged to a guest or patient and collected by the motel, hotel or hospital; provided further, that payment of such commissions shall be in accordance with uniform tariffs which shall be subject to the approval of the Commission. Provided further, that it shall not be considered an unreasonable preference or advantage for the Commission to order, if it finds the public interest so requires, a reduction in local telephone rates for low-income residential consumers meeting a means test established by the Commission in order to match any reduction in the interstate subscriber line charge authorized by the Federal Communications Commission.

Nothing in this section prohibits the Commission from establishing different rates for natural gas service to counties that are substantially unserved, to the extent that those rates reflect the cost of providing service to the unserved counties and upon a finding by the Commission that natural gas service would not otherwise become available to the counties.

(b) The Commission shall make reasonable and just rules and regulations:

(1) To prevent discrimination in the rates or services of public utilities.

(2) To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or misleading or deceiving the public in any manner as to rates charged for the services of public utilities.

(c) No public utility shall offer or pay any compensation or consideration or furnish any equipment to secure the installation or adoption of the use of such utility service except upon filing of a schedule of such compensation or consideration or equipment to be furnished and approved thereof by the Commission, and offering such compensation, consideration or equipment to all persons within the same classification using or applying for such public utility service; provided, in considering the reasonableness of any such schedule filed by a public utility the Commission shall consider, among other things, evidence of consideration or compensation paid by any competitor, regulated or nonregulated, of the public utility to secure the installation or adoption of the use of such competitor's service. Provided, further, that nothing herein shall prohibit a public utility from carrying out any contractual commitment in existence at the time of the enactment hereof, so long as such program does not extend beyond December 31, 1963. For the purpose of this subsection, "public utility" shall include any electric membership corporation operating within this State, and the terms "utility service" and "public utility service" shall include the service rendered by any such electric membership corporation. (1899, c. 164, s. 2, subsecs. 3, 5; Rev., s. 1095; 1913, c. 127, s. 6; C.S., s. 1054; 1933, c. 134, s. 8; c. 307, s. 6; 1941, c. 97; 1963, c. 1165, s. 1; 1965, c. 287, s. 8; 1977, 2nd Sess., c. 1146; 1985, c. 694, s. 1; 1997-426, s. 1.)

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1024 (1981).

CASE NOTES

I. In General.
II. Differences in Rates or Services.
III. Discrimination.
IV. No Discrimination.

I. IN GENERAL.

Reaffirmance of Common-Law Rule. — The requirement to furnish accommodations within a reasonable time is but a reaffirmance of the common law, leaving the courts to say what time is reasonable. Alsop v. Southern Express Co., 104 N.C. 278, 10 S.E. 297 (1889).

Duty to Provide Transportation. — It is the duty of a common carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of the obligation if, by the use of reasonable foresight, it could have been provided for. Purcell v. Richmond & D.R.R., 108 N.C. 414, 12 S.E. 954 (1891).

Former Section Declaratory of Common Law. — Former G.S. 60-5, making discrimination in charges by common carriers a misdemeanor, was declaratory of the common law, and secured to every person the right to participate in the use of the facilities furnished, or which it was its duty to furnish, by a common carrier upon terms of equality, in regard to price, and otherwise, and free from unlawful discrimination. Hilton Lumber Co. v. Atlantic C.L.R.R., 141 N.C. 171, 53 S.E. 823 (1906).

Duty Imposed by This Section as Development of Common-Law Obligation. — The duty now imposed by this section upon privately owned distributors and sellers of electric power not to discriminate in service or rates is merely a development of the common-law obligation of equal and undiscriminating service. Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967).

The obligation of a public service corporation to serve impartially and without unjust discrimination is fundamental. It is not essential that consumers who are charged different rates for service should be competitors in order to invoke this principle. There must be substantial differences in service or conditions to justify differences in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service. State ex rel. Utils. Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953); State ex rel. N.C. Utils. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Subsection (a) is similar to § 3 of the Interstate Commerce Act. State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

The language of subsection (a) does not mean that customer classifications, once established by a utility, must remain frozen absent a showing of change of conditions justifying a change in classifications. State ex rel. Utils. Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

Application of Subsection (a). — Subsection (a) of this section was enacted to prohibit a utility from unreasonable discrimination among its customers. It was not meant to be applied to the Utilities Commission's conduct toward various public utilities. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

What Party Entitled to Injunctive Relief. — Where certain carriers by truck sought injunctive relief against railroad carriers for discrimination in rates against certain cities and against certain commodities, it was held that the basis for injunctive relief must be an interference or threatened interference with a legal right of the petitioner, not of a third party, and that the shippers would be the real parties in interest, not the contract truck carriers. Carolina Motor Serv., Inc. v. Atlantic C.L.R.R., 210 N.C. 36, 185 S.E. 479, 104 A.L.R. 1165 (1936).

Recovery of Excess Charges. — Where a higher freight charge was paid than that charged other shippers, the payment was not to be considered voluntary, and the excess could be recovered back upon account for money had and received, and it was not necessary that at the time of payment there should have been any protest. Hilton Lumber Co. v. Atlantic C.L.R.R., 141 N.C. 171, 53 S.E. 823 (1906).

Claim for Relief Where Disputed Rates "Established" May Exist Under Section. — An appropriate claim for relief where the disputed rates are "established" by the Commission may exist under this section which prohibits unreasonable discrimination by public utilities, or under G.S. 62-139 which prohibits a utility from receiving more compensation for services than the amount prescribed by the Commission. Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990).

Question for Decision of Court. — Where the Utilities Commission concluded upon undisputed facts that there was no unlawful discrimination by a power company in the rates charged its commercial customers, whether the conclusion was supported by competent, material and substantial evidence in view of the entire record was held to present a question of law for the decision of the court. State ex rel. Utils. Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

Applied in State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985); State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 500 S.E.2d 693 (1998).

Cited in State ex rel. Utils. Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973); State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398 (1977); State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985); Eaton Corp. v. Public Serv. Co., 99 N.C. App. 174, 392 S.E.2d 404 (1990); State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

II. DIFFERENCES IN RATES OR SERVICES.

Classifications of customers and differences in rates must be based on reason-

able differences in conditions, and the variance in charges must bear a reasonable proportion to the variance in conditions. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983).

The question of law with respect to public utility rate differentials is not whether the differential is merely discriminatory or preferential but is whether the differential is an unreasonable or unjust discrimination. State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

There must be no unreasonable discrimination between those receiving the same kind and degree of service. State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); State ex rel. Utils. Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234, cert. denied, 301 N.C. 531, 273 S.E.2d 461 (1980); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 313 N.C. 215, 328 S.E.2d 264 (1985).

All who ship goods with common carriers are required to be treated equally with respect to the same category of service. State ex rel. Utils. Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838, rev'd on other grounds, 302 N.C. 14, 273 S.E.2d 232 (1980).

But Rates May Differ Under Varying Conditions. — The charging of different rates for service rendered under varying conditions and circumstances is not unlawful. State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Provided Differences in Service or Conditions Are Substantial. — There must be substantial differences in service or conditions to justify difference in rates. State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 313 N.C. 215, 328 S.E.2d 264 (1985).

And where substantial differences in services or conditions exist, unreasonable application of the same rates may be discriminatory and thus improper. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

Factors which constitute "substantial differences in services or conditions" and, therefore, justify a rate differential include (1) quantity of use, (2) time of use, (3) manner of service, and (4) costs of rendering the two services. State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

Any matter which presents a substantial difference as a ground for distinction between customers, such as quantity used, time of use, or manner of service, is a material factor in the determination of rates. State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

In determining whether rate differences constitute unreasonable discrimination, a number of factors should be considered: (1) quantity of use, (2) time of use, (3) manner of service, and (4) costs of rendering the two services. Other factors to be considered include competitive conditions, consumption characteristics of the several classes and the value of service to each class, which is indicated to some extent by the cost of alternate fuels available. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 313 N.C. 215, 328 S.E.2d 264 (1985).

In determining whether rate differences constitute unreasonable discrimination, a number of factors should be considered: (1) quantity of use, (2) time of use, (3) manner of service, and (4) costs of rendering the two services. Other factors to be considered include competitive conditions, consumption characteristics of the several classes and the value of service to each class, which is indicated to some extent by the cost of alternate fuels available. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

The authority of the Utilities Commission to set different rates is not unbridled. There must be substantial differences in service or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976).

While decisions of the Commission involving the exercise of its discretion of fixing rates are accorded great deference, the Commission has no power to authorize rates that result in unreasonable and unjust discrimination. State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 313 N.C. 215, 328 S.E.2d 264 (1985).

Rates for Shipments from Different Origins Need Not Be Equal. — Subsection (a) of this section does not require an equality of rates where the shipments are from different points of origin to the same destination even though the distances be equal or approximately so. State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

What Constitutes Unlawful Discrimination by Carriers. — Discrimination in freight tariffs by railroad companies means charging shippers of freight unequal sums for carrying the same quantity of freight equal distances, that is, more in proportion for a short than for a long distance. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886).

A common carrier is guilty of unlawful discrimination, by the principles of the common law and the terms of the statute, when it charges one person, for service rendered, a larger sum than is charged another person for like service under substantially similar conditions. Hilton Lumber Co. v. Atlantic C.L.R.R., 141 N.C. 171, 53 S.E. 823 (1906).

Different Rate Schedules for Municipalities and Industrial Users of Electrical Energy. — The Commission, in determining whether there is a justifiable basis for establishment of different rate schedules for municipalities engaged in resale of electrical energy and industrial users, must consider use characteristics and load factors as well as the amount of electrical energy purchased under the respective schedules. State ex rel. N.C. Utils. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

The Commission was justified in placing municipalities engaged in resale of electrical energy and industrial users under different schedules based upon a difference in the load factor. State ex rel. N.C. Utils. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Commission's Approval of Bifurcated Full-Margin Pricing Method Upheld. — The record, combined with the Utilities Commission's analysis of prior cases addressing the lawfulness of full-margin transportation rates, was more than adequate to support the Commission's approval of a gas company's bifurcated full-margin pricing mechanism, which essentially resulted in sales customers, rather than transportation customers, paying duplicate charges for interstate transportation. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

III. DISCRIMINATION.

Charging Subsequent Users for Expense of Serving Prior Users as Discrimination. — The cost of coal burned in generating power has no relation whatever to service in any subsequent month. Thus, it, like wage expense, should be borne by the users of the service in the month in which the expense was incurred and may not properly be amortized so as to make subsequent users pay part of this burden. To cast upon subsequent users the expense of serving prior users is discrimination forbidden by this section. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).

An attempted justification of rate differentials by a classification of power furnished as "secondary" and "primary" was held insupportable on the facts. State ex rel. Utils. Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

Giving Preference to Parent Corporation. — A power company which is a subsidiary of one of its commercial customers may not give a preference to its parent corporation, but must give equal treatment to all its customers similarly situated. State ex rel. Utils. Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

A power company which is a subsidiary may not be allowed to structure its economic affairs or physical operations in such a way as to effect an unreasonable preference or advantage to anyone, including its parent. State ex rel. Utils. Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980).

Furnishing free service for municipal purposes in compliance with franchise provisions constitutes an unjust and illegal discrimination. State ex rel. N.C. Utils. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960).

A railroad carrying logs to a sawmill cannot charge a shipper agreeing to ship the manufactured products by the same line less for the same service than it charges a shipper who makes no such agreement. Hilton Lumber Co. v. Atlantic C.L.R.R., 136 N.C. 479, 48 S.E. 813 (1904).

Allegation that common carrier for hire gave a named person undue preference by transporting him free ex vi termini alleged discrimination. State v. Southern Ry., 125 N.C. 666, 34 S.E. 527 (1899).

Discriminatory Embargoes. — A common carrier cannot place an embargo on its customer or patron so as to discriminate against him or those dealing with him. Garrison v. Southern Ry., 150 N.C. 575, 64 S.E. 578 (1909).

Commission May Not Permit Unjustified Service Refusal. — A refusal by a telephone company to serve, without a reasonable justification therefor, is a violation of the company's duty, and the Commission has no authority to permit it. State ex rel. Utils. Comm'n v. National Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975).

Right of City to Refuse to Serve Is Same as Private Company's. — The right of a municipal corporation operating a plant for the distribution and sale of electricity to its inhabitants to refuse to serve is neither greater nor less than that of a privately owned electric power company to do so. Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967).

City May Not Deprive Inhabitant of Service to Compel Obedience to Police Regulations. — A city may not deprive an inhabitant, otherwise entitled thereto, of light, water, or other utility service as a means of compelling obedience to its police regulations, however valid and otherwise enforceable those regulations may be. Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967).

IV. NO DISCRIMINATION.

Rate Designs. — The Utilities Commission properly considered factors other than cost-of-service, i.e., value of service, type of service, quantity of use, time of use, manner of service, competitive conditions relating to acquisition of new customers, historical rate design, revenue stability to the utility, and economic and political factors, in adopting a rate design that would be just and not unreasonably discriminatory among the various customer classes. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

Rates of Return Not Unreasonably Discriminatory. — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the approved rates of return were just and reasonable and did not unreasonably discriminate among the various classes of North Carolina Natural Gas Corporation customers and were supported by substantial evidence in view of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Although there were still significant disparities in rates of return between various customer classes, the rates set for each customer class produced revenues in excess of the operating costs allocable to that class; therefore, the rates were not unreasonably discriminatory, and the Commission's order contained findings sufficient to justify its conclusion that the approved rates of return were just and reasonable. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988).

Legitimate Justifications for Maintaining City and Industrial Rates of Return. — The North Carolina Utilities Commission drew legitimate distinctions which justified its decision to maintain industrial and cities' rates of return at a higher level than residential and commercial and small industrial rates. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Utilities Commission has authority to allow use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utils. Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Rates charged REA cooperatives were not available to municipalities engaged in resale of electrical energy due to the following factors: (1) The cooperatives were required to extend their lines though sparsely settled rural areas with resulting line losses; and (2) the cooperatives were created and operated on a nonprofit basis pursuant to the established public policy of State and federal government. State ex rel. N.C. Utils. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Formula Did Not Unreasonably Discriminate. — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the Industrial Sales Tracker Formula did not unreasonably discriminate between North Carolina Natural Gas Corporation's customer classes, and these findings were supported by substantial evidence in light of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Difference in Service Among Customers in the Same Municipality. — The fact that a power company which is a "secondary supplier" directly serves seven customers within a municipality pursuant to the provisions of G.S. 160A-332 but does not directly serve other customers within the municipality does not constitute an "unreasonable preference or advantage" within the meaning of this section. State ex rel. Utils. Comm'n v. Hunt Mfg. Co., 16 N.C. App. 335, 192 S.E.2d 16 (1972).

§ 62-141. Long and short hauls.

(a) Except when expressly permitted by the Commission, it shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of like kind of household goods under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Chapter to charge and receive as great compensation for a shorter as for a longer distance.

(b) Upon application to the Commission, common carriers may in special cases be authorized to charge less for longer than for shorter distances for the transportation of household goods; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section.

(c) The provisions of this section shall not be applicable to bus companies or to their rates, charges or tariffs. (1899, c. 164, s. 14; Rev., s. 1107; Ex. Sess.

1913, c. 20, s. 9; 1915, c. 17, s. 1; C.S., s. 1072; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1985, c. 676, s. 15(4); 1995, c. 523, s. 7.)

§ 62-142. Contracts as to rates.

All contracts and agreements between public utilities as to rates shall be submitted to the Commission for inspection that it may be seen whether or not they are a violation of law or the rules and regulations of the Commission, and all arrangements and agreements whatever as to the division of earnings of any kind by competing public utilities shall be submitted to the Commission for inspection and approval insofar as they affect the rules and regulations made by the Commission to secure to all persons doing business with such utilities just and reasonable rates. The Commission may make such rules and regulations, as to such contracts and agreements as the public interest may require. (1899, c. 164, s. 6; Rev., s. 1108; C.S., s. 1073; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-143. Schedule of rates to be evidence.

The schedule of rates fixed by statute or under this Article, in suits brought against any public utility involving the rates of a public utility or unjust discrimination in relation thereto, shall be taken in all courts as prima facie evidence that the rates therein fixed are just and reasonable. Any such schedule when certified by a clerk of the Commission as a true copy of a schedule on file with the Commission shall be received in all courts as prima facie evidence of such schedule without further proof, and, if the clerk certifies that said schedule has been approved by the Commission, as prima facie evidence of such approval. (1899, c. 164, s. 7; Rev., s. 1112; C.S., s. 1077; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-144. Free transportation.

(a) All common carriers under the supervision of the Commission shall furnish free transportation to the members of the Commission, and, upon written authority of the Commission, such carriers shall also furnish free transportation to such persons as the Commission may designate in its employ or in the employ of the Department of Motor Vehicles for the inspection of equipment and supervision of safe operating conditions and of traffic upon the highways of the State.

(b) Except as provided in subsection (a), no common carrier shall, directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents, commission agents, employees and retired employees, and members of their immediate families: Provided, that common carriers under this Article may exchange free transportation within the limits of this section and may accept as a passenger a totally blind person accompanied by a guide at the usual and ordinary fare charged to one person under such reasonable regulations as may have been established by the carrier and approved by the Commission.

(c) Any person except those permitted by law accepting free transportation shall be guilty of a Class 1 misdemeanor.

(d) Nothing in this section shall prohibit the carriage, storage or handling of household goods free or at reduced rates for the United States, State or municipal governments, or for charitable or educational purposes, or the use of passes for journeys wholly within this State which have been or may be issued for interstate journeys under the authority of the United States Interstate Commerce Commission. (1899, c. 164, s. 22; c. 642; 1901, c. 652; c. 679, s. 2;

1905, c. 312; Rev., s. 1105; Ex. Sess. 1908, c. 144, s. 4; 1911, cc. 49, 148; 1913, c. 100; 1915, c. 215; 1917, cc. 56, 160; C.S., ss. 1069, 1070, 3492; 1933, c. 134, s. 8; 1941, c. 97; 1949, c. 1132, s. 27; 1953, c. 1279; 1963, c. 1165, s. 1; 1993, c. 539, s. 477; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 523, s. 8.)

CASE NOTES

Transportation by a common carrier of any person, except of the classes specified, without charge, is unlawful, the offense being the actual free transportation and not the issuance of the free pass. State v. Southern Ry., 122 N.C. 1052, 30 S.E. 133 (1898).

A gratuitous passenger is not in pari delicto with the common carrier. McNeill v. Railroad, 135 N.C. 682, 47 S.E. 765, rehearing denied, 137 N.C. 704, 49 S.E. 1038 (1904).

Recovery for Injury Occasioned While Riding on Illegally Issued Pass. — The rights, privileges and protection attaching to the relation of passenger are imposed by law upon common carriers upon consideration of public policy, independent of contract, and arise from the nature of their public employment. Hence, one injured while riding on a pass illegally issued may recover from the railroad. McNeill v. Railroad, 135 N.C. 682, 47 S.E. 765, rehearing denied, 137 N.C. 704, 49 S.E. 1038 (1904).

Construction of Penal Statute. — In construing a penal statute prohibiting discrimination between passengers, the construction placed on it by common carriers generally, and by private individuals and officials, will not be considered. State v. Southern Ry., 122 N.C. 1052, 30 S.E. 133 (1898).

§ 62-145. Rates between points connected by more than one route.

When there is more than one route between given points in North Carolina, and freight is routed or directed by the shipper or consignee to be transported over a shorter route, and it is in fact shipped by a longer route between such points, the rate fixed by law or by the Commission for the shorter route shall be the maximum rate which may be charged, and it shall be unlawful to charge more for transporting such freight over the longer route than the lawful charge for the shorter route. (Ex. Sess. 1913, c. 20, s. 11; C.S., s. 1085; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

Mileage is calculated over the shortest rail line between the point of origin and the point of delivery. State ex rel. N.C. Utils. Comm'n v. Norfolk Southern Ry., 249 N.C. 477, 106 S.E.2d 681 (1959).

Carrier may not present evidence that rate charged was just and reasonable where a rate was set for a short line distance and the carrier unlawfully charged a shipper the rate at a longer mileage level. State ex rel. Utils. Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234, cert. denied, 301 N.C. 531, 273 S.E.2d 461 (1980).

§ 62-146. Rates and service of motor common carriers of property.

(a) It shall be the duty of every common carrier of household goods by motor vehicle to provide safe and adequate service, equipment, and facilities for transportation in intrastate commerce and to establish, observe and enforce just and reasonable regulations and practices relating thereto, and, in the case of household goods carriers, relating to the manner and method of presenting, marking, packing and delivering property for transportation in intrastate commerce.

(b) Except under special conditions and for good cause shown, a common carrier by motor vehicle authorized to transport general commodities over regular routes shall establish reasonable through routes and joint rates, charges, and classifications with other such common carriers by motor vehicle; and such common carrier may establish, with the prior approval of the Commission, such routes, joint rates, charges and classifications with any irregular route common carrier by motor vehicle, or any common carrier by rail, express, or water.

(c) Repealed by Session Laws 1985, c. 676, s. 15.

(d) In case of joint rates between common carriers of property, it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein, which shall not unduly prefer or prejudice any of such participating carriers. Upon investigation and for good cause, the Commission may, in its discretion, prohibit the establishment of joint rates or service.

(e) Any person may make complaint in writing to the Commission that any rate, classification, rule, regulations, or practice in effect or proposed to be put into effect, is or will be in violation of this Article. Whenever, after hearing, upon complaint or in an investigation or its own initiative, the Commission shall be of the opinion that any individual or joint rate demanded, charged, or collected by any common carrier or carriers by motor vehicle, or by any such common carrier or carriers in conjunction with any other common carrier or carriers, for transportation of household goods in intrastate commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate or the value of the service thereunder, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate or the minimum or maximum, or the minimum and maximum rate thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective.

(f) Whenever, after hearing upon complaint or upon its own initiative, the Commission is of the opinion that the divisions of joint rates applicable to the transportation of household goods in intrastate commerce between a common carrier by motor vehicle and another carrier are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable division thereof to be received by the several carriers; and in cases where the joint rate or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable or unduly preferential or prejudicial, the Commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers and require adjustment to be made in accordance therewith. The order of the Commission may require the adjustment of divisions between the carriers in accordance with the order from the date of filing the complaint or entry of order of investigation or such other dates subsequent thereto as the Commission finds justified, and in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order.

(g) In any proceeding to determine the justness or reasonableness of any rate of any common carrier of household goods by motor vehicle, there shall not be taken into consideration or allowed as evidence any elements of value of the property of such carrier, good will, earning power, or the certificate under which such carrier is operating, and such rates shall be fixed and approved, subject to the provisions of subsection (h) hereof, on the basis of the operating ratios of such carriers, being the ratio of their operating expenses to their operating revenues, at a ratio to be determined by the Commission; and in applying for and receiving a certificate under this Chapter any such carrier shall be deemed to have agreed to the provisions of this paragraph, on its own behalf and on behalf of every transferee of such certificate or of any part thereof.

(h) In the exercise of its power to prescribe just and reasonable rates and charges for the transportation of household goods in intrastate commerce by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon movement of traffic by the carrier or carriers for which rates are prescribed; to the need in the public interest of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers under honest, economical, and efficient management to provide such service.

(i) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith. This section shall be in addition to other provisions of this Chapter which relate to public utilities generally, except that in cases of conflict between such other provisions and this section, this section shall prevail for motor carriers. (1947, c. 1008, s. 23; 1949, c. 1132, s. 22; 1963, c. 1165, s. 1; 1985, c. 676, s. 15(5); 1995, c. 523, s. 9.)

CASE NOTES

Carriers have legal right to contract inter se, and the law encourages cooperation and agreements between them respecting their service to the public. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Former subsection (c) of this section encouraged cooperation and agreements between common carriers respecting their service to the public. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Duty to Establish Joint Rates and Divide Revenues. — Motor carriers of freight in intrastate commerce who exchange freight in the course of delivery are not only given authority to establish joint rates, but are required to do so, and to provide for the division of revenues derived from such shipments by contract, subject only to the limitation that the contract shall not unduly prefer or prejudice any of the participating carriers. State ex rel. Utils. Comm'n v. Thurston Motor Lines, 240 N.C. 166, 81 S.E.2d 404 (1954).

Authority of Commission to Interfere with Division of Revenue from Interchanged Freight. — The Utilities Commission is given authority to intervene and vacate a contract for division of revenue from interchanged freight between two intrastate motor carriers only upon finding after hearing that the contractual agreement between the carriers for the division of revenue from such shipments is, or will be, unjust, unreasonable and inequitable, or unduly preferential or prejudicial as between the contracting carriers, and when an order is entered by the Commission without such jurisdictional finding, the cause must be remanded. A finding merely that the Commission does not accept the contractual practice of the carriers as being equitable is insufficient. And the provision of subsection (d), giving the Commission discretionary power to prohibit the establishment of joint rates, is inapplicable. State ex rel. Utils. Comm'n v. Thurston Motor Lines, 240 N.C. 166, 81 S.E.2d 404 (1954).

Mileage alone is not a sufficient basis for the determination of intrastate rates by the Utilities Commission, but the Commission must consider all factors involved in rate making, including competition from interstate carriers, the different modes of transportation, the topography and volume of business as affecting costs, etc. State ex rel. Utils. Comm'n v. North Carolina Motor Carriers Ass'n, 253 N.C. 432, 117 S.E.2d 271 (1960).

An operating ratio of 100% means that for every dollar of freight revenue received, the carrier spends a dollar in operating expenses. State ex rel. N.C. Utils. Comm'n v. Attorney Gen., 2 N.C. App. 657, 163 S.E.2d 638 (1968); State ex rel. Utils. Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

Lower Operating Ratios Indicative of More Profitable Operations. — When the operating ratio exceeds 100%, it means that the expenses exceed the revenues. The lower the operating ratio, the more profitable the operation is to the carrier. State ex rel. N.C. Utils.

Comm'n v. Attorney Gen., 2 N.C. App. 657, 163 S.E.2d 638 (1968).

Basis for Determination of Ratios. — A determination of intrastate operating ratios must be based on revenues and expenses incurred in North Carolina alone; where ratios do not reflect an actual separation of intrastate and interstate revenues and expenses, a rate increase based thereon cannot be sustained. State ex rel. Utils. Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

The operating ratios for the movement of tobacco in intrastate traffic cannot be determined with mathematical exactitude. But the carriers can no doubt approximate the rateable proportion of their operating ratios from tobacco movements in intrastate traffic and offer evidence of other facts and circumstances in respect thereto sufficient in probative force to enable the Commission to make findings of fact and to issue such orders as the findings of fact may warrant. State ex rel. N.C. Utils. Comm'n v. Attorney Gen., 2 N.C. App. 657, 163 S.E.2d 638 (1968).

Authority to transport general commodities includes authority to transport meats and packing house products. State ex rel. Utils. Comm'n v. Forbes Transf. Co., 259 N.C. 688, 131 S.E.2d 452 (1963).

§ 62-146.1. Rates and service of bus companies.

(a) It shall be the duty of every bus company to provide safe and adequate service, equipment and facilities for transportation of passengers in intrastate commerce and to establish, observe and enforce just and reasonable regulations and practices.

(b) The Commission by its rules and regulations may require the interlining of passengers by bus companies operating in intrastate commerce in this State where the point of destination of the passenger is not served by the originating carrier. In these cases it shall be the duty of every bus company to establish reasonable through rates with other bus companies; to establish, observe and enforce just and reasonable individual and joint rates, fares and charges and just and reasonable regulations and practices relating to the charges and to the issuance, form and substance of tickets and the carrying of personal and excess baggage.

(c) In case of joint rates between bus companies, it shall be the duty of the bus companies to establish just and reasonable regulations and practices in connection with the joint rates and just, reasonable and equitable divisions between the participating companies, which shall not unduly prefer or prejudice any of the participating companies.

(d) A bus company providing fixed route service may file with the Commission a petition for new or revised rates, fares or charges. Unless the Commission orders otherwise, no bus company shall make any changes in its rates, fares and charges, which have been established under this Chapter, except after 30 days' notice to the Commission. The notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The bus company shall also give notice, which may include notice by publication, of the proposed changes to other interested persons that the Commission may direct. All proposed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed with the Commission and in force at the time and kept open to public inspection by the bus company. The Commission, for good cause shown in writing, may allow changes in rates without requiring the 30 days' notice, under any conditions as it prescribes. All changes shall be immediately indicated by the bus company on its schedules.

(e) Whenever there is filed with the Commission by any bus company any schedule stating a new or revised rate, fare or charge, the Commission may, either upon complaint or upon its own initiative, after reasonable notice, hold a hearing to determine if the proposed new or revised rates, fares or charges are just and reasonable. Pending the hearing and a decision, the Commission, upon filing with the proposed schedule and delivering to the affected bus company a statement in writing of its reasons, may, at any time before they become effective, suspend the operation of the rate or rates, for a period not to exceed 120 days from the filing of the petition. If the proceeding has not been concluded and a final order made within the period of suspension, the proposed change of rate shall go into effect at the end of the 120-day period.

(f) In any proceeding to determine the justness or reasonableness of any rates, fares or charges of a bus company, the Commission shall authorize revenue levels that are adequate under honest, economical, and efficient management to cover total operating expenses, including the operation of leased equipment and depreciation, plus a reasonable profit. The standards and procedures adopted by the Commission under this subsection shall allow the bus company to achieve revenue levels that will provide a flow of net income, plus depreciation, adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, attract and retain capital and amounts adequate to provide a sound passenger bus transportation system in this State, and take into account reasonable estimated or foreseeable future costs.

(g) Notwithstanding any provision of this section, the Commission may not investigate, suspend, review or revoke the operation of proposed new or revised rates, fares or charges if the proposed new or revised rates, fares or charges do not exceed the standard rates, fares or charges then in effect by the petitioning bus company for comparable interstate transportation of passengers.

(h) Any person may make complaint in writing to the Commission that any rate, fare, charge, classification, rule, regulation, or practice in effect, or proposed to be put in effect, is or will be in violation of this Chapter. Whenever, after holding a hearing, upon complaint, in an investigation, or upon its own initiative, the Commission finds that any individual or joint rate demanded, charged, or collected by any bus company for transportation of passengers in intrastate commerce, or any classification, rule, regulation or practice of the bus company affecting the rate or the value of the service provided, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or unduly prejudicial or constitute an unfair or destructive competitive practice, or otherwise contravenes the policies declared in this Chapter, or is in contravention of any provision of this Chapter, the Commission shall determine and prescribe the lawful rate, or the lawful classification, rule, regulation or practice to be put into effect.

(i) For purposes of this Chapter, rates, fares and charges established pursuant to this section shall be deemed fair, just and reasonable.

(j) Notwithstanding any other provision of this Chapter, the rates, fares and charges established for charter service by a bus company authorized and engaged in charter operations in this State shall be exempt from regulation by the Commission. A bus company authorized and engaged in charter operations shall file with the Commission a current statement of its rates, fares and charges as required by the Commission. (1985, c. 676, s. 15(6).)

§ **62-147:** Repealed by Session Laws 1995, c. 523, s. 10.

§ 62-148. Rates on leased or controlled utility.

If any public utility operating in the State other than a motor carrier is owned, controlled or operated by lease or other agreement by any other public utility doing business in the State, its rates may, in the discretion of the Commission, be determined for such public utility by the rates prescribed for the public utility which owns, controls or operates it. (Ex. Sess. 1908, c. 144, s. 2; C.S., s. 3490; 1963, c. 1165, s. 1.)

§ 62-149. Unused tickets to be redeemed.

Whenever any ticket is sold and is not wholly used by the purchaser, it shall be the duty of the carrier selling such ticket to redeem it or the unused portion thereof at the price paid for it, or in such manner and at such price as the Commission shall prescribe by regulation. (1891, c. 290; 1893, c. 249; 1895, c. 83, ss. 2, 3; 1897, c. 418; Rev., s. 2627; C.S., s. 3503; 1963, c. 1165, s. 1.)

§ 62-150. Ticket may be refused intoxicated person; penalty for prohibited entry.

The ticket agent of any common carrier of passengers shall at all times have power to refuse to sell a ticket to any person applying for the same who may at the time be intoxicated. The driver or other person in charge of any conveyance for the use of the traveling public shall at all times have power to prevent any intoxicated person from entering such conveyance. If any intoxicated person, after being forbidden by the driver or other person having charge of any such conveyance for the use of the traveling public, shall enter such conveyance, he shall be guilty of a Class 1 misdemeanor. (1885, c. 358, ss. 1, 2, 3; Rev., ss. 2625, 2626, 3757; C.S., s. 3504; 1963, c. 1165, s. 1; 1993, c. 539, s. 478; 1994, Ex. Sess., c. 24, s. 14(c); 1998-128, s. 5.)

CASE NOTES

When Exemplary Damages Allowed. — In an action for damages for refusal to allow a person with a ticket to board a train because he was intoxicated, exemplary damages would be allowed if such refusal was made with malice, undue force, or insult. Story v. Norfolk & S.R.R., 133 N.C. 59, 45 S.E. 349 (1903).

§ 62-151. Passenger refusing to pay fare or violating rules may be ejected.

If any passenger shall refuse to pay his fare, or be or become intoxicated, or violate the rules of a common carrier, it shall be lawful for the driver of the bus or other conveyance, and servants of the carrier, on stopping the conveyance, to put him and his baggage out of the conveyance, using no unnecessary force. (1871-2, c. 138, s. 34; Code, s. 1962; Rev., s. 2629; C.S., s. 3507; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, s. 11; 1963, c. 1165, s. 1; 1998-128, s. 6.)

CASE NOTES

Ejection from Baggage Car. — A person who gets on a blind baggage car, even though he has a ticket, and does not tell the conductor that he has it, where the conductor does not see it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. McGraw v. Railroad, 135 N.C. 264, 47 S.E. 758 (1904).

Where individual shipped horses by express with an agreement that he should ride in the same car, he could not ride in the passenger coach without paying his fare. Teeter v. Southern Express Co., 172 N.C. 616, 90 S.E. 761, rehearing denied, 172 N.C. 620, 90 S.E. 927 (1961).

Mileage Book Holder Must Comply with Terms. — The holder of a mileage book must comply with its terms if reasonable opportunity is given, or he may be ejected. Mason v. Seaboard Air Line Ry., 159 N.C. 183, 75 S.E. 25 (1912); McNairy v. Norfolk & W.R.R., 172 N.C. 505, 90 S.E. 497 (1916).

Ejection of Party Refusing to Show Mileage Book. — When a purchaser of a mileage book from a railroad company is riding on an exchange ticket and refuses, without excuse, to show his mileage book, in connection with the ticket, to the conductor on the train, he is not regarded as a passenger, and the conductor has the right to eject him from the train. Mason v. Seaboard Air Line Ry., 159 N.C. 183, 75 S.E. 25 (1912).

Ejection Caused by Failure of Conductor to Return Ticket. — Where the conductor failed to return a ticket to a passenger to be used on another train, and the passenger was ejected therefrom for lack of the ticket, the railroad was liable for all damages attending the ejection. Sawyer v. Norfolk S.R.R., 171 N.C. 13, 86 S.E. 166 (1915).

Reliance on Agent's Statements. — The purchaser of a ticket may rely upon the statements of the railroad agent as to trains, connection, validity of ticket, etc., and if the passenger is ejected as a result of the agent's mistake the railroad is liable. Hallman v. Southern Ry., 169 N.C. 127, 85 S.E. 298 (1915); Creech v. Atlantic C.L.R.R., 174 N.C. 61, 93 S.E. 453 (1917).

Carrier Not Liable for Unforeseen Result of Ejection. — A conductor requiring an intoxicated man to leave the train for nonpayment of fare did not render the carrier liable for the death of the man from exposure, where the conductor did not have reasonable ground to believe that the man was unable to find his way or walk to the nearest house or to the railroad station, or even to his own father's house, which was not far away. Roseman v. Carolina Cent. R.R., 112 N.C. 709, 16 S.E. 766 (1893).

Evidence of Drunkenness Held Inadmissible. — In an action for wrongful ejection from a train, evidence of drunkenness of plaintiff was not admissible where the answer simply denied the wrongful ejection alleged in the complaint. Raynor v. Wilmington Seacoast R.R., 129 N.C. 195, 39 S.E. 821 (1901).

As to requirement of former statute that passenger be ejected near usual stopping place or dwelling house, see Roseman v. Carolina Cent. R.R., 112 N.C. 709, 16 S.E. 766 (1893); Bullock v. Atlantic C.L.R.R., 152 N.C. 66, 67 S.E. 60 (1910); McNairy v. Norfolk & W.R.R., 172 N.C. 505, 90 S.E. 497 (1916).

§ 62-152: Repealed by Session Laws 1998-128, s. 13, effective September 4, 1998.

§ 62-152.1. Uniform rates; joint rate agreements among carriers.

(a) Definitions. — As used in this section, unless the context otherwise requires, the term:

(1) "Carrier" means any common carrier as defined in G.S. 62-3(6).

(2) For purposes of this section, carriers by motor vehicles are carriers of the same class, carriers by pipeline are carriers of the same class, carriers by water are carriers of the same class, carriers by air are carriers of the same class, and freight forwarders are carriers of the same class.

(3) The term "antitrust laws" means the provisions of Chapter 75 of the General Statutes (N.C.G.S. 75-1, et seq.), relating to combinations in restraint of trade.

(b) For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class. In order to realize and effectuate this policy and regulatory goal any carrier subject to regulation by this Commission and party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by subsection (d) or (e) of this section) if it finds that, by reason of furtherance of the transportation policy and goal declared in this section and in G.S. 62-2 or G.S. 62-259 as may be pertinent, the relief provided in subsection (h) shall apply with respect to the making and carrying out of such agreement; otherwise, the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this subsection.

(c) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under this section shall maintain such accounts, records, files and memoranda and shall submit to the Commission such information and reports as may be prescribed by the Commission, and all the accounts, records, files and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

(d) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that the agreement is of the character described in subsection (b) of this section and is limited to matters relating to transportation under joint rates or over through routes.

(e) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action after any determination arrived at through such procedure.

(f) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which the approval was granted is not or are not in conformity with the standards set forth in subsection (b) of this section, or whether any such terms and conditions are not necessary for the purposes of conformity with such standards, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standards, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standards or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardships.

(g) No order shall be entered under this section except after interested parties have been afforded reasonable notice and opportunity for hearing.

(h) Parties to any agreement approved by the Commission under this section and other parties are, if the approval of such agreement is not prohibited by subsection (d) or (e) of this section, hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with the terms and conditions prescribed by the Commission.

(i) Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of subsection (h) of this section. (1977, c. 219, s. 1; 1998-128, s. 7.)

Legal Periodicals. — For survey of 1977 law on common carriers, see 56 N.C.L. Rev. 853 (1978).

§ 62-152.2. Standard transportation practices.

(a) For the purposes of this section, “standard transportation practices” means:

(1) Uniform cargo liability rules.
(2) Uniform bills of lading or receipts for property being transported.
(3) Uniform cargo credit rules.
(4) Antitrust immunity for joint line rates or routes, classification, and mileage guides.

(b) A person otherwise exempt from regulation by the Commission under Public Law 103-305 may file an application with the Commission to participate in one or more standard transportation practices under rules set out by the Commission. (1995, c. 523, s. 10.1.)

§ 62-153. Contracts of public utilities with certain companies and for services.

(a) All public utilities shall file with the Commission copies of contracts with any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing or purchasing company or agency, and when requested by the Commission, copies of contracts with any person selling service of any kind. The Commission may disapprove, after hearing, any such contract if it is found to be unjust or unreasonable, and made for the purpose or with the effect of concealing, transferring or dissipating the earnings of the public utility. Such contracts so disapproved by the Commission shall be void and shall not be carried out by the public utility which is a party thereto, nor shall any payments be made thereunder. Provided, however, that in the case of motor carriers of passengers this subsection shall apply only to such contracts as the Commission shall request such carriers to file.

(b) No public utility shall pay any fees, commissions or compensation of any description whatsoever to any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing or purchasing company or agency for services rendered or to be rendered without first filing copies of all proposed agreements and contracts with the Commission and obtaining its approval. Provided, however, that this subsection shall not apply to motor carriers of passengers. (1931, c. 455; 1933, c. 134, s. 8; c. 307, s. 17; 1941, c. 97; 1963, c. 1165, s. 1.)

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

CASE NOTES

Purpose. — The purpose of this section is merely to assure that executory contracts between affiliates be just and reasonable on their face. State ex rel. Utils. Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

This section was clearly enacted for the purpose of discovering contracts between affiliated corporations which are "unjust or unreasonable, and made for the purpose or with the effect of concealing, transferring or dissipating the earnings of the public utility." State ex rel. Utils. Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Affiliate Company Cannot Be Used to Transmit Unreasonable Profits to Parent Holding Company. — The Commission cannot permit parent holding companies to use affiliate companies as a device for transmitting an unreasonable level of profits to such parent holding company from goods or services supplied the operating company by way of an affiliate company. State ex rel. Utils. Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479, rev'd on other grounds, 277 N.C. 255, 177 S.E.2d 405 (1970), reaffirmed, 278 N.C. 235, 179 S.E.2d 419 (1971).

The statutory scheme is directed at prior approval. State ex rel. Utils. Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Standard for Approval. — The consideration of the Commission under this section is directed to whether the contracts are just and reasonable. If they are, and are not efforts to divert or conceal profits, they are to be approved. State ex rel. Utils. Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Basis for Determining Reasonableness of Affiliate's Charges. — The Utilities Commission must determine the reasonableness of charges to a public utility by an affiliated corporation on the basis of either: (1) the cost of the same services on the open market; (2) the cost similar utilities pay to their service companies; or (3) the reasonableness of the expenses incurred by the affiliated corporation in generating its services. State ex rel. Utils. Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Consideration for Rate Making Purposes of Expenses Pursuant to Unfiled Contracts. — This section does not prohibit the Utilities Commission from considering fees or charges owed to affiliated corporations under unfiled contracts as expenses of the public utility for purposes of rate making, so long as the Commission determines in the rate making procedure that the agreements between the utility and the affiliated corporations are just and reasonable and it does not appear that their purpose is to conceal or divert profits from the public utility to an affiliate. State ex rel. Utils. Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Expenses incurred under unreasonable contracts would have to be disregarded in computing a utility's expenses. State ex rel. Utils. Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Examination of Books and Records of Affiliated Companies. — An examination by the Utilities Commission of the books and records of companies affiliated with a regulated utility is necessary in a rate case only if there is no evidence of what the utility would have had to pay nonaffiliated companies for the same services or of what similar utilities pay their service companies for similar services. State ex rel. Utils. Comm'n v. Intervenor Residents, 52 N.C. App. 222, 278 S.E.2d 761 (1981), rev'd on other grounds, 305 N.C. 62, 286 S.E.2d 770 (1982).

Cited in State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-154. Surplus power rates.

The Commission is authorized to investigate the sale of surplus electric power and the rates made for such energy, and to prescribe reasonable rules and rates for such sales. (1963, c. 1165, s. 1.)

§ 62-155. Electric power rates to promote conservation.

(a) It is the policy of the State to conserve energy through efficient utilization of all resources.

(b) If the Utilities Commission after study determines that conservation of electricity and economy of operation for the public utility will be furthered thereby, it shall direct each electric public utility to notify its customers by the most economical means available of the anticipated periods in the near future when its generating capacity is likely to be near peak demand and urge its customers to refrain from using electricity at these peak times of the day. In addition, each public utility shall, insofar as practicable, investigate, develop, and put into service, with approval of the Commission, procedures and devices that will temporarily curtail or cut off certain types of appliances or equipment for short periods of time whenever an unusual peak demand threatens to overload its system.

(c) The Commission itself shall inform the general public as to the necessity for controlling demands for electricity at peak periods and shall require the several electric public utilities to carry out its program of information and education in any reasonable manner.

(d) The Commission shall study the feasibility of and, if found to be practicable, just and reasonable, make plans for the public utilities to bill customers by a system of nondiscriminatory peak pricing, with incentive rates for off-peak use of electricity charging more for peak periods than for off-peak periods to reflect the higher cost of providing electric service during periods of peak demand on the utility system. No order regarding such rates shall be issued by the Commission without a prior public hearing, whether in a single electric utility company rate case or in general orders relating to two or more or all electric utilities.

(e) No Class A electric public utility shall apply for any rate change unless it files at the time of the application a report of the probable effect of the proposed rates on peak demand on it and its estimate of the kilowatt hours of electricity that will be used by its customers during the ensuing one year and five years from the time such rates are proposed to become effective. (1975, c. 780, s. 2.)

§ 62-156. Power sales by small power producers to public utilities.

(a) In the event that a small power producer and an electric utility are unable to mutually agree to a contract for the sale of electricity or to a price for the electricity purchased by the electric utility, the commission shall require the utility to purchase the power, under rates and terms established as provided in subsection (b) of this section.

(b) No later than March 1, 1981, and at least every two years thereafter, the commission shall determine the rates to be paid by electric utilities for power purchased from small power producers, according to the following standards:

(1) Term of Contract. — Long-term contracts for the purchase of electricity by the utility from small power producers shall be encouraged in order to enhance the economic feasibility of small power production facilities.

(2) Avoided Cost of Energy to the Utility. — The rates paid by a utility to a small power producer shall not exceed, over the term of the purchase power contract, the incremental cost to the electric utility of the electric energy which, but for the purchase from a small power producer, the utility would generate or purchase from another source. A determination of the avoided energy costs to the utility shall include a consideration of the following factors over the term of the power contracts: the expected costs of the additional or existing generating capacity which could be displaced, the expected cost of fuel and other operating expenses of electric energy production which a utility would otherwise incur in generating or purchasing power from another source, and the expected security of the supply of fuel for the utilities' alternative power sources.

(3) Availability and Reliability of Power. — The rates to be paid by electric utilities for power purchased from a small power producer shall be established with consideration of the reliability and availability of the power. (1979, 2nd Sess., c. 1219, s. 2.)

§ 62-157. Telecommunications relay service.

(a) Finding. — The General Assembly finds and declares that it is in the public interest to provide access to public telecommunications services for hearing impaired or speech impaired persons, including those who also have vision impairment, and that a statewide telecommunications relay service for telephone service should be established.

(a1) Definitions. — For purposes of this section:

(1) "CMRS" is as defined in G.S. 62A-40.

(2) "CMRS connection" is as defined in G.S. 62A-40.

(3) "CMRS provider" is as defined in G.S. 62A-40.

(4) "Exchange access facility" means the access from a particular telephone subscriber's premises to the telephone system of a local exchange telephone company, and includes local exchange company-provided access lines, private branch exchange trunks, and centrex network access registers, all as defined by tariffs of telephone companies as approved by the Commission.

(5) "Local service provider" means a local exchange company, competing local provider, or telephone membership corporation.

(b) Authority to Require Surcharge. — The Commission shall require local service providers to impose a monthly surcharge on all residential and business local exchange access facilities to fund a statewide telecommunications relay service by which hearing impaired or speech impaired persons, including those who also have vision impairment, may communicate with others by telephone. This surcharge, however, may not be imposed on participants in the Subscriber Line Charge Waiver Program or the Link-up Carolina Program established by the Commission. This surcharge, and long distance revenues collected under subsection (f) of this section, are not includable in gross receipts subject to the franchise tax levied under G.S. 105-120 or the sales tax levied under G.S. 105-164.4.

(c) Specification of Surcharge. — The Department of Health and Human Services shall initiate a telecommunications relay service by filing a petition with the Commission requesting the service and detailing initial projected required funding. The Commission shall, after giving notice and an opportunity to be heard to other interested parties, set the initial monthly surcharge based upon the amount of funding necessary to implement and operate the service, including a reasonable margin for a reserve. The surcharge shall be identified on customer bills as a special surcharge for provision of a telecommunications relay service for hearing impaired and speech impaired persons. The Commission may, upon petition of any interested party, and after giving notice and an opportunity to be heard to other interested parties, revise the surcharge from time to time if the funding requirements change. In no event shall the surcharge exceed twenty-five cents (25¢) per month for each exchange access facility.

(d) Funds to Be Deposited in Special Account. — The local service providers shall collect the surcharge from their customers and deposit the moneys collected with the State Treasurer, who shall maintain the funds in an interest-bearing, nonreverting account. After consulting with the State Treasurer, the Commission shall direct how and when the local service providers shall deposit these moneys. Revenues from this fund shall be available only to the Department of Health and Human Services to administer the statewide telecommunications relay service program, including its establishment, operation, and promotion. The Commission may allow the Department of Health and Human Services to use up to four cents (4¢) per access line per month of the surcharge for the purpose of providing telecommunications devices for hearing impaired or speech impaired persons, including those who also have vision impairment, through a distribution program. The Commission shall prepare such guidelines for the distribution program as it deems appropriate and in the public interest. Both the Commission and the Public Staff may audit all aspects of the telecommunications relay service program, including the distribution programs, as they do with any public utility subject to the provisions of this Chapter. Equipment paid for with surcharge revenues, as allowed by the Commission, may be distributed only by the Department of Health and Human Services.

(d1) The Department of Health and Human Services shall utilize revenues from the wireless surcharge collected under subsection (i) of this section to fund the Regional Resource Centers within the Division of Services for the

Deaf and the Hard of Hearing, in accordance with G.S. 143B-216.33, G.S. 143B-216.34, and Chapter 8B of the General Statutes.

(e) Administration of Service. — The Department of Health and Human Services shall administer the statewide telecommunications relay service program, including its establishment, operation, and promotion. The Department may contract out the provision of this service for four-year periods to one or more service providers, using the provisions of G.S. 143-129. The Department shall administer the Regional Resource Centers within the Division of Services for the Deaf and the Hard of Hearing in accordance with G.S. 143B-216.33, G.S. 143B-216.34, and Chapter 8B of the General Statutes.

(f) Charge to Users. — The users of the telecommunications relay service shall be charged their approved long distance and local rates for telephone services (including the surcharge required by this section), but no additional charges may be imposed for the use of the relay service. The local service providers shall collect revenues from the users of the relay service for long distance services provided through the relay service. These revenues shall be deposited in the special fund established in subsection (d) of this section in a manner determined by the Commission after consulting with the State Treasurer. Local service providers shall be compensated for collection, inquiry, and other administrative services provided by said companies, subject to the approval of the Commission.

(g) Reporting Requirement. — The Commission shall, after consulting with the Department of Health and Human Services, develop a format and filing schedule for a comprehensive financial and operational report on the telecommunications relay service program. The Department of Health and Human Services shall thereafter prepare and file these reports as required by the Commission with the Commission and the Public Staff. The Department shall also be required to report to the Revenue Laws Study Committee.

(h) Power to Regulate. — The Commission shall have the same power to regulate the operation of the telecommunications relay service program as it has to regulate any public utility subject to the provisions of this Chapter.

(i) Wireless Surcharge. — A CMRS provider, as part of its monthly billing process, must collect the same surcharge imposed on each exchange access facility under this section for each CMRS connection. A CMRS provider may deduct a one percent (1%) administrative fee from the total amount of surcharge collected. A CMRS provider shall remit the surcharge collected, less the administrative fee, to the 911 Board in the same manner and with the same frequency as the local service providers remit the surcharge to the State Treasurer. The 911 Board shall remit the funds collected from the surcharge to the special account created under subsection (d) of this section. (1989, c. 599; 1997-443, s. 11A.118(a); 1999-402, s. 1; 2003-341, s. 1; 2007-383, s. 4; 2009-451, s. 10.56(c), (d).)

Editor's Note. — G.S. 105-120 referred to in the above G.S. 62-157(b) was repealed by Session Laws 2001-430, s. 12.

Session Laws 2009-451, s. 10.56(a), provides: "Notwithstanding G.S. 62-157, on July 1, 2009, the State Controller shall transfer four million five hundred thousand dollars ($4,500,000) from the Special Account for Telecommunications Relay Service to Nontax Budget Code 19978 (Intra State Transfers) to support General Fund appropriations for the 2009-2010 fiscal year."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-383, s. 4, effective January 1, 2008, substituted "G.S. 62A-40" for "G.S. 62A-21" in subdivisions (a1)(1) through (a1)(3); and deleted "Wireless" preceding "911 Board" twice in subsection (i).

Session Laws 2009-451, s. 10.56(c) and (d), effective July 1, 2009, added subsection (d1), and added the last sentence of subsection (e).

§ 62-158. Natural gas expansion.

(a) In order to facilitate the construction of facilities in and the extension of natural gas service to unserved areas, the Commission may, after a hearing, order a natural gas local distribution company to create a special natural gas expansion fund to be used by that company to construct natural gas facilities in areas within the company's franchised territory that otherwise would not be feasible for the company to construct. The fund shall be supervised and administered by the Commission. Any applicable taxes shall be paid out of the fund.

(b) Sources of funding for a natural gas local distribution company's expansion fund may, pursuant to the order of the Commission, after hearing, include:

(1) Refunds to a local distribution company from the company's suppliers of natural gas and transportation services pursuant to refund orders or requirements of the Federal Energy Regulatory Commission;

(2) Expansion surcharges by the local distribution company charged to customers purchasing natural gas or transportation services throughout that company's franchised territory; provided, however, in determining the amount of any surcharge the Commission shall take into account the prices of alternative sources of energy and the need to remain competitive with those alternative sources, and the need to maintain just and reasonable rates for natural gas and transportation services for all customers served by the company; provided further that the expansion surcharge shall not be greater than fifteen cents (15¢) per dekatherm; and

(3) Other sources of funding approved by the Commission.

(c) The application of all such funds to expansion projects shall be pursuant to the order of the Commission. The Commission shall ensure that all projects to which expansion funds are applied are consistent with the intent of this section and G.S. 62-2(9). In determining economic feasibility, the Commission shall employ the net present value method of analysis on a project specific basis. Only those projects with a negative net present value shall be determined to be economically infeasible for the company to construct. In no event shall the Commission authorize a distribution from the fund of an amount greater than the negative net present value of any proposed project as determined by the Commission. If at any time a project is determined by the Commission to have become economically feasible, the Commission may require the company to remit to the expansion fund or to customers appropriate portions of the distributions from the fund related to the project, and the Commission may order such funds to be returned with interest in a reasonable amount to be determined by the Commission. Utility plant acquired with expansion funds shall be included in the local distribution company's rate base at zero cost except to the extent such funds have been remitted by the company pursuant to order of the Commission.

(d) The Commission, after hearing, may adopt rules to implement this section, including rules for the establishment of expansion funds, for the use of such funds, for the remittance to the expansion fund or to customers of supplier and transporter refunds and expansion surcharges or other funds that were sources of the expansion fund, and for appropriate accounting, reporting and ratemaking treatment. The Commission and Public Staff shall report to the Joint Legislative Utility Review Committee on the operation of any expansion funds in conjunction with the reports required under G.S. 62-36A. (1991, c. 598, s. 2.)

CASE NOTES

The purpose of this section is to facilitate the construction of facilities and the extension of natural gas service into areas of the State where it may not be economically feasible to expand with traditional funding methods in order to provide infrastructure to aid industrial recruitment and economic development. State ex rel. Utils. Comm'n v. Piedmont Natural Gas Co., 346 N.C. 558, 488 S.E.2d 591 (1997).

Expansion fund legislation is a proper delegation of legislative authority to an administrative agency and is not unconstitutional. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

Commission Authority. — As an administrative agency created by the legislature, the Commission has not been given jurisdiction to determine the constitutionality of legislative enactments, specifically G.S. 62-2(9) or this section. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

The Commission did not act under a misapprehension of applicable law when it granted the petition and established the expansion fund pursuant to a proper interpretation of its authority and discretion to do so. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

Expansion Funds Not Used Where Alternative Financing Feasible. — Utilities Commission concluded that it would be inappropriate and inconsistent with the legislative intent expressed in this section to allow expansion funds to be used where alternative financing was feasible. State ex rel. Utils. Comm'n v. Piedmont Natural Gas Co., 346 N.C. 558, 488 S.E.2d 591 (1997).

Utilities commission's ruling that creation of natural gas expansion fund was not in the public interest was not arbitrary and capricious, where the court found that (1) the areas to be served by the expansion were small and were within a county that had significant natural gas infrastructure; (2) there were alternate means of mitigating the costs of extending service to unserved areas; and (3) a refund of the $2 million the utility held in escrow would be better used to mitigate high customer bills. State ex rel. Utils. Comm'n v. NUI Corp., 154 N.C. App. 258, 572 S.E.2d 176, 2002 N.C. App. LEXIS 1470 (2002).

Cited in State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 337 N.C. 236, 446 S.E.2d 348 (1994); State ex rel. Utils. Comm'n v. North Carolina Gas Serv., 128 N.C. App. 288, 494 S.E.2d 621 (1998).

§ 62-159. Additional funding for natural gas expansion.

(a) In order to facilitate the construction of facilities in and the extension of natural gas service to unserved areas, the Commission may provide funding through appropriations from the General Assembly or the proceeds of general obligation bonds as provided in this section to either (i) an existing natural gas local distribution company; (ii) a person awarded a new franchise; or (iii) a gas district for the construction of natural gas facilities that it otherwise would not be economically feasible for the company, person, or gas district to construct.

(b) The use of funds provided under this section shall be pursuant to an order of the Commission after a public hearing. The Commission shall ensure that all projects for which funds are provided under this section are consistent with the intent of this section and G.S. 62-2(9). In determining whether to approve the use of funds for a particular project pursuant to this section, the Commission shall consider the scope of a proposed project, including the number of unserved counties and the number of anticipated customers that would be served, the total cost of the project, the extent to which the project is considered feasible, and other relevant factors affecting the public interest. In determining economic feasibility, the Commission shall employ the net present value method of analysis on a project specific basis. Only those projects with a negative net present value shall be determined to be economically infeasible for the company, person, or gas district to construct. In no event shall the Commission provide funding under this section of an amount greater than the negative net present value of any proposed project as determined by the

Commission. If at any time a project is determined by the Commission to have become economically feasible, the Commission shall require the recipient of funding to remit to the Commission appropriate funds related to the project, and the Commission may order those funds to be returned with interest in a reasonable amount to be determined by the Commission. Funds returned, together with interest, shall be deposited with the State Treasurer to be used for other expansion projects pursuant to the provisions of this section. Utility plant acquired with expansion funds shall be included in the local distribution company's rate base at zero cost except to the extent such funds have been remitted by the company pursuant to order of the Commission. In the event a gas district wishes to sell or otherwise dispose of facilities financed with funds received under this section, it must first notify the Commission which shall determine the method of repayment or accounting for those funds.

(c) To the extent that one or more of the counties included in a proposed project to be funded pursuant to this section are counties affected by the loss of exclusive franchise rights provided for in G.S. 62-36A(b), the Commission may conclude that the public interest requires that the person obtaining the franchise or funding pursuant to this section be given an exclusive franchise and that the existing franchise be canceled. Any new exclusive franchise granted under this subsection shall be subject to the provisions of G.S. 62-36A(b). This subsection does not apply to gas districts formed under Article 28 of Chapter 160A of the General Statutes.

(d) The Commission, after hearing, shall adopt rules to implement this section as soon as practicable. The Commission and Public Staff shall report to the Joint Legislative Utility Review Committee on the use of funding provided under this section in conjunction with the reports required under G.S. 62-36A. (1998-132, s. 17; 1999-456, s. 17.)

Editor's Note. — Session Laws 1998-132, s. 16 provides that the extension of natural gas facilities to unserved parts of the state is necessary and to be encouraged, that the construction of facilities may not be feasible with traditional funding methods, and that it is necessary to authorize additional funding methods to facilitate the expansion of natural gas service.

§ 62-159.1. Debt collection practices.

(a) A public utility, electric membership corporation, and telephone membership corporation shall not do any of the following in its debt collection practices:

(1) Suspend or disconnect service to a customer because of a past-due and unpaid balance for service incurred by another person who resides with the customer after service has been provided to the customer's household, unless one or more of the following apply:

a. The customer and the person were members of the same household at a different location when the unpaid balance for service was incurred.

b. The person was a member of the customer's current household when the service was established, and the person had an unpaid balance for service at that time.

c. The person is or becomes responsible for the bill for the service to the customer.

(2) Require that in order to continue service, a customer must agree to be liable for the delinquent account of any other person who will reside in the customer's household after the customer receives the service, unless one or more of the following apply:

a. The customer and the person were members of the same household at a different location when the unpaid balance for service was incurred.

b. The person was a member of the customer's current household when the service was established, and the person had an unpaid balance for service at that time.

(b) Notwithstanding the provisions of subsection (a) of this section, if a customer misrepresents his or her identity in a written or verbal agreement for service or receives service using another person's identity, the public utility, electric membership corporation, and telephone membership corporation shall have the power to collect a delinquent account using any remedy provided by law for collecting and enforcing private debts from that customer. (2009-302, s. 1.)

Cross References. — Deceptive representation, see G.S. 58-70-110 and 75-54.

Editor's Note. — Session Laws 2009-302, s. 6, made this section effective July 17, 2009.

§§ 62-159.2 through 62-159.5: Reserved for future codification purposes.

Article 8.

Securities Regulation.

§ 62-160. Permission to pledge assets.

No public utility shall pledge its faith, credit, moneys or property for the benefit of any holder of its preferred or common stocks or bonds, nor for any other business interest with which it may be affiliated through agents or holding companies or otherwise by the authority of the action of its stockholders, directors, or contract or other agents, the compliance or result of which would in any manner deplete, reduce, conceal, abstract or dissipate the earnings or assets thereof, decrease or increase its liabilities or assets, without first making application to the Commission and by order obtain its permission so to do. (1933, c. 307, s. 17; 1963, c. 1165, s. 1.)

CASE NOTES

The General Assembly intended this Article to apply to all public utilities doing business in this State, whether they be foreign or domestic corporations, and even though they are also engaged in interstate commerce. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

The Commission may not lawfully require a multistate foreign corporation engaged in interstate commerce to comply with this Article and issue securities in the future only after first making application to and obtaining an order from the Commission authorizing such issue. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

The regulation and control by this State over the issuance of securities by a multistate foreign corporation engaged in interstate commerce, which the attempted enforcement by the Commission of this Article was held necessarily to entail, is to impose such an undue burden on interstate commerce as to make such regulation and control constitutionally beyond the State's power to enforce. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

§ 62-161. Assumption of certain liabilities and obligations to be approved by Commission; refinancing of public utility securities.

(a) No public utility shall issue any securities, or assume any liability or obligation as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect to the securities of any other person unless and until, and then only to the extent that, upon application by such utility, and after investigation by the Commission of the purposes and uses of the proposed issue, and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, the Commission by order authorizes such issue or assumption.

(b) The Commission shall make such order only if it finds that such issue or assumption is (i) for some lawful object within the corporate purposes of the public utility, (ii) is compatible with the public interest, (iii) is necessary or appropriate for or consistent with the proper performance by such utility of its service to the public and will not impair its ability to perform that service, and (iv) is reasonably necessary and appropriate for such purpose.

(c) Any such order of the Commission shall specify the purposes for which any such securities or the proceeds thereof may be used by the public utility making such application.

(d) If a public utility shall apply to the Commission for the refinancing of its outstanding shares of stock by exchanging or redeeming such outstanding shares, the exchange or redemption of such shares of any dividend rate or rates, class or classes, may be made in whole or in part, in the manner and to the extent approved by the Commission, notwithstanding any provisions of law applicable to corporations in general: Provided, that the proposed transactions are found by the Commission to be in the public interest and in the interest of consumers and investors, and provided that any redemption shall be at a price or prices, not less than par, and at a time or times, stated or provided for in the utility's charter or stock certificates. (1933, c. 307, s. 18; 1945, c. 656; 1963, c. 1165, s. 1.)

CASE NOTES

The General Assembly intended this Article to apply to all public utilities doing business in this State, whether they be foreign or domestic corporations, and even though they are also engaged in interstate commerce. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

The Commission may not lawfully require a multistate foreign corporation engaged in interstate commerce to comply with this Article and issue securities in the future only after first making application to and obtaining an order from the Commission authorizing such issue. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

The regulation and control by this State over the issuance of securities by a multistate foreign corporation engaged in interstate commerce, which the attempted enforcement by the Commission of this Article was held necessarily to entail, is to impose such an undue burden on interstate commerce as to make such regulation and control constitutionally beyond the State's power to enforce. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

The common capital stock of a corporation is a "security" within the meaning of that term as used in this section and G.S. 62-162. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 243 N.C. 46, 89 S.E.2d 802 (1955).

Cited in State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

§ 62-162. Commission may approve in whole or in part or refuse approval.

The Commission, by its order, may grant or deny the application provided for in the preceding section [G.S. 62-161] as made, or may grant it in part or deny it in part or may grant it with such modification and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises and may, from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate and may, by any such supplemental order, modify the provisions of any previous order as to the particular purposes, uses, and extent to which or the conditions under which any securities so authorized or the proceeds thereof may be applied; subject always to the requirements of the foregoing section [G.S. 62-161]. (1933, c. 307, s. 19; 1963, c. 1165, s. 1.)

CASE NOTES

Authority of Commission to Set Minimum Price for Sale of Unissued Common Stock. — In view of the language used by the legislature in conferring power of the Utilities Commission to supervise and control the issue and sale of securities by a public utility, the Commission had the authority not only to veto the sale of unissued common stock of a utility at par but also to impose the condition that such stock should be sold at a price not less than $125.00 per share. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 243 N.C. 46, 89 S.E.2d 802 (1955).

§ 62-163. Contents of application for permission.

Every application for authority for such issue or assumption shall be made in such form and contain such matters as the Commission may prescribe. Every such application and every certificate of notification hereinafter provided for shall be made under oath, signed and filed on behalf of the public utility by its president, a vice-president, auditor, comptroller, or other executive officer duly designated for that purpose by such utility. (1933, c. 307, s. 20; 1963, c. 1165, s. 1.)

§ 62-164. Applications to receive immediate attention; continuances.

All applications for the issuance of securities or assumption of liability or obligation shall be placed at the head of the Commission's docket and disposed of promptly, and all such applications shall be disposed of in 30 days after the same are filed with the Commission, unless it is necessary for good cause to continue the same for a longer period for consideration. Whenever such application is continued beyond 30 days after the time it is filed, the order making such continuance must state fully the facts necessitating such continuance. (1933, c. 307, s. 21; 1963, c. 1165, s. 1.)

§ 62-165. Notifying Commission as to disposition of securities.

Whenever any securities set forth and described in any such application for authority or certificate of notification as pledged or held unencumbered in the treasury of the utility shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of, by the utility, such utility shall, within 10 days after such sale, pledge, repledge, or other disposition, file with the Commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the Commission. (1933, c. 307, s. 22; 1963, c. 1165, s. 1.)

§ 62-166. No guarantee on part of State.

Nothing herein shall be construed to imply any guarantee or obligation as to such securities on the part of the State of North Carolina. (1933, c. 307, s. 23; 1963, c. 1165, s. 1.)

§ 62-167. Article not applicable to note issues and renewals; notice to Commission.

The provisions of the foregoing sections shall not apply to notes issued by a utility for proper purposes and not in violation of law, payable at a period of not more than two years from the date thereof, and shall not apply to like notes issued by a utility payable at a period of not more than two years from date thereof, to pay, retire, discharge, or refund in whole or in part any such note or notes, and shall not apply to renewals thereof from time to time not exceeding in the aggregate six years from the date of the issue of the original note or notes so renewed or refunded. No such notes payable at a period of not more than two years from the date thereof, shall, in whole or in part, directly or indirectly, be paid, retired, discharged or refunded by any issue of securities or another kind of any term or character or from the proceeds thereof without the approval of the Commission. Within 10 days after the making of any such notes, so payable at periods of not more than two years from the date thereof, the utility issuing the same shall file with the Commission a certificate of notification, in such form as may be determined and prescribed by the Commission. (1933, c. 307, ss. 24, 25; 1963, c. 1165, s. 1.)

§ 62-168. Not applicable to debentures of court receivers.

Nothing contained in this Article shall limit the power of any court having jurisdiction to authorize or cause receiver's certificates or debentures to be issued according to the rules and practice obtained in receivership proceedings in courts of equity. (1933, c. 307, s. 25; 1963, c. 1165, s. 1.)

§ 62-169. Periodical or special reports.

The Commission shall require periodical or special reports from each public utility issuing any security, including such notes payable at periods of not more than two years from the date thereof, which shall show, in such detail as the Commission may require, the disposition made of such securities and the application of the proceeds. (1933, c. 307, s. 26; 1963, c. 1165, s. 1.)

§ 62-170. Failure to obtain approval not to invalidate securities or obligations; noncompliance with Article, etc.

(a) Securities issued and obligations and liabilities assumed by a public utility, for which the authorization of the Commission is required, shall not be invalidated because issued or assumed without such authorization therefor having first been obtained or because issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption.

(b) Securities issued or obligations or liabilities assumed in accordance with all the terms and conditions of the order of authorization therefor shall not be affected by a failure to comply with any provision of this Article or rule or regulation of the Commission relating to procedure and other matters preceding the entry of such order of authorization or order supplemental thereto.

(c) A copy of any order made and entered by the Commission and certified by a clerk of the Commission approving the issuance of any securities or the assumption of any obligation or liability by a public utility shall be sufficient evidence of full and complete compliance by the applicant for such approval with all procedural and other matters required precedent to the entry of such order.

(d) Any public utility which willfully issues any such securities, or assumes any such obligation or liability, or makes any sale or other disposition of securities, or applies any securities or the proceeds thereof to purposes other than the purposes specified in an order of the Commission with respect thereto, contrary to the provisions of this Article, shall be liable to a penalty of not more than ten thousand dollars ($10,000), but such utility is only required to specify in general terms the purpose for which any securities are to be issued, or for which any obligation or liability is to be assumed, and the order of the Commission with respect thereto shall likewise be in general terms. (1933, c. 307, s. 27; 1963, c. 1165, s. 1.)

§ 62-171. Commission may act jointly with agency of another state where public utility operates.

If a commission or other agency or agencies is empowered by another state to regulate and control the amount and character of securities to be issued by any public utility within such other state, then the Utilities Commission of the State of North Carolina shall have the power to agree with such commission or other agency or agencies of such other state on the issue of stocks, bonds, notes or other evidences of indebtedness by a public utility owning or operating a public utility both in such state and in this State, and shall have the power to approve such issue jointly with such commission or other agency or agencies and to issue joint certificate of such approval: Provided, however, that no such joint approval shall be required in order to express the consent to an approval of such issue by the State of North Carolina if said issue is separately approved by the Utilities Commission of the State of North Carolina. (1933, c. 134, s. 8; c. 307, s. 28; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

The General Assembly intended this Article to apply to all public utilities doing business in this State, whether they be foreign or domestic corporations, and even though they are also engaged in interstate commerce. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 288 N.C. 201, 217 S.E.2d 543 (1975).

The Commission may not lawfully require a multistate foreign corporation engaged in interstate commerce to comply with the provisions of this Article and issue securities in the future only after first making application to and obtaining an order from the Commission authorizing such issue. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

The regulation and control by this State over the issuance of securities by a multistate foreign corporation engaged in interstate commerce, which the attempted enforcement by the Commission of this Article was held necessarily to entail, is to impose such an undue burden on interstate commerce as to make such regulation and control constitutionally beyond the State's power to enforce. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

§§ 62-172 through 62-179: Reserved for future codification purposes.

ARTICLE 9.

Acquisition and Condemnation of Property.

§ 62-180. Use of railroads and public highways.

Any person operating electric power, telegraph or telephone lines or authorized by law to establish such lines, has the right to construct, maintain and operate such lines along any railroad or public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder unreasonably the usual travel on such railroad or highway. (1874-5, c. 203, s. 2; Code, s. 2007; 1899, c. 64, s. 1; 1903, c. 562; Rev., s. 1571; C.S., s. 1695; 1939, c. 228, s. 1; 1963, c. 1165, s. 1.)

CASE NOTES

Constitutionality of Former Law. — The provisions of former G.S. 56-1 to 56-10, empowering electric power or lighting companies, etc., to condemn lands for the erection of poles, establishment of offices, and other appropriate purposes, were constitutional and valid. Wissler v. Yadkin River Power Co., 158 N.C. 465, 74 S.E. 460 (1912).

No Rights over Private Land Under Former Law. — Former G.S. 56-1 applied to constructing lines along the highway and not to constructing the lines over private land. Wade v. Carolina Tel. & Tel. Co., 147 N.C. 219, 60 S.E. 987 (1908).

Upon What Telegraph Companies Rights Conferred. — The right to construct and operate telegraph lines along any railroad or other public highway in the State, and to obtain the right-of-way therefor by a condemnatory proceeding, was expressly conferred upon any telegraph company incorporated by this or by any other state. North Carolina & R. & D.R.R. v. Carolina Cent. Ry., 83 N.C. 489 (1880); Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

Telegraph Line as Additional Burden on Land. — A telegraph line along a railroad and on the right-of-way of the railroad is an additional burden upon the land, for which the landowner is entitled to just compensation. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902); Hodges v. Western Union Tel. Co., 133 N.C. 225, 45 S.E. 572 (1903); Query v. Postal Tel. Cable Co., 178 N.C. 639, 101 S.E. 390 (1919).

As to electric light wires placed along the street being an additional burden on the land, see Brown v. Electric Co., 138 N.C. 533, 51 S.E. 62 (1905).

The construction of a street passenger railway does not impose any additional servitude upon the property fronting on the street so occupied. Hester v. Traction Co., 138 N.C. 288, 50 S.E. 711 (1905).

Maintenance of a utility pole along a public highway does not constitute an act of negligence unless the pole constitutes a hazard to motorists using the portion of the highway designated and intended for vehicular travel in a proper manner. Shapiro v. Toyota Motor Co., 38 N.C. App. 658, 248 S.E.2d 868 (1978).

Maintenance of a telephone pole 12 1/2 inches beyond the elevated curbing of a road did not constitute an act of negligence in a personal injury action in which a car failed to negotiate a curve and crashed into the pole. Shapiro v. Toyota Motor Co., 38 N.C. App. 658, 248 S.E.2d 868 (1978).

§ 62-181. Electric and hydroelectric power companies may appropriate highways; conditions.

Every electric power or hydroelectric power corporation, person, firm or copartnership which may exercise the right of eminent domain under the Chapter Eminent Domain, where in the development of electric or hydroelectric power it shall become necessary to use or occupy any public highway, or any part of the same, after obtaining the consent of the public road authorities having supervision of such public highway, shall have power to appropriate said public highway for the development of electric or hydroelectric power: Provided, that said electric power or hydroelectric power corporation shall construct an equally good public highway, by a route to be selected by and subject to the approval and satisfaction of the public road authorities having supervision of such public highway: Provided further, that said company shall pay all damages to be assessed as provided by law, by the damming of water, the discontinuance of the road, and for the laying out of said new road. (1911, c. 114; C.S., s. 1696; 1939, c. 228, s. 2; 1963, c. 1165, s. 1.)

Cross References. — As to what corporations, etc., may exercise the right of eminent domain, see G.S. 40A-3.

CASE NOTES

Change in Section of Highway. — Where a hydroelectric power company appropriated a section of a public highway and built another section in lieu thereof, the provision of the statute that the company pay all damages assessed as provided by law did not entitle the plaintiff to recover damages for the slight change in the road causing inconvenience to him in hauling wood, etc., to and from his market town. Crowell v. Tallassee Power Co., 200 N.C. 208, 156 S.E. 493 (1931).

§ 62-182. Acquisition of right-of-way by contract.

Such telegraph, telephone, or electric power or lighting company has power to contract with any person or corporation, the owner of any lands or of any franchise or easement therein, over which its lines are proposed to be erected, for the right-of-way for planting, repairing and preservation of its poles or other property, and for the erection and occupation of offices at suitable distances for the public accommodation. This section shall not be construed as requiring electric power or lighting companies to erect offices for public accommodation. (1874-5, c. 203, s. 3; Code, s. 2008; 1899, c. 64; 1903, c. 562, ss. 1, 2; Rev., s. 1572; C.S., s. 1697; 1963, c. 1165, s. 1.)

Cross References. — As to recording deeds of easement, see G.S. 47-27.

CASE NOTES

Nonowner Cannot Grant Easement. — Railroad company which is not the owner of the soil cannot grant an easement to a telegraph company. Hodges v. Western Union Tel. Co., 133 N.C. 225, 45 S.E. 572 (1903). See also, Narron v. Wilmington & W.R.R., 122 N.C. 856, 29 S.E. 356 (1898).

How Easement Acquired. — A telegraph company can acquire an easement in lands for construction and maintenance of its lines by grant, or pursuant to statute, or by adverse and continuous use for the period of 20 years. Teeter v. Postal Tel. Cable Co., 172 N.C. 783, 90 S.E. 941 (1916).

§ 62-182.1. Access to dedicated public right-of-way.

When any map or plat of a subdivision, recorded as provided in G.S. 47-30 and G.S. 136-102.6, reflects the dedication of a public street or other public right-of-way, the dedicated public street or public right-of-way shall, upon recordation of the map or plat, become immediately available for use by any public utility, telephone membership corporation organized under G.S. 117-30, or cable television system to install, maintain, and operate lines, cables, or facilities for the provision of service to the public. No public utility, telephone membership corporation organized under G.S. 117-30, or cable television system shall place or erect any line, cable, or facility in, over, or upon a street or right-of-way in a subdivision that is intended to become a public street or public right-of-way, until a map or plat of the subdivision has been recorded as provided in G.S. 47-30 and G.S. 136-102.6, and except in accordance with procedures established by the Department of Transportation, Division of Highways, for accommodating utilities or cable television systems on highway rights-of-way. Upon recordation of a map or plat of a subdivision as provided in G.S. 47-30 and G.S. 136-102.6, no liability shall attach to the developer of the property as a result of any activity of a public utility, telephone membership corporation organized under G.S. 117-30, or cable television system occurring in the dedicated public street or public right-of-way. Nothing in this section shall relieve the developer of the property of responsibilities under G.S. 136-102.6. (2005-286, s. 1; 2006-259, s. 15.)

§ 62-183. Grant of eminent domain.

Such telegraph, telephone, electric power or lighting company shall be entitled, upon making just compensation therefor, to the right-of-way over the lands, privileges and easements of other persons and corporations, including rights-of-way for the construction, maintenance, and operation of pipelines for transporting fuel to their power plants; and to the right to erect poles and towers, to establish offices, and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works, railroads, or sidetracks, or powerhouses, with the right to divert the water from such ponds or reservoirs, and conduct the same by flume, ditch, conduit, waterway or pipeline, or in any other manner, to the point of use for the generation of power at its said powerhouses, returning said water to its proper channel after being so used. (1874-5, c. 203, s. 4; Code, s. 2009; 1899, c. 64; 1903, c. 562; Rev., s. 1573; 1907, c. 74; C.S., s. 1698; 1921, c. 115; 1923, c. 60; 1925, c. 175; 1957, c. 1046; 1963, c. 1165, s. 1; 1981, c. 919, s. 2.)

Cross References. — As to the right of eminent domain in general, see Chapter 40A.

Legal Periodicals. — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Power of Eminent Domain Granted for Public Benefit. — The power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, but for the use and benefit of the people at large. Wissler v. Yadkin River Power Co., 158 N.C. 465, 74 S.E. 460 (1912).

Limitation of Right of Eminent Domain. — The statute limits the right of eminent domain, and any special power claimed by charter must clearly appear. Yadkin River Power Co. v. Whitney Co., 150 N.C. 31, 63 S.E. 188 (1908), appeal dismissed, 214 U.S. 503, 29 S. Ct. 702, 53 L. Ed. 1061 (1909). See also Blue Ridge Interurban Ry. v. Hendersonville Light & Power Co., 169 N.C. 471, 86 S.E. 296 (1915), on rehearing, 171 N.C. 314, 88 S.E. 245 (1916).

Extent of Rights Usually Determined by Companies. — The extent of the rights to be acquired is primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of facts tending to show bad faith on the part of the companies, or an oppressive or manifest abuse of their discretion. Yadkin River Power Co., v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912). See also Carolina Cent. Ry. v. Love, 81 N.C. 434 (1879).

The right of eminent domain is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. Thomason v. Railroad, 142 N.C. 318, 55 S.E. 205 (1906); Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

Construction of Future Facilities. — Property owner's contention that the energy company did not have the authority to condemn an easement to construct "future facilities" had to be rejected, as statutory law gave the energy company the authority to condemn an easement for "future facilities," including the right to erect poles and towers, and to establish offices and powerhouses. Progress Energy Carolinas, Inc. v. Strickland, 181 N.C. App. 610, 640 S.E.2d 856, 2007 N.C. App. LEXIS 404 (2007).

Compensation Essential. — Private property may not be taken for public use, directly or indirectly, without just compensation. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Conflicting Claims. — Where the claims of two companies conflict, the prior right belongs to that company which first defines and marks its route. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N.C. 248, 88 S.E. 349 (1916).

Effect of Subsequent Charter. — Where a legislative charter has been granted since a statute was passed, the powers given in the charter are not subject to the restriction of the statute. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N.C. 248, 88 S.E. 349 (1916).

Burden of Proof of Excepted Status on Defendant. — Where a quasi-public corporation brings action for condemnation, and the defendant resists upon the ground that the lands or power sought to be taken are protected by the statute, the burden of proof is upon the defendant to bring the lands or water power within the provision of the statute excepting them. Blue Ridge Interurban Ry. v. Hendersonville Light & Power Co., 171 N.C. 314, 88 S.E. 245 (1916), aff'd, 243 U.S. 563, 37 S. Ct. 440, 61 L. Ed. 900 (1917).

As to effect of federal statute, see Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Applied in Carolina Power & Light Co. v. Bowman, 229 N.C. 682, 51 S.E.2d 191 (1949).

§ 62-184. Dwelling house of owner, etc., may be taken under certain cases.

The dwelling house, yard, kitchen, garden or burial ground of the owner may be taken under G.S. 62-183 when the company alleges, and upon the proceedings to condemn makes it appear to the satisfaction of the court, that it owns or otherwise controls not less than seventy-five percent (75%) of the fall of the river or stream on which it proposes to erect its works, from the location of its proposed dam to the head of its pond or reservoir; or when the Commission, upon the petition filed by the company, shall, after due inquiry, so authorize. Nothing in this section repeals any part or feature of any private charter, but any firm or corporation acting under a private charter may operate under or adopt any feature of this section. (1907, c. 74; 1917, c. 108; C.S., s. 1699; 1933, c. 134, ss. 7, 8; 1963, c. 1165, s. 1.)

§ 62-185. Exercise of right of eminent domain; parties' interests only taken; no survey required.

When such telegraph, telephone, electric power or lighting company fails on application therefor to secure by contract or agreement such right-of-way for the purposes aforesaid over the lands, privilege or easement of another person or corporation; it may condemn the said interest through the procedures of the Chapter entitled Eminent Domain.

Only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right-of-way of a railroad or railway company sought to be condemned extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such right-of-way extends.

It is not necessary for the petitioner to make any survey of or over the right-of-way, nor to file any map or survey thereof, nor to file any certificate of the location of its line by its board of directors. (1874-5, c. 203, s. 5; Code, s. 2010; 1899, c. 64, s. 2; 1903, c. 562; Rev., s. 1574; C.S., s. 1700; 1963, c. 1165, s. 1; 1981, c. 919, s. 3.)

Cross References. — As to eminent domain, see Chapter 40A.

CASE NOTES

Editor's Note. — *The cases cited below were decided under former statutory provisions, and were decided prior to the 1981 amendment which substituted reference to the Eminent Domain Chapter for specific procedural provisions.*

"Right-of-way" is not used as synonymous with "easement," but, as applied to railroads, includes the strip of land over which the track is laid through the country, and which is used in connection therewith, whether the railroad company owns only an easement therein or the title in fee. Postal Tel. Cable Co. v. Southern Ry., 90 F. 30 (W.D.N.C. 1898), appeal dismissed, 93 F. 393 (4th Cir. 1899).

Condemnation Not Confined to Right-of-Way. — The power of condemnation is not confined to a right-of-way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions outside of these boundaries, when required for reasonable preservation and protection of lines and other property. Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

No Entry Until Damage Paid. — A telegraph company seeking to condemn a right-of-way for its line cannot be authorized to enter into possession and construct its line until damages have been assessed and paid into court. Postal Tel. Cable Co. v. Southern Ry., 89 F. 190 (W.D.N.C. 1898).

Permanent damages may be awarded a landowner who was injured by telegraph poles placed on his land. The company then acquires an easement. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902); Lambreth v. Southern Power Co., 152 N.C. 371, 67 S.E. 921 (1910).

A purchaser of land subsequent to the taking and erection thereon of a telegraph line may recover permanent damages for the easement taken, and the telegraph company thereby acquires the easement and right to maintain its line thereon. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Limitation of City's Authority. — Authority granted by a city to defendant electric company to remove a shade tree in front of plaintiff's home in order to put up its poles and wires did not justify the act of defendant in removing the tree; the city had no power to deprive plaintiff of his own property for such purpose without compensation. Brown v. Electric Co., 138 N.C. 533, 51 S.E. 62 (1905).

Who May File Petition. — The telegraph, etc., company alone has the right to file the petition in condemnation proceedings. The landowner is not given such right. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Petition Need Not State Railroad Company's Tenure. — It is not necessary that a petition asking for the condemnation of a right-of-way over the right-of-way of a railroad should state by what tenure the railroad company holds. Postal Tel. Cable Co. v. Southern Ry., 89 F. 190 (W.D.N.C. 1898).

Proceeding Does Not Affect Landowner Not Made a Party. — Condemnation proceeding by a telegraph company against a railroad company to condemn the right-of-way, to which the landowner is not a party, gives no rights against the landowner, but gives rights only against the parties before the court. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Jury Trial. — While ordinarily a jury trial is not required in condemnation proceedings, except as to the assessment of damages, the general rule does not apply where the pleadings put at issue the question of whether the character of the lands is such as to be embraced within the right conferred, or within an exception to that right under the terms of a statute. Blue Ridge Interurban R.R. v. Oates, 164 N.C. 167, 80 S.E. 398 (1913).

Judgment Necessary to Give Vested Right Under Prior Act. — In order to acquire a vested right under a statute to condemn lands which was subsequently repealed, it was necessary to show a finality by judgment in the proceedings before the later act became effective; and where it appeared that the summons was served in time, but that the prosecution bond, made a prerequisite by G.S. 1-109, was not, no vested right in the former statute could be acquired by further prosecution of the condemnation proceedings. Blue Ridge Interurban R.R. v. Oates, 164 N.C. 167, 80 S.E. 398 (1913).

Federal statute authorizing telegraph companies to construct their lines over and along any military or post roads of the United States does not give such companies the right to build their lines over the right-of-way of a railroad or other private property without the consent of the owner, or the condemnation of the right-of-way over such property in accordance with the laws of the state where situated. Postal Tel. Cable Co. v. Southern Ry., 89 F. 190 (W.D.N.C. 1898).

§ 62-186: Repealed by Session Laws 1981, c. 919, s. 4.

§ 62-187. Proceedings as under eminent domain.

The proceedings for the condemnation of lands, or any easement or interest therein, for the use of telegraph, telephone, electric power or lighting companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in Chapter 40A, the Chapter entitled Eminent Domain. (Code, s. 2012; 1899, c. 64; 1903, c. 562; Rev., s. 1576; C.S., s. 1702; 1963, c. 1165, s. 1; 1981, c. 919, s. 5.)

CASE NOTES

This section refers to proceedings subsequent to the filing of the petition and the service of the required notices. In other words, it refers to the proceedings after the parties are all before the court. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Applied in Carolina Power & Light Co. v. Briggs, 268 N.C. 158, 150 S.E.2d 16 (1966); Duke Power Co. v. Parker, 18 N.C. App. 242, 196 S.E.2d 553 (1973).

§ 62-188: Repealed by Session Laws 1981, c. 919, s. 6.

§ 62-189. Powers granted corporations under Chapter exercisable by persons, firms or copartnerships.

All the rights, powers and obligations given, extended to, or that may be exercised by any corporation or incorporated company under this Chapter shall be extended to and likewise be exercised and are hereby granted unto all persons, firms or copartnerships engaged in or authorized by law to engage in the business herein described. Such persons, firms, copartnerships and corporations engaging in such business shall be subject to the provisions and requirements of the public laws which are applicable to others engaged in the same kind of business. (1939, c. 228, s. 3; 1963, c. 1165, s. 1.)

§ 62-190. Right of eminent domain conferred upon pipeline companies; other rights.

(a) Any pipeline company transporting or conveying natural gas, gasoline, crude oil, coal in suspension, or other fluid substances by pipeline for the public for compensation, and incorporated under the laws of the State, or foreign corporations domesticated under the laws of North Carolina, may exercise the right of eminent domain under the provisions of the Chapter, Eminent Domain, and for the purpose of constructing and maintaining its pipelines and other works shall have all the rights and powers given other corporations by this Chapter and acts amendatory thereof. Nothing herein shall prohibit any such pipeline company granted the right of eminent domain under the laws of this State from extending its pipelines from within this State into another state for the purpose of transporting natural gas or coal in suspension into this State, nor to prohibit any such pipeline company from conveying or transporting natural gas, gasoline, crude oil, coal in suspension, or other fluid substances from within this State into another state. All such pipeline companies shall be deemed public utilities and shall be subject to regulation under the provisions of this Chapter.

(b) Liquid pipeline right-of-way must be selected to avoid, as far as practicable, areas containing private dwellings, industrial buildings, and places of assembly.

No liquid pipeline may be located within 50 feet of any private dwelling, or any industrial building or place of public assembly in which persons work, congregate, or assemble, unless it is provided with at least 12 inches of cover in addition to that prescribed in Part 195, Title 49, Code of Federal Regulations.

Any liquid pipeline installed underground must have at least 12 inches of clearance between the outside of the pipe and the extremity of any other underground structure, except that for drainage tile the minimum clearance may be less than 12 inches but not less than two inches. However, where 12 inches of clearance is impracticable, the clearance may be reduced if adequate provisions are made for corrosion control. (1937, c. 280; 1951, c. 1002, s. 3; 1957, c. 1045, s. 2; 1963, c. 1165, s. 1; 1985, c. 696, s. 1; 1998-128, s. 8.)

Cross References. — As to definition of "public utility" including pipeline company, see G.S. 62-3(23)a.5. As to eminent domain in general, see Chapter 40A.

Legal Periodicals. — For article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

CASE NOTES

For case reviewing the history of this section, see Colonial Pipeline Co. v. Neill, 296 N.C. 503, 251 S.E.2d 457 (1979).

The history of this indicates a legislative intent to broaden the scope of the act and to encompass interstate as well as local pipeline companies. Colonial Pipeline Co. v. Neill, 296 N.C. 503, 251 S.E.2d 457 (1979).

This section clearly confers the right of eminent domain upon interstate pipeline companies incorporated or domesticated under the laws of North Carolina, regardless of whether their pipelines originate in North Carolina. Colonial Pipeline Co. v. Neill, 296 N.C. 503, 251 S.E.2d 457 (1979).

Transport of Natural Gas Is a Public Purpose. — Property taken for the transport of natural gas between states and for its distribution within this state is a public purpose. Transcontinental Gas Pipe Line Corp. v. Calco Enters., 132 N.C. App. 237, 511 S.E.2d 671 (1999).

Effect of Former G.S. 40-2. — The legislature did not intend pipeline companies to be limited by former G.S. 40-2. Colonial Pipeline Co. v. Neill, 296 N.C. 503, 251 S.E.2d 457 (1979).

The language "pipelines originating in North Carolina" in former G.S. 40-2 does not impose a limitation on this section. Colonial Pipeline Co. v. Neill, 296 N.C. 503, 251 S.E.2d 457 (1979).

Measure of Damages. — The measures of damages to which landowners were entitled for taking of an easement by a gas company was the difference in the fair market value of the land immediately before the taking as compared to the fair market value of the land immediately after the taking. Public Serv. Co. v. Kiser, 9 N.C. App. 202, 175 S.E.2d 686 (1970).

Consideration of Precluded Future Uses in Determining Market Value. — In determining market value where a gas company has taken land for a pipeline, consideration of future uses to which the property is adapted and which are precluded by the taking should be limited to those uses which are so reasonably probable as to have an effect on the present market value of the land, and purely imaginative or speculative value should not be considered. Public Serv. Co. v. Kiser, 9 N.C. App. 202, 175 S.E.2d 686 (1970).

§ 62-191. Flume companies exercising right of eminent domain become common carriers.

All flume companies availing themselves of the right of eminent domain under the provisions of the Chapter Eminent Domain shall become common carriers of freight, for the purpose for which they are adapted, and shall be under the direction, control and supervision of the Commission in the same manner and for the same purposes as is by law provided for other common carriers of freight. (1907, c. 39, s. 4; C.S., s. 3517; 1933, c. 134, s. 8; 1941, c. 97, § 5; 1963, c. 1165, s. 1.)

Local Modification. — Duplin: 1911, c. 214.

Cross References. — As to eminent domain in general, see Chapter 40A.

§ 62-192: Repealed by Session Laws 1998-128, s. 13, effective September 4, 1998.

§§ 62-193 through 62-199: Reserved for future codification purposes.

ARTICLE 10.

Transportation in General.

§ 62-200. Duty to transport household goods within a reasonable time.

(a) It shall be unlawful for any common carrier of household goods doing business in this State to omit or neglect to transport within a reasonable time any goods, merchandise or other articles of value received by it for shipment and billed to or from any place in this State, unless otherwise agreed upon between the carrier and the shipper, or unless the same be burned, stolen or otherwise destroyed, or unless otherwise provided by the Commission.

(b) Any common carrier violating any of the provisions of this section shall forfeit to the party aggrieved the sum of ten dollars ($10.00) for the first day and one dollar ($1.00) for each succeeding day of such unlawful detention or neglect, but the forfeiture shall not be collected for a period exceeding 30 days.

(c) In reckoning what is a reasonable time for such transportation, it shall be considered that such common carrier has transported household goods within a reasonable time if it has done so in the ordinary time required for transporting such articles by similar carriers between the receiving and shipping stations. The Commission is authorized to establish reasonable times for transportation by the various modes of carriage which shall be held to be prima facie reasonable, and a failure to transport within such times shall be held prima facie unreasonable. This section shall be construed to refer not only to delay in starting the household goods from the station where they are received, but to require the delivery at their destination within the time specified: Provided, that if such delay shall be due to causes which could not in the exercise of ordinary care have been foreseen or which were unavoidable, then upon the establishment of these facts to the satisfaction of the court trying the cause, the defendant common carrier shall be relieved from any penalty for delay in the transportation of household goods, but it shall not be relieved from the costs of such action. In all actions to recover penalties against a common carrier under this section, the burden of proof shall be upon such carrier to show where the delay, if any, occurred. The penalties provided in this section shall be in addition to the damages recoverable for failure to transport within a reasonable time.

(d) This section shall not apply to motor carriers of passengers. (Code, s. 1964; 1899, c. 164, s. 2, subsecs. 2, 7; 1903, c. 444; c. 590, s. 3; c. 693; 1905, c. 545; Rev., ss. 1094, 2631, 2632; 1907, cc. 217, 461; C.S., ss. 1053, 3515, 3516; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1995, c. 523, s. 11; 1995 (Reg. Sess., 1996), c. 742, s. 33; 1998-128, s. 9.)

Cross References. — As to venue of actions against railroads, see G.S. 1-81.

CASE NOTES

As to constitutionality of former section, see Grocery Co. v. Railroad Co., 136 N.C. 396, 48 S.E. 801 (1904); Rollins v. Seaboard Air Line Ry., 146 N.C. 153, 59 S.E. 671 (1907); Davis v. Southern Ry., 147 N.C. 68, 60 S.E. 722 (1908); Owens v. Hines, 178 N.C. 325, 100 S.E. 617 (1919), rev'd on other grounds, 256 U.S. 565, 41 S. Ct. 597, 65 L. Ed. 1093 (1921).

Penalty Not Applicable to Interstate Shipments. — A penalty may not be recovered of the carrier of an interstate shipment for negligent delay in transportation under this section. Bivens Bros. v. Atlantic C.L.R.R., 176 N.C. 414, 97 S.E. 215 (1918). See also Hickory Marble & Granite Co. v. Southern Ry., 147 N.C. 53, 60 S.E. 719 (1908).

A penalty cannot be recovered for the failure of a railroad company to transport freight within a reasonable time when the initial and terminal points are within the State, but the shipment necessarily passes into another state in transit. Such is interstate commerce and cannot be interfered with by the State. Shelby Ice & Fuel Co. v. Southern Ry., 147 N.C. 66, 60 S.E. 721 (1908).

For review of the history of legislative penalties for refusal of railroads to transport freight, see Grocery Co. v. Railroad Co., 136 N.C. 396, 48 S.E. 801 (1904).

As to strict construction of former section, see Alexander v. Atlantic C.L.R.R., 144 N.C. 93, 56 S.E. 697 (1907).

Former section did not supersede or alter carrier's duty at common law, but merely enforced an admitted duty and superadded a penalty. Meredith v. Railroad Co., 137 N.C. 478, 50 S.E. 1 (1905).

"Ordinary Time" a Jury Question. — The question of "ordinary time" for the transportation of freight by the carrier, in a suit for a penalty for failure to transport, is a question of fact for the jury. Shelby Ice & Fuel Co. v. Southern Ry., 147 N.C. 66, 60 S.E. 721 (1908); Wall-Huske Co. v. Southern Ry., 147 N.C. 407, 61 S.E. 277 (1908).

In an action for the recovery of a penalty, it was for the jury to find what was "ordinary" time, under the surrounding circumstances, and whether the defendant transported freight within such time, as well as the amount of recovery. It is error for the trial court to instruct the jury that if they believe the evidence they should answer the issue in a certain way or in a sum certain. Davis v. Southern Ry., 147 N.C. 68, 60 S.E. 722 (1908).

No "hard and fast" rule is fixed in defining reasonable time. Jenkins v. Southern Ry., 146 N.C. 178, 59 S.E. 663 (1907).

Burden of Proof Where Time Prima Facie Reasonable. — When the evidence discloses that the time taken by the railroad company for transporting goods, etc., was prima facie reasonable as fixed by the statute, the question of reasonable time is one for the jury to measure by the statutory standard, the burden of proof being upon the plaintiff. Alexander v. Atlantic C.L.R.R., 144 N.C. 93, 56 S.E. 697 (1907).

How Unreasonableness of Time May Be Shown. — In an action to recover the penalty, the burden of proof is on the plaintiff to show that the carrier failed to transport and deliver the goods within a reasonable time, which is defined to be the "ordinary time" required to transport and deliver. This may be shown by proving the distance over which the goods are to be transported and the time consumed therein. From this evidence the jury may, as a matter of common knowledge and observation, draw the conclusion whether, in view of the usual speed of freight trains, the time consumed, the distance, and other conditions, the carrier has failed to transport and deliver within a reasonable time. Jenkins v. Southern Ry., 146 N.C. 178, 59 S.E. 663 (1907).

Over 21 Days to Transport Articles 58 Miles. — Where it was admitted that certain articles were received by defendant to be transported and delivered to plaintiff, the place of shipment and destination both being in the State, 58 miles apart, with but one intermediate point between them, and that the articles were not delivered to plaintiff within 21 days, the delay was unreasonable. Watson v. Atlantic C.L.R.R., 145 N.C. 236, 59 S.E. 55 (1907).

Twelve Days to Transport Shipment 25 Miles. — When there was evidence that it took 12 days to transport a certain shipment from one station to another only 25 miles away, on the same railroad, the jury would be permitted, from their common observation and experience, to consider and determine the question of ordinary time between the two points, and, in the absence of explanation by defendant, fix the amount of wrongful delay. Rollins v. Seaboard Air Line Ry., 146 N.C. 153, 59 S.E. 671 (1907).

For cases construing former provision making delay of two days at initial point and 48 hours at one intermediate point for each 100 miles prima facie reasonable, see Meredith v. Railroad Co., 137 N.C. 478, 50 S.E. 1 (1905); Davis & Hooks v. Atlantic C.L.R.R., 145 N.C. 207, 59 S.E. 53 (1907); Watson v. Atlantic C.L.R.R., 145 N.C. 236, 59 S.E. 55 (1907); Jenkins v. Southern Ry., 146 N.C. 178, 59 S.E. 663 (1907); Wall-Huske Co. v. Southern Ry., 147 N.C. 407, 61 S.E. 277 (1908); Blue Ridge Collection Agency v. Southern Ry., 147 N.C. 593, 61 S.E. 462 (1908); Talley & Baughman, Inc. v. Atlantic C.L.R.R., 198 N.C. 492, 152 S.E. 390 (1930).

Negligent Default in Delivery to Consignee. — Former similar section extended the penalty to cases of negligent default in the carrier's making delivery of the freight to the consignee. Mitchell v. Atlantic C.L.R.R., 183 N.C. 162, 110 S.E. 859 (1922), decided prior to 1907 amendment including such delays, see Alexander v. Atlantic C.L.R.R., 144 N.C. 93, 56 S.E. 697 (1907).

When Transportation Ceases. — Transportation ceases when the duty of the carrier as a warehouseman commences, and in respect to freight transported in carload lots, when the car reaches its destination and is placed for unloading. What particular parts of the carrier's tracks and freight yards may be used for such purposes must of necessity be left to its discretion, but the car must be reasonably accessible and placed for delivery before transportation is fully ended. Brooks Mfg. Co. v. Southern Ry., 152 N.C. 665, 68 S.E. 243 (1910).

Former section did not apply to a delivery on the private tracks of a consignee, but to avoid the penalty it was required of the carrier to place for delivery a carload shipment on its track at destination at a place reasonably accessible. Brooks Mfg. Co. v. Southern Ry., 152 N.C. 665, 68 S.E. 243 (1910).

Transportation does not cease when a carload is placed by the carrier within the yard limits of the point of destination. Wall-Huske Co. v. Southern Ry., 147 N.C. 407, 61 S.E. 277 (1908).

Duty to Notify Consignee. — Where a shipment of goods is delivered to a railroad company for transportation, the title vests in the consignee, with the duty resting upon the carrier on the arrival of the goods at destination to notify the consignee and make delivery. This principle applied to a side-station when notification of arrival should have been given from a nearby station, and the inquiring consignee was there misinformed as to the arrival, and the car in the meanwhile was broken into and the shipment stolen. Acme Mfg. Co. v. Tucker, 183 N.C. 303, 111 S.E. 525 (1922).

When Goods Travel over Several Lines. — When the initial carrier delivers goods to its connecting carrier for further transportation to their destination, and an unreasonable delay occurs, without evidence as to which carrier was responsible for the delay, the defendant, the initial carrier, is liable for the entire delay, the burden of proof being upon it as the party having the evidence peculiarly within its own knowledge or possession. Watson v. Atlantic C.L.R.R., 145 N.C. 236, 59 S.E. 55 (1907).

Where an intrastate shipment of goods is transported over connecting lines to its destination, it is proper for the trial court to make both roads parties to an action to recover the penalty for the failure to transport safely and within a reasonable time, the burden being upon each defendant to show that it had not failed in its duty. Sellars Hosiery Mills v. Southern Ry., 174 N.C. 449, 93 S.E. 952 (1917).

Who Is "Party Aggrieved". — The plaintiff is entitled to recover the penalty as the "party aggrieved," for defendant's wrongfully failing to transport freight within a reasonable time, where the facts show that, from the attendant circumstances or terms of the agreement, he is the one whose legal right is denied and who is alone interested in having the transportation properly made. Cardwell v. Southern Ry., 146 N.C. 218, 59 S.E. 673 (1907).

When the consignor ships goods to be sold for his own benefit, he is the "party aggrieved," and the proper party plaintiff. Robertson v. Atlantic C.L.R.R., 148 N.C. 323, 62 S.E. 413 (1908).

The plaintiff could maintain his action against the defendant railroad company for wrongful failure to transport certain goods received by the latter, and bill of lading issued by it to plaintiff, when it appeared that plaintiff shipped the goods to be sold for his benefit by the consignee, and that the plaintiff was the one who alone acquired the right to demand the service to be rendered by the defendant, and was the party aggrieved. Rollins v. Seaboard Air Line Ry., 146 N.C. 153, 59 S.E. 671 (1907).

Consignor as Party Aggrieved Where Goods Not to Be Paid for Until Delivery. — When the consignor had agreed with the consignee that the latter was only required to pay for the intrastate shipment when it reached its destination, the consignor could maintain his action for delay in transit, as the party aggrieved. Davis v. Southern Ry., 147 N.C. 68, 60 S.E. 722 (1908).

Vendor as Aggrieved Party. — When by the contract or agreement between a vendor and vendee of goods, the goods were to be "received, inspected and weighed" by the vendee before any part of the purchase price was payable, the title did not vest in the vendee, and the vendor was the "party aggrieved." Elliott v. Southern Ry., 155 N.C. 235, 71 S.E. 339 (1911).

Defendant's Knowledge of Who Is Aggrieved Party Immaterial. — When it is shown that the plaintiff is the "party aggrieved," it is of no importance and bears in no way on the justice of plaintiff's demand or of defendant's obligation, whether defendant knew who was the party aggrieved, either at the inception of the matter or at any other time. Rollins v. Seaboard Air Line Ry., 146 N.C. 153, 59 S.E. 671 (1907).

The real "party aggrieved" is entitled to recover the penalty, irrespective of the question of knowledge of or notice to the defendant. Cardwell v. Southern Ry., 146 N.C. 218, 59 S.E. 673 (1907).

Action Not Brought "on Relation of State". — The action for penalty is given directly to the party aggrieved, and is not required to be brought "on relation of the State." If it were, failure to bring the action in such form would be a mere informality, which could be remedied by amendment. Robertson v. Atlantic C.L.R.R., 148 N.C. 323, 62 S.E. 413 (1908).

Joinder of Actions. — An action for damages against a carrier for a lost shipment, and one for the penalty for unreasonable delay, do not merge into each other. They arise on contract and may be joined in the same action. Robertson v. Atlantic C.L.R.R., 148 N.C. 323, 62 S.E. 413 (1908).

Burden of Proof as to Destruction of Goods. — The burden of proof is on the carrier to show that it is relieved of the penalty because the goods were burned, stolen or destroyed. A showing that the goods were placed in defendant's car by the initial carrier and that search had been made therefor, and the absence of evidence that the goods had since been seen, was no evidence that they were burned, stolen or destroyed. Robertson v. Atlantic C.L.R.R., 148 N.C. 323, 62 S.E. 413 (1908).

When Bill of Lading Not Presumptive Evidence. — When it was the consignor's duty to load a car for shipment, which had been placed at its mill by the carrier, and the carrier's agent gave a bill of lading upon the statement of the consignor that the car had been loaded, without being required to verify the statement, the bill of lading was not presumptive evidence of the receipt of the contents of the car, and the question was an open one for the jury in a suit by the consignee for the penalty for failure to deliver. Peele v. Atlantic C.L.R.R., 149 N.C. 390, 63 S.E. 66 (1908).

Motion for Nonsuit Properly Denied. — Where a shipment of various articles was transported by the carrier to destination, and all were received by the consignee, except one of them, which was missing and remained in the carrier's warehouse beyond the statutory reasonable time, a motion for nonsuit was properly denied. Mitchell v. Atlantic C.L.R.R., 183 N.C. 162, 110 S.E. 859 (1922).

Verdict Incomplete. — Where it was established by the jury that a consignment of goods was carried to the delivering point by the carrier, which failed to deliver to the consignee, or to notify him, and the goods were lost while in its possession, the verdict was incomplete where there was no issue submitted as to whether the carrier, which was a party to the action, was in default in not delivering the goods to the consignee. Acme Mfg. Co. v. Tucker, 183 N.C. 303, 111 S.E. 525 (1922).

§ 62-201. Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same.

All common carriers doing business in this State shall settle their freight charges according to the rate stipulated in the bill of lading, provided the rate therein stipulated be in conformity with the classifications and rates made and filed with the North Carolina Utilities Commission in the case of intrastate shipments, by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carriers to inform any consignee of the correct amount due for freight according to such classification and rates. Upon payment or tender of the amount due on any shipment which has arrived at its destination according to such classification and rates, such common carrier shall deliver the freight in question to the consignee. Any failure or refusal to comply with the provisions hereof shall subject such carrier so failing or refusing to liability for actual damages plus a penalty of fifty dollars ($50.00) for each such failure or refusal, to be recovered by any consignee aggrieved by a suit in a court of competent jurisdiction. Provided, however, that this section shall not apply to motor carriers of passengers. (1905, c. 330, s. 1; Rev., s. 2633; C.S., s. 3518; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1963, c. 1165, s. 1.)

Cross References. — As to venue of actions against railroads, see G.S. 1-81. As to rates of public utilities, see G.S. 62-130 et seq.

CASE NOTES

As to constitutionality of former section, see Harrill Bros. v. Southern Ry., 144 N.C. 532, 57 S.E. 383 (1907); Hockfield v. Southern Ry., 150 N.C. 419, 64 S.E. 181 (1909); Jeans v. Seaboard Air Line Ry., 164 N.C. 224, 80 S.E. 242 (1913).

Former Section Not Cumulative. — Former section imposed only one penalty for the refusal of the railroad company to deliver freight upon demand and tender of charges, and it was not cumulative upon more than one demand for the same offense. Harrill Bros. v. Southern Ry., 144 N.C. 532, 57 S.E. 383 (1907).

Where a railroad corporation chartered by another state leases a railroad chartered by this State, it is bound to observe and obey all laws of this State regulating the business of transportation. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886).

Intrastate Rebilling of Interstate Shipment. — Where an interstate shipment of goods was misdirected and the bill of lading was lost, and the shipment was rebilled from one point in the State to another therein, in an intrastate shipment, upon the carrier's violating former similar section, the penalty therein accrued. Hockfield v. Southern Ry., 150 N.C. 419, 64 S.E. 181 (1909).

Consignee must produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession. Jeans v. Seaboard Air Line Ry., 164 N.C. 224, 80 S.E. 242 (1913).

Insufficient Notice to Consignee. — Notice given by a carrier of the arrival of goods to a transfer company in the habit of hauling consignor's goods from the depot was not of itself sufficient notice to the consignee. Hockfield v. Southern Ry., 150 N.C. 419, 64 S.E. 181 (1909).

Burden of Proving Reason for Refusal to Deliver. — Where the consignee brings his action to recover the value of a shipment of goods from the carrier and shows that the shipment was addressed to him, was prepaid, and was in the carrier's possession at destination, and that a demand for delivery was made, the burden is on the carrier to show a valid reason for its refusal to deliver the shipment. Jeans v. Seaboard Air Line Ry., 164 N.C. 224, 80 S.E. 242 (1913).

No Liability for Unlawful Shipment. — A druggist who has not received a valid license to sell intoxicating liquors for the purposes and in the manner indicated may not recover of the carrier the penalty provided for failure to deliver such liquors to him for the purposes of sale, for such are unlawful and prohibited. Smith v. Southern Express Co., 166 N.C. 155, 82 S.E. 15 (1914).

Agent's Ignorance of Amount of Charges No Defense. — It is no defense to an action to recover a penalty for refusing to deliver a shipment upon tender of freight charges by the consignee for the defendant company to show that its agents did not know the correct amount of the charges because of the defendant's failure to file its schedule of rates. Harrill Bros. v. Southern Ry., 144 N.C. 532, 57 S.E. 383 (1907).

Rate When Smaller Cars Furnished. — Where a consignor requested two cars of a certain standard size and the carrier furnished four cars of a smaller size, the rate for the shipment must be the same. Yorke Furn. Co. v. Southern Ry., 16 N.C. 138, 162 N.C. 138, 78 S.E. 67, 78 S.E. 67 (1913).

Carrier cannot collect storage charges arising from wrongful refusal to deliver goods to consignee. Hockfield v. Southern Ry., 150 N.C. 419, 64 S.E. 181 (1909).

Applied in Atlantic C.L.R.R. v. West Paving Co., 228 N.C. 94, 44 S.E.2d 523 (1947).

§ 62-202. Baggage and freight to be carefully handled.

All common carriers shall handle with care all baggage and freight placed with them for transportation, and they shall be liable in damages for any and all injuries to the baggage or freight of persons from whom they have collected fare or charged freight while the same is under their control. Upon proof of injury to baggage or freight in the possession or under the control of any such carrier, it shall be presumed that the injury was caused by the negligence of the carrier. This section shall not apply to motor carriers of passengers. (1897, c. 46; Rev., s. 2624; C.S., s. 3523; 1963, c. 1165, s. 1.)

Cross References. — As to conveying livestock in a cruel manner, see G.S. 14-363.

CASE NOTES

Delivery of Baggage to Carrier. — To fix the responsibility for lost baggage upon a railroad company, either as a common carrier or warehouseman, a delivery, actual or constructive, including an acceptance by the company, is necessary; and when baggage is taken by others to the station, and to places where baggage is usually received, some kind of notice must be given to the agent authorized to receive it. Williams v. Southern Ry., 155 N.C. 260, 71 S.E. 346 (1911).

The requisites of the general rule requiring delivery of baggage of a passenger to a railroad company in order to hold the company liable may become modified by a custom of the latter to consider and treat baggage as received when left at a given place, without further notice. Williams v. Southern Ry., 155 N.C. 260, 71 S.E. 346 (1911).

Effect of Stipulations Attempting to Limit Liability. — Stipulations upon a railroad ticket, limiting the liability of the carrier in a specified sum "unless a greater value has been declared by the owner and excess charge paid thereon at the time of taking passage," and similar provisions in a bill of lading for the transportation of freight, are void as an attempt on the part of the carrier to contract against its own negligence. Cooper v. Norfolk S.R.R., 161 N.C. 400, 77 S.E. 339 (1913).

A common carrier cannot contract with a passenger against the loss of baggage by its negligence. Thomas v. Southern Ry., 131 N.C. 590, 42 S.E. 964 (1902).

Liability for Articles Not Properly Baggage. — While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of an extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or for damage to them, though it may have been without any fault. Trouser Co. v. Railroad, 139 N.C. 382, 51 S.E. 973 (1905).

When Liability as Carrier Ceases. — When baggage has arrived at its destination and has been deposited at the usual or customary place of delivery and kept there a sufficient time for passenger to claim and remove the same, the company's liability as a common carrier ceases, and it is thereafter liable only as a warehouseman, and bound to the use of ordinary care. Trouser Co. v. Railroad, 139 N.C. 382, 51 S.E. 973 (1905).

Liability When Passenger Not Carried. — When there is no partnership arrangement between connecting lines of railroads, and a passenger buys a through ticket from a carrier to his destination on a connecting line, checks his trunk through to his destination and voluntarily returns to the starting point without going upon the road of the connecting lines, the latter carrier is not liable as insurer of the contents of the trunk from larceny by reason of taking the trunk to its destination, storing it there in its baggage room until its return is requested and then forwarding it to the junctional point, without compensation. Kindley v. Seaboard Air Line Ry., 151 N.C. 207, 65 S.E. 897 (1909).

Liability When Baggage Not on Same Train. — The passenger's right to a limited amount of baggage as a part of the consideration for the price of his ticket is upon condition that the baggage accompany the passenger on the same train; and where, without any default on the part of the carrier, its agent, without further charge, has the baggage forwarded on a later train, the carrier's liability is not that of an insurer, but of a gratuitous bailee, under the rule of the prudent man, and attaches only in instances of gross negligence. Perry v. Seaboard Air Line Ry., 171 N.C. 158, 88 S.E. 156 (1916).

Cited in Flexlon Fabrics, Inc. v. Wicker Pick-Up & Delivery Serv., Inc., 39 N.C. App. 443, 250 S.E.2d 723 (1979).

§ 62-203. Claims for loss or damage to goods; filing and adjustment.

(a) Every common carrier receiving household goods for transportation in intrastate commerce shall issue a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such household goods caused by it, or by any carrier participating in the haul when transported on a through bill of lading, and any such carrier delivering said household goods so received and transported shall be liable to the lawful holder of said bill of lading or to any party entitled to recover thereon for such loss, damage, or injury, notwithstanding any contract or agreement to the contrary; provided, however, the Commission may, by regulation or order, authorize or require any such common carrier to establish and maintain rates related to the value of shipments declared in writing by the shipper, or agreed upon as the release value of such shipments, such declaration or agreement to have no effect other than to limit liability and recovery to an amount not exceeding the value so declared or released, in which case, any tariff filed pursuant to such regulation or order shall specifically refer thereto; provided further, that a rate shall be afforded the shipper covering the full value of the goods shipped; provided further, that nothing in this section shall deprive any lawful holder of such bill of lading of any remedy or right of action which such holder has under existing law; provided further, that the carrier issuing such bill of lading, or delivering such household goods so received and transported, shall be entitled to recover from the carrier on whose route the loss, damage, or injury shall have been sustained the amount it may be required to pay to the owners of such property.

(b) Every claim for loss of or damage to household goods while in possession of a common carrier shall be adjusted and paid within 90 days after the filing of such claim with the agent of such carrier at the point of destination of such shipment, or point of delivery to another common carrier, by the consignee or at the point of origin by the consignor, when it shall appear that the consignee was the owner of the shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof.

(c) In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars ($50.00) for each and every such failure, to be recovered by any consignee aggrieved (or consignor, when it shall appear that the consignor was the owner of the property at the time of shipment and at the time of suit, and is, therefore, the party aggrieved), in any court of competent jurisdiction: Provided, that unless such consignee or consignor recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid; and that no penalty shall be recoverable under the provisions of this section where claims have been filed by both the consignor and consignee, unless the time herein provided has elapsed after the withdrawal of one of the claims.

(d) A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of a common carrier, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the passenger or person delivering the same on his behalf. If such check be refused on demand, the common carrier shall pay to such passenger the sum of ten dollars ($10.00), to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare the same shall be refunded by the carrier.

(e) If a passenger, whose bag has been checked, shall produce the check and his baggage shall not be delivered to him, he may by an action recover the value of such baggage.

(f) Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto, and for the penalties herein provided for, may be united in the same complaint.

(g) This section shall not deprive any consignee or consignor of any other rights or remedies existing against common carriers in regard to freight charges or claims for loss or damage to freight, but shall be deemed and held as creating an additional liability upon such common carriers.

(h) This section shall not apply to motor carriers of passengers and only subsection (a) of this section shall apply to motor carriers of property. (1871-2, c. 138, s. 36; Code, s. 1970; 1905, c. 330, ss. 2, 4, 5; Rev., ss. 2623, 2634, 2635; 1907, c. 983; 1911, c. 139; C.S., ss. 3510, 3524, 3525; 1947, c. 781; c. 1008, s. 27; 1963, c. 1165, s. 1; 1995, c. 523, s. 12.)

Cross References. — As to venue of actions against railroads, see G.S. 1-81.

CASE NOTES

I. In General.
II. Connecting Carriers.
III. Filing of Claim.
IV. Actions.

I. IN GENERAL.

Penalty Inapplicable to Interstate Shipments. — The entire regulation of interstate commerce is under federal control, and the penalty provided for by former provision similar to subsection (c) of this section for failure of a carrier to pay a claim in the time prescribed does not apply to interstate shipments. See Morphis v. Southern Express Co., 167 N.C. 139, 83 S.E. 1 (1914).

As to strict construction of former provisions similar to subsections (b) and (c), see Watkins v. American Ry. Express Co., 190 N.C. 605, 130 S.E. 305 (1925). See also B.F. Eagles Co. v. East Carolina Ry., 184 N.C. 66, 113 S.E. 512 (1922).

The common-law remedies of shippers and passengers were not taken away by former similar Chapter. Bell v. Norfolk S.R.R., 163 N.C. 180, 79 S.E. 421 (1913).

Action May Be Brought in Contract or Tort. — A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains may bring an action on contract, or in tort, independent of the statute. Purcell v. Richmond & D.R.R., 108 N.C. 414, 12 S.E. 954 (1891), overruled on other grounds, Hansley v. Jamesville & W.R. Co., 20 S.E. 528 (1894); Virginia-Carolina Peanut Co. v. Atlantic C.L.R.R., 155 N.C. 148, 71 S.E. 71 (1911).

Parol Agreement to Reship Sufficient. — When a carrier has received goods for transportation over its own and a connecting line which were not delivered, and upon consignor's parol request it has them reshipped to the initial or starting point, the latter agreement for reshipment, though resting in parol, is sufficient in an action for damages to the goods occurring while in the carrier's possession. Lyon v. Atlantic C.L.R.R., 165 N.C. 143, 81 S.E. 1 (1914).

Carrier Cannot Contract Against Own Negligence. — A common carrier may relieve itself from liability as an insurer upon a contract reasonable in its terms and founded upon a valuable consideration, but it cannot so limit its responsibility for loss or damage resulting from its negligence. Mitchell v. Carolina Cent. R.R., 124 N.C. 236, 32 S.E. 671 (1899); Everett v. Railroad, 138 N.C. 68, 50 S.E. 557 (1905).

Owner Cannot Generally Refuse Damaged Goods. — Damage to a shipment of goods by a railroad company, caused by the carrier's negligence, does not justify the owner in refusing to accept them on that account, unless the damages are sufficient to render the goods practically worthless. He must accept the goods and sue for the damages upon the refusal of the carrier to pay them. Whittington v. Southern Ry., 172 N.C. 501, 90 S.E. 505 (1916).

II. CONNECTING CARRIERS.

Duty Assumed by Carrier. — Where a carrier accepts goods for transportation, in the absence of a special contract, it assumes the duty of safely carrying, within a reasonable time, the goods to the end of its line, and delivering them in like condition to the connecting carrier. Meredith v. Railroad Co., 137 N.C. 478, 50 S.E. 1 (1905).

Duration of Duty of Safe Carriage. — The duty of safe carriage attaches as the goods pass into the custody of each company and ceases only when they are safely delivered to its successor. Lindley v. Richmond & D.R.R., 88 N.C. 547 (1883).

Burden of Proof as to Safe Delivery. — On proof that a carrier received goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee, such proof being peculiarly within its power. Meredith v. Railroad Co., 137 N.C. 478, 50 S.E. 1 (1905).

Admissibility of Evidence as to Condition of Freight. — To show that freight was in good condition when it was delivered by the defendant to a connecting line, evidence that it was the custom of agents of such lines to examine freights before receiving them, and if found in good condition to forward them, and that such examination was made and forwarding was done, was admissible. Knott v. Raleigh & G.R.R., 98 N.C. 73, 3 S.E. 735 (1887).

Prima Facie Case. — Where a shipment of goods is received by the consignee from the final carrier in bad condition, and there is evidence that this carrier received the goods from its connecting carrier in good condition, a prima facie case of negligence is made out against the delivering carrier, and presents sufficient evidence thereof to be submitted to the jury, with the burden of proof on it. Lyon v. Atlantic C.L.R.R., 165 N.C. 143, 81 S.E. 1 (1914).

Presumption of Damage. — Among connecting lines of railway, that one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption. Morganton Mfg. Co. v. Ohio River & Charleston Ry., 121 N.C. 514, 28 S.E. 474 (1897); Mitchell v. Carolina Cent. R.R., 124 N.C. 236, 32 S.E. 671 (1899); Gwyn Harper Mfg. Co. v. Carolina Cent. R.R., 128 N.C. 280, 38 S.E. 894 (1901).

Goods Found Damaged at Destination. — When goods are shipped over several connecting lines of carriers and are found in a damaged condition at destination, there is a rebuttable presumption that the injury was negligently inflicted by the last carrier. Boss v. Atlantic C.L.R.R., 156 N.C. 70, 72 S.E. 93 (1911); Beville v. Atlantic C.L.R.R., 159 N.C. 227, 74 S.E. 349 (1912).

Liability for Negligence of Connecting Carrier. — A railroad company whose line is one of several connecting roads between places from and to which freight is shipped, in the absence of a special contract, or proof of copartnership by which each of the connecting lines will become liable for the contracts of the others, is not responsible for damages for negligence occurring beyond its terminus. Knott v. Raleigh & G.R.R., 98 N.C. 73, 3 S.E. 735 (1887).

Where two or more common carriers unite in forming an association creating a through line for the transportation of freight, payment of tariff charges to be made at the beginning or end of the transportation, with through bills of lading, the freight charges to be divided according to the respective mileage of the companies, they become a copartnership and each line is liable for any damage resulting from delay or otherwise on any part of the through line, notwithstanding a provision in the bill of lading that each company shall be liable only for loss or damage occurring on its own line. Rocky Mount Mills v. Wilmington & W.R.R., 119 N.C. 693, 25 S.E. 854 (1896).

Effect of Court Order Relieving Initial Carrier. — While the initial carrier may also be held liable for damages to a shipment made over connecting lines, a direction of the court relieving it from liability does not necessarily relieve the carrier whose negligence caused the damages. Gilikin v. Norfolk S.R.R., 174 N.C. 137, 93 S.E. 469 (1917).

Interstate Shipments by Connecting Carriers. — While federal laws make the initial carrier liable for damages to a shipment over connecting lines, this does not relieve the intermediate or delivering carrier of responsibility for its own negligence, or prevent the State court from requiring the carriers to show which is responsible for the damage. Aydlett v. Norfolk S.R.R., 172 N.C. 47, 89 S.E. 1000 (1916).

Notice as to damages to the initial carrier of an interstate shipment of goods is sufficient notice to the connecting carrier. Gilikin v. Norfolk S.R.R., 174 N.C. 137, 93 S.E. 469 (1917).

III. FILING OF CLAIM.

Filing of Claim Prerequisite to Penalty. — A consignor of a shipment of goods is required to file his claim with the agent of the common carrier at the point of its origin, and this he must have done to maintain his action against the carrier for the penalty prescribed for its failure to settle for its loss, or damage thereto, within 90 days. Hamlet Grocery Co. v. Southern Ry., 170 N.C. 241, 87 S.E. 57 (1915).

In order to recover the penalty, the consignee must file his claim with the agent as the statute directs, and the filing thereof with another of the carrier's agents is insufficient. B.F. Eagles Co. v. East Carolina Ry., 184 N.C. 66, 113 S.E. 512 (1922).

Regulation of Time of Filing by Carrier. — A stipulation in a bill of lading denying the carrier's liability for damages unless written notice of such claim be filed within a specified period is in derogation of the common law, and while it will be upheld if reasonable, the burden of proof is on the carrier to show that it is. Phillips v. Seaboard Air Line Ry., 172 N.C. 86, 89 S.E. 1057 (1916).

Stipulation that claims must be filed in four months is reasonable. Culbreth v. Atlantic C.L.R.R., 169 N.C. 723, 86 S.E. 624 (1915).

An allowance of 60 days is reasonable, but 30 days is unreasonable. Gwyn Harper Mfg. Co. v. Carolina Cent. R.R., 128 N.C. 280, 38 S.E. 894 (1901).

Waiver of Stipulation. — The stipulation in a livestock bill of lading requiring that notice in writing be given the carrier's agent at destination of claim for damages to the animals shipped before they were removed or mingled with other animals, could be waived by the carrier's agent at the delivering point. T.W. Newborn & Co. v. Louisville & N.R.R., 170 N.C. 205, 87 S.E. 37 (1915).

As to necessity of written demand to enforce penalty, see Thompson v. Southern Express Co., 147 N.C. 343, 61 S.E. 182 (1908).

Failure to file a formal written demand is no bar to recovery of actual damages sustained. Hinkle, Craig & Co. v. Southern Ry., 126 N.C. 932, 36 S.E. 348 (1900); Kime v. Southern Ry., 153 N.C. 398, 69 S.E. 264 (1910).

Filing Claim by Mail. — The essential things necessary for the proper filing of the claim against the common carrier for damages, and for the penalty, being its delivery to and acceptance by the carrier's designated agent, such filing is not restricted to its manual delivery, but the same may be done through the agency of the United States mail. The delivery of the mail will be presumed. B.F. Eagles Co. v. East Carolina Ry., 184 N.C. 66, 113 S.E. 512 (1922).

It is not required that a claimant state the amount of his loss in his claim for damages against a carrier. McRary v. Southern Ry., 174 N.C. 563, 94 S.E. 107 (1917).

Notice to Negligent Connecting Carrier. — Where the second carrier in the connected line of shipment causes damages to the shipment by improperly loading it, it may not defeat an action to recover such damages, when the required notice within four months has been filed with and accepted without comment by it, on the ground that such notice had not been filed with the initial or final carrier under the terms of the contract of carriage. The doctrine of notice to the agent is applicable here. Aydlett v. Norfolk S.R.R., 172 N.C. 47, 89 S.E. 1000 (1916).

Notice as to Interstate Shipments. — The federal statutes, while recognizing the right of the carrier to stipulate for the filing of claims within a reasonable period, provide that if loss or damage is due to a delay in transit by negligence, no notice shall be required as a condition precedent to recovery. Mann v. Fairfield & Elizabeth City Transp. Co., 176 N.C. 104, 96 S.E. 731 (1918).

IV. ACTIONS.

Who May Bring Action. — Ordinarily the title to a shipment of goods by common carrier passes to the consignee upon acceptance by the carrier, and he may sue for damages thereto in transit; but when it is shown that the consignee refused to accept the damaged goods, and that the sale was cancelled by consent, the consignor may maintain his action against the carrier for damages. Aydlett v. Norfolk S.R.R., 172 N.C. 47, 89 S.E. 1000 (1916).

Joinder of Causes of Action. — A recovery of the value of a shipment of goods and the penalties for the refusal of the carrier to deliver and for the failure to settle the claim within the statutory period may be united in the same action. Jeans v. Seaboard Air Line Ry., 164 N.C. 224, 80 S.E. 242 (1913).

Separate and Distinct Issues. — In an action against a railroad company to recover damages to a shipment of goods and the penalty for the failure of defendant to pay the same within 90 days, the issues raised are entirely separate and distinct from each other, and the trial judge may set aside the verdict on the second issue, and retain that on the first one, for a retrial. Hussey v. Atlantic C.L.R.R., 183 N.C. 7, 110 S.E. 599 (1922).

Prima Facie Case. — In an action against the carrier for damages for the destruction of a shipment of freight by fire, a prima facie case is made out when the plaintiff shows the receipt of the freight for transportation and its nondelivery. Everett v. Railroad, 138 N.C. 68, 50 S.E. 557 (1905); Osborne v. Southern Ry., 175 N.C. 594, 96 S.E. 34 (1918).

Plaintiff Must Prove Failure to Settle. — The burden is on plaintiff to show that the common carrier has failed to settle his claim in 90 days, after written demand under statutory provisions, and the prima facie case made out by showing the unreasonable delay in the delivery of the shipment is not sufficient. Watkins v. American Ry. Express Co., 190 N.C. 605, 130 S.E. 305 (1925).

Burden on Carrier When Prima Facie Case Made. — In cases of limited liability, proof of shipment and loss or injury makes a prima facie case for the shipper, and then the burden is upon the carrier to show that the circumstances of the loss bring it within the excepted causes; when this is shown, the burden still rests upon the carrier of showing that the loss or injury was not due to its own negligence. Mitchell v. Carolina Cent. R.R., 124 N.C. 236, 32 S.E. 671 (1899).

Recovery Must Equal Claim. — In order to recover the penalty for failure to settle a claim for damages within 90 days, the burden is on plaintiff to show that the amount of his recovery is at least equal to the amount of his written demand. Watkins v. American Ry. Express Co., 190 N.C. 605, 130 S.E. 305 (1925).

Effect of Settlement After Penalty Accrues. — The proviso that the consignee must first recover the full amount claimed is only to protect the carrier against excessive demands and not to discourage settlements for losses, and plaintiff's right to recover the penalty in such suits is not lost by accepting settlement for damages for the full amount claimed after the penalty accrues. Rabon v. Atlantic C.L.R.R., 149 N.C. 59, 62 S.E. 743 (1908).

Measure of Damages for Delay. — In the trial of an action against a railroad company for loss occasioned by its delay in transporting machinery shipped over its line by plaintiff, which was engaged in equipping a cotton factory, where it appeared that workmen employed by the plaintiff were forced to remain idle, though under pay of plaintiff, the measure of plaintiff's damages was the interest on the unemployed capital, the wages paid to its workmen and such other costs and expenses incurred by plaintiff in consequence of the delay. Rocky Mount Mills v. Wilmington & W.R.R., 119 N.C. 693, 25 S.E. 854 (1896).

§ 62-204. Notice of claims, statute of limitations for loss, damage or injury to property.

Any claim for loss, damage or injury to property while in the possession of a common carrier shall be filed by the claimant with the carrier in writing within nine months after the same occurred, and the cause of action with respect thereto shall be deemed to have accrued at the expiration of 30 days after the date of such notice, and action for the recovery thereon may be commenced immediately thereafter or at any time within two years after notice in writing shall have been given to the claimant by the adverse party that the claim or any part thereof specified in such notice has been disallowed, and neither party shall by rule, regulation, contract, or otherwise, provide for a shorter time for filing such claims or for commencing actions thereon than the period set out in this section. Provided, however, that this section shall not apply to motor carriers of passengers. (1947, c. 1008, s. 21; 1963, c. 1165, s. 1.)

§ 62-205. Joinder of causes of action.

To expedite the settlement of claims between shippers and common carriers, a shipper may join in the same complaint against a common carrier any number of claims for overcharges, or a common carrier may join in the same complaint any number of claims against a shipper for undercharges, whether such claims arose at the same time or in the course of shipments at different times; provided, that each such claim shall be so identified that the same and the allegations with respect thereto may be distinguished from other claims so joined in the complaint, and in cases in which the right of subrogation may be invoked the judgment shall specify the amount of recovery, if any, on each such claim. For the purpose of jurisdiction under this section the aggregate amount set out in the complaint shall be deemed the sum in controversy. Provided, however, that this section shall not apply to motor carriers of passengers. (1947, c. 1008, s. 20; 1963, c. 1165, s. 1.)

§ 62-206. Carrier's right against prior carrier.

Any common carrier shall have all the rights and remedies herein provided for against a common carrier from which it received the household goods in question. Provided, however, that this section shall not apply to motor carriers of passengers. (1905, c. 330, s. 3; Rev., s. 2636; C.S., s. 3526; 1963, c. 1165, s. 1; 1995, c. 523, s. 13.)

Cross References. — As to power of Utilities Commission to act as arbitrator in disputes between carriers, see G.S. 62-40.

§ 62-207: Repealed by Session Laws 1998-128, s. 13.

§ 62-208. Common carriers to settle promptly for cash-on-delivery shipments; penalty.

Every common carrier which shall fail to make settlement with the consignor of a cash-on-delivery shipment, either by payment of the moneys stipulated to be collected upon the delivery of the articles so shipped or by the return to such consignor of the article so shipped, within 20 days after demand made by the consignor and payment or tender of payment by him of the lawful charges for transportation, shall forfeit and pay to such consignor a penalty of twenty-five dollars ($25.00), where the value of the shipment is twenty-five dollars ($25.00) or less; and, where the value of the shipment is over twenty-five dollars ($25.00), a penalty equal to the value of the shipment; the penalty not to exceed fifty dollars ($50.00) in any case: Provided, no penalty shall be collectible where the shipment, through no act of negligence of the common carrier is burned, stolen or otherwise destroyed: Provided further, that the penalties here named shall be cumulative and shall not be in derogation of any right the consignor may have under any other provision of law to recover of the common carrier damages for the loss of any cash-on-delivery shipment or for negligent delay in handling the same. Provided, however, that this section shall not apply to motor carriers of passengers. (1909, c. 866; C.S., s. 3530; 1963, c. 1165, s. 1.)

§ 62-209. Sale of unclaimed baggage or household goods; notice; sale of rejected property; escheat.

(a) Any common carrier which has had in its possession on hand at any destination in this State any article whether baggage or household goods, for a period of 60 days from its arrival at destination, which said carrier cannot deliver because unclaimed, may at the expiration of said 60 days sell the same at public auction at any point where in the opinion of the carrier the best price can be obtained: Provided, however, that notice of such sale shall be mailed to the consignor and consignee, by registered or certified mail, if known to such carrier, not less than 15 days before such sale shall be made; or if the name and address of the consignor and consignee cannot with reasonable diligence be ascertained by such carrier, notice of the sale shall be published once a week for two consecutive weeks in some newspaper of general circulation published at the point of sale: Provided, that if there is no such paper published at such point, the publication may be made in any paper having a general circulation in the State: Provided further, however, that if the nondelivery of said article is due to the consignee's and consignor's rejection of it, then such article may be sold by the carrier at public or private sale, and at such time and place as will in the carrier's judgment net the best price, and this without further notice to either consignee or consignor, and without the necessity of publication.

(b) Repealed by Session Laws 1995, c. 523, s. 14.

(c) The common carrier shall keep a record of the articles sold and of the prices obtained therefor, and shall, after deducting all charges and the expenses of the sale, including advertisement, if advertised, pay the balance to the owner of such articles on demand therefor made at any time within five years from the date of the sale. If no person shall claim the surplus within five years, such surplus shall be paid to the Escheat Fund of the Department of State Treasurer.

(d) This section shall not apply to motor carriers of passengers. (1871-2, c. 138, s. 50; Code, s. 1987; Rev., s. 2639; 1921, c. 124, ss. 1, 2, 3; C.S., s. 3534; 1963, c. 1165, s. 1; 1981, c. 531, s. 17; 1995, c. 523, s. 14.)

Cross References. — As to unclaimed personalty escheating to The University of North Carolina, see G.S. 116B-4.

CASE NOTES

For decisions under former statute relating to sale of unclaimed freight, see Norfolk S.R.R. v. New Bern Iron Works & Supply Co., 172 N.C. 188, 90 S.E. 149 (1916); Holloman v. Southern Ry., 172 N.C. 372, 90 S.E. 292 (1916).

§ 62-210. Discrimination between connecting lines.

All common carriers subject to the provisions of this Chapter shall afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freight to and from their several lines and those connecting therewith, and shall not discriminate in their rates, routes and charges against such connecting lines, and shall be required to make as close connection as practicable for the convenience of the traveling public. Common carriers shall obey all rules and regulations made by the Commission relating to trackage. Irregular route motor carriers shall interchange traffic only with the approval of the Commission. Provided, however, that this section shall not apply to motor carriers of passengers. (1899, c. 164, s. 21; Rev., s. 1088; C.S., s. 1107; 1933, c. 134, s. 8; 1935, c. 258; 1941, c. 97; 1963, c. 1165, s. 1.)

Legal Periodicals. — As to the practice of specifying in published tariffs particular routes formed with connecting carriers, see 13 N.C.L. Rev. 364 (1935).

CASE NOTES

For case holding former similar section in the act creating the former Railroad Commission merely declaratory of the common law, see Atlantic Express Co. v.

Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393 (1892).

Authority to Require Trains to Make Connection. — The Commission has power to require a railroad company to have a train arrive at a certain station on its road at a certain schedule time, so as to connect with the train of another company. SCC v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904), aff'd, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

A railroad company is not compelled to furnish express facilities to another to conduct an express business over its road the same as it provides for itself or affords to any other express company. Atlantic Express Co. v. Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393 (1892).

§ 62-211: Repealed by Session Laws 1995, c. 523, s. 15.

§ 62-212. Indemnity agreements in motor carrier transportation contracts.

(a) A provision, clause, covenant, or agreement contained in, collateral to, or affecting a motor carrier transportation contract that purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending, or holding harmless the promisee from or against any liability for loss or damage resulting from the negligence or intentional acts or omission of the promisee is against the public policy of this State and is void and unenforceable.

(b) The following definitions apply in this section:

(1) Motor carrier transportation contract. — A contract, agreement, or understanding covering at least one of the following:
  a. The transportation of property for compensation or hire by the motor carrier.
  b. Entrance on property by the motor carrier for the purpose of loading, unloading, or transporting property for compensation or hire.
  c. A service incidental to activity described in sub-subdivision a. or b. of this subdivision, including storage of property.

(2) Promisee. — The person with whom the motor carrier enters into a motor carrier transportation contract and any agents, employees, servants, or independent contractors who are directly responsible to that person, except for motor carriers party to a motor carrier transportation contract with the person, and the motor carrier's agents, employees, servants, or independent contractors directly responsible to the motor carrier.

(c) Nothing contained in this section affects a provision, clause, covenant, or agreement where the motor carrier indemnifies or holds harmless the contract's promisee against liability for damages to the extent that the damages were caused by and resulted from the negligence of the motor carrier, its agents, employees, servants, or independent contractors who are directly responsible to the motor carrier.

(d) Notwithstanding the other provisions contained in this section, the term "motor carrier transportation contract", as defined in this section, shall not include the Uniform Intermodal Interchange and Facilities Access Agreement administered by the Intermodal Association of North America, or other agreements providing for the interchange, use or possession of intermodal chassis, containers, trailers, or other intermodal equipment that contain substantially the same indemnity provision as the provision contained in the Uniform Intermodal Interchange and Facilities Access Agreement. (2005-185, s. 1; 2006-264, s. 45.5(a).)

§§ 62-213 through 62-219: Reserved for future codification purposes.

Article 11.

Railroads.

§ 62-220: Recodified as G.S. 136-190 by Session Laws 1998-128, s. 14.

§§ 62-221, 62-222: Repealed by Session Laws 1998-128, s. 13.

§§ 62-223 through 62-226: Recodified as G.S. 136-191 through 136-194 by Session Laws 1998-128, s. 14.

§§ 62-227 through 62-234: Repealed by Session Laws 1998-128, s. 13.

§ 62-235: Repealed by Session Laws 1995 (Regular Session, 1996), c. 673, s. 3.

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 673, s. 1, provides: "The statutory authority, powers, duties, and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and purchasing, of the Rail Safety Section of the Transportation Division of the North Carolina Utilities Commission, is transferred to the Department of Transportation."

§ 62-236: Recodified as G.S. 136-20.1 by Session Laws 1995 (Regular Session, 1996), c. 673, s. 5.

§ 62-237: Recodified as G.S. 136-195 by Session Laws 1998-128, s. 14, effective September 4, 1998.

§§ 62-238, 62-239: Repealed by Session Laws 1998-128, s. 13, effective September 4, 1998.

§ 62-240: Recodified as G.S. 136-196 by Session Laws 1998-128, s. 14, effective September 4, 1998.

§§ 62-241 through 62-247: Repealed by Session Laws 1998-128, s. 13, effective September 4, 1998.

§§ 62-248 through 62-258: Reserved for future codification purposes.

Article 12.

Motor Carriers.

§ 62-259. Additional declaration of policy for motor carriers.

In addition to the declaration of policy set forth in G.S. 62-2 of Article 1 of Chapter 62, it is declared the policy of the State of North Carolina to preserve and continue all motor carrier transportation services now afforded this State;

and to provide fair and impartial regulations of motor carriers in the use of the public highways in such a manner as to promote, in the interest of the public, the inherent advantages of highway transportation; to promote and preserve adequate economical and efficient service to all the communities of the State by motor carriers; to encourage and promote harmony among all carriers and to prevent discrimination, undue preferences or advantages, or unfair or destructive competitive practices between all carriers; to foster a coordinated statewide motor carrier service; and to conform with the national transportation policy and the federal motor carriers acts insofar as the same may be practical and adequate for application to intrastate commerce. The provisions of this section and these policies are applicable to bus companies and their rates and services only to the extent with which they are consistent with the provisions of G.S. 62-259.1 and of the Bus Regulatory Reform Act of 1985. (1947, c. 1008, s. 1; 1949, c. 1132, s. 2; 1963, c. 1165, s. 1; 1985, c. 676, s. 16.)

Local Modification. — Cabarrus: 1947, c. 532; 1949, c. 1132, s. 39.

Cross References. — As to ridesharing arrangements, see G.S. 136-44.21 through 136-44.26.

Editor's Note. — This Article combines the Bus Act of 1949, Session Laws 1949, c. 1132, and the North Carolina Truck Act, Session Laws 1947, c. 1008.

Legal Periodicals. — For a discussion of the Bus Act of 1949, see 27 N.C.L. Rev. 467 (1949).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1024 (1981).

CASE NOTES

Purpose of Former Truck Act. — The North Carolina Truck Act was enacted to preserve and continue motor carrier transportation services. State ex rel. Utils. Comm'n v. Fredrickson Motor Express, 232 N.C. 178, 59 S.E.2d 580 (1950).

Policy of Former Bus Act Stated. — The policy of the law controlling the granting of bus franchises is to provide adequate, economical and efficient bus service at reasonable cost to all communities of the State, without discrimination, undue privileges or advantages or unfair or destructive competitive practices, all to the end of promoting the public interest. State ex rel. Utils. Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951).

As to application of former article of similar import, see City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947).

This section does not require the Utilities Commission to adopt a rule of the Interstate Commerce Commission. The Commission must make its own independent investigations, determinations and findings of fact based upon the evidence presented to it. State ex rel. Utilities Comm'n v. Associated Petro. Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972), cert. denied, 281 N.C. 158, 188 S.E.2d 364 (1972).

Equal Treatment Required. — All who ship goods with common carriers are required to be treated equally with respect to the same category of service. State ex rel. Utils. Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838, rev'd on other grounds, 302 N.C. 14, 273 S.E.2d 232 (1980).

Cited in State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973); State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981); State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

§ 62-259.1. Specific declaration of policy for bus companies.

The transportation of passengers, their baggage and express, by bus companies has become increasingly subject to competition from other forms of transportation which are unregulated or only partially regulated as to rates and services. It is in the public interest and it is the policy of this State that bus companies be partially deregulated so that they may rely upon competitive market forces to determine the best quality, variety and price of bus services, thereby promoting the public health, safety and welfare by strengthening and increasing the viability of this necessary form of transportation. (1985, c. 676, s. 17.)

§ 62-260. Exemptions from regulations.

(a) Nothing in this Chapter shall be construed to include persons and vehicles engaged in one or more of the following services by motor vehicle if not engaged at the time in the transportation of other passengers or other property by motor vehicle for compensation:

(1) Transportation of passengers or household goods for or under the control of the State of North Carolina, or any political subdivision thereof, or any board, department or commission of the State, or any institution owned and supported by the State;

(2) Transportation of passengers by taxicabs when not carrying more than fifteen passengers or transportation by other motor vehicles performing bona fide taxicab service and not carrying more than fifteen passengers in a single vehicle at the same time when such taxicab or other vehicle performing bona fide taxicab service is not operated on a regular route or between termini; provided, no taxicab while operating over the regular route of a common carrier outside of a municipality and a residential and commercial zone adjacent thereto, as such zone may be determined by the Commission as provided in subdivision (8) of this subsection, shall solicit passengers along such route, but nothing herein shall be construed to prohibit a taxicab operator from picking up passengers along such route upon call, sign or signal from prospective passengers;

(3) Transportation by motor vehicles owned or operated by or on behalf of hotels while used exclusively for the transportation of hotel patronage between hotels and local railroad or other common carrier stations;

(4) Transportation of passengers to and from airports and passenger airline terminals when such transportation is incidental to transportation by aircraft;

(5) Transportation of passengers by trolley buses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service;

(6) Transportation by motor vehicles used exclusively for the transportation of passengers to or from religious services or transportation of pupils and employees to and from private or parochial schools or transportation to and from functions for students and employees of private or parochial schools;

(7) Transportation of any bona fide employees to and from their place(s) of regular employment;

(8) Transportation of passengers when the movement is within a municipality exclusively, or within contiguous municipalities and within a residential and commercial zone adjacent to and a part of such municipality or contiguous municipalities; provided, the Commission shall have power in its discretion, in any particular case, to fix the limits of any such zone;

(9) through (17) Repealed by Session Laws 1995, c. 523, s. 16.

(18) Charter parties, as defined by this subdivision when such charter party is sponsored or organized by, and used by, any organized senior citizen group whose members are sixty (60) years of age or older. Such charter party shall be subject to subsections (f) and (g) of this section. "Charter party", for the purpose of this subdivision, means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group from a point of origin to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartering group after having left the place of origin.

(b) The Commission shall have jurisdiction to fix rates of carriers of passengers operating as described in (5) and (8) of subsection (a) of this section in the manner provided in this Chapter, and shall have jurisdiction to hear and determine controversies with respect to extensions and services, and the Commission's rules of practice shall include appropriate provisions for bringing such controversies before the Commission and for the hearing and determination of the same; provided nothing in this paragraph shall include taxicabs.

(c) The Commission may conduct investigations to determine whether any person purporting to operate under the exemption provisions of this section is, in fact, so operating, and make such orders as it deems necessary to enforce compliance with this section.

(d) The venue for any action commenced to enforce compliance with the terms of this Article against any person purporting to operate under any of the exemptions provided in this section shall be in one of the counties of the superior court district or set of districts as defined in G.S. 7A-41.1 wherein the violation is alleged to have taken place and such person shall be entitled to trial by jury.

(e) None of the provisions of this section nor any of the provisions of this Chapter shall be construed so as to prohibit or regulate the transportation of property by any motor carrier when the movement is within a municipality or within contiguous municipalities and within a zone adjacent to and commercially a part of such municipality or contiguous municipalities, as defined by the Commission. The Commission shall have the power in its discretion, in any particular case, to fix the limits of any such zone. Nothing herein shall be construed as an abridgment of the police powers of any municipality over such operation wholly within any such municipality. Nothing in this Chapter shall be construed to prohibit or regulate the transportation of household effects of families from one residence to another by persons who do not hold themselves out as being, and are not generally engaged in the business of transporting such property for compensation.

(f) Notwithstanding the exemption for transportation of passengers and household goods provided under subsections (a) through (e) of this section, all motor carriers transporting passengers for compensation under said exemptions or under any special exemptions granted by the Utilities Commission under G.S. 62-261 shall be subject to the same requirements for security for protection of the public as are established for regulated motor common carriers by the rules of the Utilities Commission pursuant to G.S. 62-268, and all such motor carriers transporting for hire under said exemption provisions shall further be subject to the same requirements for safety of operation of said motor vehicles as are required of regulated motor common carriers under the provisions of Chapter 20 and the regulations of the Division adopted pursuant thereto. The Division is authorized to promulgate rules and regulations for the enforcement of said requirements in the case of all such exempt operations, and the officers and agents of the Division shall have full authority to inspect said exempt vehicles and to apply all enforcement regulations and penalties for violation of said security regulations and safety regulations as in the case of regulated motor carriers.

(g) The owners of all motor vehicles used in any transportation for compensation which is declared to be exempt under this section shall register such operation with the Division of Motor Vehicles and shall secure from the Division of Motor Vehicles a certificate of exemption. (1947, c. 1008, s. 4; 1949, c. 1132, s. 5; 1951, c. 987, s. 1; 1953, c. 1140, s. 2; 1955, c. 1194, ss. 1, 2; 1959, c. 102, c. 639, s. 15; 1963, c. 1165, c. 1; 1967, cc. 1135, 1203; 1969, c. 681; 1971, cc. 856, 1192; 1973, c. 175; 1977, c. 217; 1979, c. 204, s. 1; 1985, c. 454, ss. 9-11; 1987 (Reg. Sess., 1988), c. 1037, s. 94; 1995, c. 523, s. 16.)

CASE NOTES

Rate Scheme Held Unconstitutional. — The state regulatory scheme by which the Utilities Commission set rates for franchised carriers to charge the U.S. Army in transportation of household goods violated the national procurement policy and was an unconstitutional burden on the United States in the exercise of its constitutional powers. United States v. North Carolina Utils. Comm'n, 352 F. Supp. 274 (E.D.N.C. 1972).

The Utilities Commission is not vested with power to require the operators of services enumerated in subdivisions (1) to (8) of subsection (a) to obtain a franchise from it and does not have any supervision or jurisdiction over such operation, except the operations set forth in subdivisions (5) and (8) of subsection (a), and as to them it retains jurisdiction to fix rates and "to hear and determine controversies with respect to extensions and services." City of Winston-Salem v. Winston-Salem City Coach Lines, 245 N.C. 179, 95 S.E.2d 510 (1956).

Commission Has Jurisdiction to Determine Exemptions. — The Commission has jurisdiction to determine whether or not the actual operations of a carrier fall under the exemptive provisions. State ex rel. N.C. Utils. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Jurisdiction of Commission over City Bus Lines. — The Commission has been given specific authority to fix city bus fares. State ex rel. Utils. Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956).

An intracity carrier, holding a certificate of exemption issued by the Commission and a franchise from the city or town in which it operates, is exempt from control of the Commission, except as to rates and controversies with respect to extensions and services. State ex rel. N.C. Utils. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Any provisions with respect to rates and services contained in a franchise contract between a utilities company and a municipal corporation, authorizing the utilities company to transport passengers over its streets, are subject to the orders of the Utilities Commission in respect thereto. City of Winston-Salem v. Winston-Salem City Coach Lines, 245 N.C. 179, 95 S.E.2d 510 (1956).

Dispute as to Curtailment of Services by Bus Carrier. — Where a municipality has granted a franchise to a utilities company to operate passenger buses over its streets, the parties may mutually agree upon extensions and services, changes in routes, or curtailment of services, when in the opinion of the governing board of the municipality such changes are, under the existing conditions, for the best interest of all concerned, including the public. However, when the parties are unable to agree to a proposed curtailment of existing services, the matter is within the exclusive jurisdiction of the Utilities Commission and the municipality may not enjoin the utility from the proposed curtailment of services, although the utility may not change its schedules or curtail its services unless given authority to do so by the Utilities Commission. City of Winston-Salem v. Winston-Salem City Coach Lines, 245 N.C. 179, 95 S.E.2d 510 (1956).

No Territorial Limitations on Intracity Carrier When Subdivisions (a)(1) and (a)(6) Apply. — An exempted intracity carrier under subdivision (a)(8) has no territorial limitations as to the transportation of passengers under subdivisions (a)(1) and (a)(6) of this section, where the request for such services arises within the area for which such carrier holds a certificate of exemption from the Commission and a franchise from the municipality in which it operates or within any additional zone or zones adjacent thereto which have been fixed by the Commission. State ex rel. N.C. Utils. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Operations Devoted Exclusively to Transportation of Employees to and from Work. — The North Carolina Utilities Commission does not have regulatory supervision of operations devoted exclusively to the transportation by motor vehicle of the bona fide employees of industrial plants to and from the places of their employment, even in cases where the persons conducting such operations are engaged at the same time or at other times in carrying on the callings of common carriers by motor vehicle. State ex rel. Utils. Comm'n v. Carolina Coach Co., 236 N.C. 583, 73 S.E.2d 562 (1952).

Transportation to and from Federal Military Reservation. — Carriers in intrastate commerce transporting passengers for hire to and from federal military reservations or bases are exempted from regulation of the Utilities Commission only if such carriers have been procured by the United States government to carry passengers for it, or the transportation of such passengers is under the control of the United States. Bryant v. Barber, 237 N.C. 480, 75 S.E.2d 410 (1953).

Transportation of Athletic Teams and School Bands. — While it is true that the statute which governs the operation of school buses makes no provision one way or the other for the transportation of athletic teams or school bands, it is equally true that school bands and athletic teams are under the control of the school authorities. Therefore, the board controlling such activities would have the inherent right to contract for such transportation as might be necessary to transport its athletic teams and its bands to and from events which have been scheduled under the supervision of school authorities, and such transportation would be exempt under subdivision (a)(1) of this section. State ex rel. N.C. Utils. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Municipal Franchise for Limousine Service to Airport. — The provisions of G.S. 63-2, 63-49, 63-50, 63-53, and this section authorize a municipal corporation to award a franchise contract granting the right to provide limousine service to a municipal airport upon certain terms and conditions set forth in the franchise ordinance. Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967).

Action by Competing Carrier Against Exempted Carrier Violating Section. — When an exempted carrier is operating in violation of the exemptive provisions of this section, any other carrier adversely affected thereby may institute an action in the superior court against such exempted carrier, pursuant to subsection (d) of this section and G.S. 62-279. State ex rel. N.C. Utils. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

As to motor vehicles carrying mail under former statute, see Winborne v. Browning, 206 N.C. 557, 174 S.E. 579 (1934).

Cited in State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utils. Comm'n v. J.D. McCotter, Inc., 16 N.C. App. 475, 192 S.E.2d 629 (1972); State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973); State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

OPINIONS OF ATTORNEY GENERAL

Subdivision (a)(1) of this section specifically exempts political subdivisions from regulation by the Utilities Commission. See opinion of Attorney General to Mr. David D. King, Director of Division of Public Transportation, North Carolina Department of Transportation, 55 N.C.A.G. 76 (1986).

The Pasquotank-Perquimans-Camden-Chowan District Health Department has the authority to operate public transit on a fare paying basis, without establishment of a Transportation Authority. Subdivision (a)(1) of this section specifically exempts political subdivisions of this State from regulation by the North Carolina Utilities Commission. See opinion of Attorney General to Mr. David D. King, Director of Division of Public Transportation, North Carolina Department of Transportation, 55 N.C.A.G. 76 (1986).

§ 62-261. Additional powers and duties of Commission applicable to motor vehicles.

The Commission is hereby vested with the following powers and duties:

(1) To supervise and regulate bus companies and to that end, the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage, newspapers, mail and light express, uniform system of accounts, records and reports and preservation of records.

(2) To supervise the operation and safety of passenger bus stations in any manner necessary to promote harmony among the carriers using such stations and efficiency of service to the traveling public.

(3) Repealed by Session Laws 1985, c. 454, s. 12.

(4) For the purpose of carrying out the provisions of this Article, the Utilities Commission may avail itself of the special information of the Board of Transportation in promulgating safety requirements and in considering applications for certificates or permits with particular reference to conditions of the public highway or highways involved, and the ability of the said public highway or highways to carry added traffic; and the Board of Transportation, upon request of the Utilities Commission, shall furnish such information.

(5) The Commission may, without prior notice and hearing, make and enter any order, rule, regulation, or requirement, not affecting rates, upon unanimous finding by the Commission of the existence of an

emergency and make such order, rule, regulation or requirement effective upon notice given to each affected motor carrier by registered mail, or by certified mail pending a hearing thereon as provided in this subdivision. It shall not be necessary for the Commission to give notice to the carriers affected or to hold a hearing prior to a revision in the rules regarding procedures to be followed in filing rates. Any such emergency order, rule, regulation or requirement shall be subject to continuation, modification, change, or revocation after notice and hearing and all such emergency orders, rules, regulations and requirements shall be supplanted and superseded by any final order, rule, regulation or requirement entered by the Commission.

(6) The Commission shall regulate brokers and make and enforce reasonable requirements respecting their licenses, financial responsibility, accounts, records, reports, operations and practices.

(7) Repealed by Session Laws 1985, c. 454, s. 12.

(8) To determine, upon its own motion, or upon motion by a motor carrier, or any other party in interest, whether the transportation of household goods in intrastate commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation in this State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in intrastate commerce. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this Article, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in intrastate commerce performed by the carrier or class of carriers designated in such certificate will be, or shall have become, or is reasonably likely to become, or such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of intrastate transportation by motor carriers in effectuating the policy declared in this Chapter. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in intrastate commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this paragraph, except after reasonable opportunity for hearing to interested parties.

(9) To inquire into the management of the business of motor carriers and into the management of business of persons controlling, controlled by or under common control with, motor carriers to the extent that such persons have a pecuniary interest in the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this Article.

(10) Repealed by Session Laws 1985, c. 454, s. 12.

(11) The Commission may from time to time establish such just and reasonable classifications of groups of carriers included in the term "common carrier by motor vehicle" as the special nature of the service

performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this Article, to be observed by such carriers so classified or grouped, as the Commission deems necessary or desirable in the public interest. (1947, c. 1008, s. 5; 1949, c. 1132, s. 6; 1953, c. 1140, s. 5; 1957, c. 65, s. 11; c. 1152, s. 7; 1961, c. 472, s. 9; 1963, c. 1165, s. 1; 1969, c. 723, s. 2; c. 763; 1973, c. 507, s. 5; 1985, c. 454, s. 12; c. 676, s. 18; 1995, c. 523, s. 17.)

Cross References. — As to revocation of license plates for violation of Chapter, see G.S. 62-278.

CASE NOTES

Power to Promulgate Rules and Regulations. — The Commission may impose upon the holder of a permit any reasonable rules and regulations with respect to the operations thereunder which are now in effect or which may be adopted hereafter for the regulation of motor vehicle carriers performing similar service. State ex rel. Utils. Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Duty to Require Certificate Holder to Render Services Contemplated. — The Truck Act of 1947 and the amendments thereto placed upon the Commission the responsibility of requiring the holder of the certificate to render the service contemplated. State ex rel. Utils. Comm'n v. Colter, 259 N.C. 269, 130 S.E.2d 385 (1963).

A substantial rather than a simulated performance is required to support a bona fide carrier operation. State ex rel. Utils. Comm'n v. Colter, 259 N.C. 269, 130 S.E.2d 385 (1963).

Contracts Subject to Commission's Authority. — Contracts between carriers affecting service to the public are subject to the Commission's regulatory authority. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Approved Contract as Order of Commission. — A contract between public utilities, when formally approved by the Commission, is in effect an order of the Commission binding on each of the parties. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The interchange of freight between an intrastate and an interstate carrier, even though the property is being moved in interstate commerce, is left to the state commissions. State ex rel. Utils. Comm'n v. Fox, 239 N.C. 253, 79 S.E.2d 391 (1954).

§ 62-262. Applications and hearings other than for bus companies.

(a) Except as otherwise provided in G.S. 62-260[,] 62-262.1 and 62-265, no person shall engage in the transportation of passengers or household goods in intrastate commerce unless such person shall have applied to and obtained from the Commission a certificate authorizing such operations, and it shall be unlawful for any person knowingly or wilfully to operate in intrastate commerce in any manner contrary to the provisions of this Article, or of the rules and regulations of the Commission. No certificate shall be amended so as to enlarge or in any manner extend the scope of operations of a motor carrier without complying with the provisions of this section.

(b) Upon the filing of an application for a certificate, the Commission shall, within a reasonable time, fix a time and place for hearing such application. The Commission shall from time to time prepare a truck calendar containing notice of such hearings, a copy of which shall be mailed to the applicant and to any other persons desiring it, upon payment of charges to be fixed by the Commission. The notice or calendar herein required shall be mailed at least 20 days prior to the date fixed for the hearing, but the failure of any person, other than applicant, to receive such notice or calendar shall not, for that reason, invalidate the action of the Commission in granting or denying the application.

(c) The Commission may, in its discretion, except where a regular calendar providing notice is issued, require the applicant to give notice of the time and place of such hearing together with a brief description of the purpose of said hearing and the exact route or routes and authority applied for, to be published not less than once each week for two successive weeks in one or more newspapers of general circulation in the territory proposed to be served. The Commission may in its discretion require the applicant to give such other and further notice in the form and manner prescribed by the Commission to the end that all interested parties and the general public may have full knowledge of such hearing and its purpose. If the Commission requires the applicant to give notice by publication, then a copy of such notice shall be immediately mailed by the applicant to the Commission, and upon receipt of same the chief clerk shall cause the copy of notice to be entered in the Commission's docket of pending proceedings. The applicant shall, prior to any hearing upon his application, be required to satisfy the Commission that such notice by publication has been duly made, and in addition to any other fees or costs required to be paid by the applicant, the applicant shall pay into the office of the Commission the cost of the notices herein required to be mailed by the Commission.

(d) Any motor carrier desiring to protest the granting of an application for a certificate, in whole, or in part, may become a party to such proceedings by filing with the Commission, not less than 10 days prior to the date fixed for the hearing, unless the time be extended by order of the Commission, its protest in writing under oath, containing a general statement of the grounds for such protest and the manner in which the protestant will be adversely affected by the granting of the application in whole or in part. Such protestant may also set forth in his protest its proposal, if any, to render either alone or in conjunction with other motor carriers, the service proposed by the applicant, either in whole or in part. Upon the filing of such protest it shall be the duty of the protestant to file three copies with the Commission, and the protestant shall certify that a copy of said protest has been delivered or mailed to the applicant or applicant's attorney. When no protest is filed with the Commission within the time herein limited, or as extended by order of the Commission, the Commission may proceed to decide the application on the basis of testimony taken at a hearing, or on the basis of information contained in the application and sworn affidavits, and make the necessary findings of fact and issue or decline to issue the certificate applied for without further notice. Persons other than motor carriers shall have the right to appear before the Commission and give evidence in favor of or against the granting of any application and with permission of the Commission may be accorded the right to examine and cross-examine witnesses.

(e) The burden of proof shall be upon the applicant for a certificate to show to the satisfaction of the Commission:

(1) That public convenience and necessity require the proposed service in addition to existing authorized transportation service, and

(2) That the applicant is fit, willing and able to properly perform the proposed service, and

(3) That the applicant is solvent and financially able to furnish adequate service on a continuing basis.

(f) through (h) Repealed by Session Laws 1985, c. 676, s. 19.

(i), (j) Repealed by Session Laws 1995, c. 523, s. 18.

(k) The Commission shall by general order, or rule, having regard for the public convenience and necessity, provide for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate.

(*l*) The provisions of this section shall not be applicable to applications for certificates of authority by bus companies or related hearings. (1947, c. 1008,

s. 11; 1949, c. 1132, s. 10; 1953, c. 825, s. 3; 1957, c. 1152, ss. 8, 9; 1959, c. 639, s. 11; 1963, c. 1165, s. 1; 1965, c. 214; 1981, c. 193, s. 4; 1985, c. 676, s. 19; 1995, c. 523, s. 18.)

Editor's Note. — It appears that a comma was intended in the first sentence of subsection (a) following the reference to "G.S. 62-260."

Legal Periodicals. — For survey of 1977 law on common carriers, see 56 N.C.L. Rev. 853 (1978).

CASE NOTES

I. In General.
II. Procedure.

I. IN GENERAL.

"Route" Not Synonymous with "Territory". — "Route" means the highway or road traveled in serving communities, districts, or territories adjacent to it, and is not synonymous with "territory." State ex rel. Utils. Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951); State ex rel. Utils. Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953).

As to what constitutes a contract carrier, see State ex rel. Utils. Comm'n v. Petro. Transp., Inc., 2 N.C. App. 566, 163 S.E.2d 526 (1968).

Requirements for Permit to Operate as Contract Carrier. — In addition to the statutory requirements of G.S. 62-3 and this section, an applicant for a permit to operate as a contract carrier in North Carolina must conform to the standards set forth by the Utilities Commission in Rule R2-15(b). State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970).

"Certificate" authorizes performance as common carrier, while "permit" authorizes performance as contract carrier. State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

Grant of Franchise to Be Predicated on Public Convenience and Necessity. — The granting of franchise authority for the operation of buses over the highways of this State, for the transportation of persons and property for compensation, must be predicated upon public convenience and necessity. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

The convenience and necessity required are those of the public and not of an individual or individuals. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The doctrine of convenience and necessity is a relative or elastic theory. The facts in each case must be separately considered, and from those facts it must be determined whether public convenience and necessity require a given service to be performed or dispensed with. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

"Necessity" means reasonably necessary and not absolutely imperative. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Any service or improvement which is desirable for the public welfare and highly important to the public convenience may be properly regarded as necessary. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

What constitutes "public convenience and necessity" is primarily an administrative question with a number of imponderables to be taken into consideration, e.g., whether there is a substantial public need for the service, whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest. State ex rel. Utils. Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969); State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

If a new service is necessary, and there are carriers already in the field, there is always the vital question, in determining convenience and necessity, whether the new service should be rendered by the existing carriers or by the new applicant. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Burden upon Applicant to Show Public Convenience and Necessity. — The burden of proof is upon the applicant for franchise authority to show public convenience and necessity. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

The Commission's conclusion that public convenience and necessity required the proposed service was unsupported by competent evidence in view of the entire record, where the petitioner failed to show that any individual required his service for a non-local, intrastate move—witness testimony that he would recommend that his daughter use petitioner's services for a long-distance move did not constitute material evidence of a substantial public need absent statistics, expert testimony or other evidence—and where petitioner failed to present evidence on the issues of whether existing carriers could reasonably meet the need for intrastate moving services and whether the granting of his application would impair the operations of existing carriers contrary to the public interest; furthermore, contrary to the Commission's suggestion, the intervenors did not have the burden of showing that granting the application would have a ruinous effect upon them. Dunnagan v. Ndikom, 139 N.C. App. 246, 533 S.E.2d 494, 2000 N.C. App. LEXIS 906 (2000).

Applicant Failed to Show Public Convenience and Necessity. — The North Carolina Utilities Commission erred in granting petitioner's application for a certificate of public convenience and necessity under this section where the petitioner failed to show that any individual required his service for a non-local, intrastate move and, although the petitioner's desire to serve the Hispanic community was commendable, he failed to show that the moving needs of the Hispanic community were not being met by existing intrastate moving services; a showing that there had been a population increase with nothing more did not establish sufficient evidence of a substantial public need for petitioner's proposed service, and petitioner failed to present evidence on the issues of whether existing carriers could reasonably meet the need for intrastate moving services and whether granting his application would impair the operations of existing carriers contrary to the public interest. Union Transf. & Storage Co. v. Lefeber, 139 N.C. App. 280, 533 S.E.2d 550, 2000 N.C. App. LEXIS 910 (2000).

Special Rule for Relocation of Existing Routes. — The Utilities Commission has developed a special rule for applications that seek only to relocate an existing route over a new highway. In these cases the Commission does not require such an extensive demonstration of public convenience and necessity as in other cases. Instead, the applicant is only required to show that the proposed route, as it now exists and with future improvements, will provide a much safer, quicker and improved service. State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

By encouraging bus companies to make use of new and improved highways soon after they are opened, the special rule for relocation of existing routes serves "to promote, in the interest of the public, the inherent advantages of highway transportation," which is one of the stated purposes of the motor carriers statute. State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

Test of "Public Need" Not Applicable to Transfer Proceedings. — The showing of public need which subsection (e)(1) of this section requires of an application for a new authority is not applicable in a transfer proceeding under G.S. 62-111 and was not written into it by G.S. 62-111(a). State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Subsection (e) of G.S. 62-111 does not indicate a policy change toward protecting existing certificate holders from lawful competition. Like the subsection (a) "public convenience and necessity" test, the requirement that the Commission find the transfer "in the public interest" does not write into the transfer approval procedure the new certificate test of public need in subsection (e)(1) of this section. State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Where Carrier's Authority Is Not Dormant. — The criteria "if justified by the public convenience and necessity" in subsection (a) of G.S. 62-111 is interpreted as a statutory basis for the test of dormancy. Where the authority has been abandoned or "dormant," the Commission has denied applications for transfer because approval would in effect be the granting of a new authority without satisfying the new authority test of public need set out in subsection (e)(1) of this section. Where the authority has been actively operated, the applicants for sale and transfer of motor freight carrier rights are under no burden to show through shipper witnesses that a demand and need exist. The rationale is that public convenience and necessity were shown to exist when the authority was granted or acquired, and the rebuttable presumption of law is that it continues. State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Where the issue of dormancy under G.S. 62-112(c) has been raised, if the Commission finds that the franchise is not dormant, it must then determine if the criteria required by G.S. 62-111 for approval of the transfer has been met. If the Commission finds that the franchise is dormant under G.S. 62-112(c), the application for transfer must be denied, because approval would in effect constitute the granting of a new franchise without satisfying the new authority test and other requirements of subsection (e) of this section. State ex rel. Utils. Comm'n v. Estes Express Lines, 33 N.C. App. 174, 234 S.E.2d 624 (1977).

The factors denominated as imponderables, namely, whether the existing carriers can reasonably meet the need for the service, and whether the granting of the application would endanger or impair the operations of existing carriers contrary to the public interest, are not solely determinative of the right of the Commission to grant the application. Both are directed to the question of public convenience and necessity. Nevertheless, if the proposed operation under the certificate sought would seriously endanger or impair the operations of existing carriers contrary to the public interest, the certificate should not be issued. State ex rel. Utils. Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969).

There is no public policy condemning competition as such, between contract carriers, in the field of public utilities; the public policy only condemns unfair or destructive competition. State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Grant of Application Not Prohibited by Fact That Competing Carrier's Business Would Be Adversely Affected. — The fact that the granting of a proposed application would adversely affect the business of a carrier corporation is not a sufficiently compelling reason to prohibit the entrance of other contract carriers into the field of transporting bank documents and other commodities. State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Applications to Serve Communities Served by Another Carrier and to Duplicate Routes Distinguished. — Application by carrier to serve communities being served by another carrier, who intervenes and protests the application, as distinguished from an application for duplication of routes, does not require the Utilities Commission to find that the existing carrier's service is inadequate and to afford such existing carrier opportunity to remedy the inadequacy. State ex rel. Utils. Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951).

Protection as to Duplication in Route. — Granting of a franchise over any part of the route of an existing carrier is prohibited except upon prescribed conditions, and not merely a duplication of the same route from terminus to terminus, but the application to serve communities being served by the intervening carrier need not be denied in toto because there would be a duplication of routes along a short distance, since the existing carrier may be protected as to the duplication in route by proper restrictions in the certificate. State ex rel. Utils. Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951).

A traversing of the same highways for certain distances by competing carriers may readily become necessary in the public interest and, in such an instance, more than one certificate may be granted, subject to such restrictions as will protect the authorized carrier in respect of that part of the highway to be traversed by both. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Former subsection (f) of this section did not forbid authority to two or more carriers to traverse the same segment of a highway so long as they did not render duplicate service. The mere fact that the two carriers would use the same highway for a distance did not require a denial of the application. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

When Duplicate Service Permitted. — Under former article of similar import, it was held that the Commission might, in its discretion, grant a franchise which would duplicate in whole or in part a previously authorized similar class of service; and when it was shown to the satisfaction of the Commission that the existing operations were not providing sufficient service reasonably to meet the public convenience and necessity and the existing operators, after 30 days' notice, failed to provide the service required by the Commission, it would be the duty of the Commission to do so. State ex rel. Utils. Comm'n v. Carolina Coach Co., 224 N.C. 390, 30 S.E.2d 328 (1944); State ex rel. Utils. Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951).

This section does not purport to protect against all competition, but is designed to protect authorized carriers against ruinous competition, and does not prohibit service of the same points by different carriers over separate routes when such duplicate service is in the public interest. State ex rel. Utils. Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951); State ex rel. Utils. Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953).

Question of duplication of service must be determined under statute in effect at the time the order of the Commission was entered. State ex rel. Utils. Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951).

Commission May Grant "Closed Door" Authority Though Application Seeks Authority to Duplicate Service. — Since the Utilities Commission is not confined to the immediate scope of the pleadings filed, and may enlarge the scope of the inquiry, it may grant a "closed door" authority even though the application is for authority to duplicate service. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

When "Closed Door" Authority Proper. — Where the principal business of a carrier is the transportation of passengers between two cities of the State along a route serving a number of other cities, and the improvement and construction of highways makes feasible a new and more direct route between the termini, the Utilities Commission, upon appropriate findings of fact, may grant such carrier "closed door" authority along the new route, notwithstanding that other carriers, respectively, serve segments of the route in "open door" operations. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Grant of Application Upheld. — The Utilities Commission properly granted an application for a contract carrier permit authorizing the applicant to transfer bank documents and other commodities between banks in the State, notwithstanding the protest by an existing contract carrier of bank documents that the granting of the application would adversely affect its business, where there were findings, supported by competent and substantial evidence, that banks needed the services offered by the applicant and that their need could not be met by any existing means of transportation. State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

As to charter service, see State ex rel. Utils. Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

For case holding scope of operation of carrier not enlarged by amendment, see State ex rel. Utils. Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Applied in Bryant v. Barber, 237 N.C. 480, 75 S.E.2d 410 (1953); State ex rel. Utils. Comm'n v. Home Transp. Co., 28 N.C. App. 340, 220 S.E.2d 871 (1976); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 47 N.C. App. 418, 267 S.E.2d 488 (1980); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 48 N.C. App. 115, 268 S.E.2d 851 (1980); State ex rel. Utils. Comm'n v. Pony Express Courier Corp., 58 N.C. App. 218, 292 S.E.2d 769 (1982).

Cited in State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utils. Comm'n v. J.D. McCotter, Inc., 16 N.C. App. 475, 192 S.E.2d 629 (1972); State ex rel. Utils. Comm'n v. Estes Express Lines, 33 N.C. App. 99, 234 S.E.2d 628 (1977).

II. PROCEDURE.

The procedure before the Commission is more or less informal, and is not as strict as in civil cases, nor is it confined by technical rules; substance and not form is controlling. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The power of the Commission is not restricted to the proceedings as commenced, but it may enlarge the scope of the inquiry beyond the issue raised by the pleadings where the parties to be affected are before the Commission, participate in the proceedings, have full opportunity to be heard, and are not misled as to the purpose of the hearing. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The Commission is not confined to the immediate scope of the pleadings on file. It may enlarge the scope of the inquiry, and where the parties to be affected are before it, participate in the inquiry and make defense, they cannot complain of a departure from the pleadings. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Treatment of Application for New Authority as Motion in Prior Cause. — An application for a new authority to carry passengers between two municipalities of the State along a new route made feasible by the improvement or construction of highways could be treated by the Utilities Commission as a motion in a prior cause in which the Commission approved an agreement of the carriers in regard to their respective services between the cities provided the carriers affected were given notice and an opportunity to be heard. The question of whether the prior order of approval could be collaterally attacked was thus obviated. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Findings of fact by the Commission are conclusive and binding upon the reviewing court when supported by competent, material and substantial evidence in view of the entire record. State ex rel. Utils. Comm'n v. Petro. Transp., Inc., 2 N.C. App. 566, 163 S.E.2d 526 (1968); State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utils. Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970); State ex rel. Utils. Comm'n v. Kenan Transp. Co., 10 N.C. App. 626, 179 S.E.2d 799 (1971).

Procedure Held Contrary to Statutory Requirements. — Where the Commission issued its directive without any notice or hearing whatever, simply instructing the parties peremptorily that they must enter into an agreement, such a procedure was entirely contrary to the statutory requirements, and any such order was invalid. State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

§ 62-262.1. Certificates of authority for passenger operations by bus companies.

(a) Except as provided in G.S. 62-260, 62-262 and 62-265, no person shall engage in the transportation of passengers in intrastate commerce by motor vehicle without having applied for and obtained a certificate authorizing those operations from the Commission. It shall be unlawful for any person to knowingly or willfully operate in intrastate commerce in a manner contrary to the provisions of this Article or to the rules and regulations of the Commission. No certificate shall be amended to enlarge, or in any manner extend, the scope of operations of a bus company without complying with the provisions of this section.

(b) Any bus company desiring a certificate of authority to operate in intrastate commerce in this State over fixed routes, or to enlarge or in any manner extend the scope of its fixed route operations previously granted by the Commission, may do so by filing a verified application with the Commission and by paying the filing fee established by G.S. 62-300.

(c) The Commission shall issue a certificate of authority to an applicant for the transportation of passengers over a fixed route or to enlarge or extend authority previously granted, if the Commission finds that the applicant is fit, willing and able to provide the transportation to be authorized by the certificate and to comply with the provisions of this Chapter, unless the Commission finds, on the basis of evidence presented by any person objecting to the issuance of the certificate, that the transportation to be authorized is not consistent with the public interest.

(d) In making any findings relating to public interest under subsection (c) of this section, the Commission shall consider, to the extent applicable, (i) the transportation policy of this State as it relates to bus companies under G.S. 62-259.1 and this Chapter; (ii) the value of competition to the traveling and shipping public; (iii) the effect of issuance of the certificate on bus company service to small communities; and (iv) whether issuance of the certificate would impair the ability of any other fixed route carrier of passengers to provide a substantial portion of its fixed route passenger service, except that diversion of revenue or traffic from a fixed route carrier of passengers, alone, shall not be sufficient to support a finding that issuance of the certificate would impair the ability of the carrier to provide a substantial portion of its fixed route passenger service.

(e) Within 10 days after the filing of an application, the applicant shall provide notice to be given as required by Commission rule. If no protest, raising material issues of fact to the granting of the application, is filed with the Commission within 30 days after the notice is given, the Commission may, upon review of the record and without a hearing, issue its certificate of authority granting the requested operating authority, if it is satisfied that the applicant meets the requirements set forth in subsection (c) of this section.

(f) If protests are filed raising material issues of fact to the granting of the application, the Commission shall set the application for hearing, as soon as possible, and cause notice to be given as provided by its rules. At the hearing, the only issues for consideration are those set forth in subsections (c) and (d) of this section. The Commission shall issue its final order not later than 180 days after the application is filed.

(g) Any bus company authorized to transport passengers in intrastate commerce over fixed routes in this State and which in fact provides that service may, without filing a new application or paying further fees: (i) transport newspapers, express parcels or United States mail over the fixed routes on which it provides passenger transportation; (ii) provide charter operations to all points in the State; and (iii) transport charter passengers in the same motor vehicles with fixed route passengers.

(h) Any bus company seeking a certificate to engage solely in charter operations within the State, or to enlarge or in any manner extend the scope of its charter operations previously granted by the Commission, may obtain one by (i) filing a verified application for the authority with the Commission; (ii) paying the applicable filing fee as prescribed by G.S. 62-300; and (iii) demonstrating that it is fit, willing and able to perform the proposed charter operations.

(i) Within 10 days after filing of an application for charter operations, the applicant shall provide notice as required by Commission rule or regulation. If no protests to the granting of the application, raising material issues of fact, are received by the Commission within 30 days after the notice is given, the Commission shall issue its certificate granting the requested authority unless it determines that the applicant is unfit, unwilling or unable to perform the proposed operations. In the event of this determination, or if protests to the proposed operation raising material issues of fact are received, the Commission shall set the application for hearing, as soon as possible, and provide notice to be given as provided by its rules and shall issue its final order within 180 days after application is filed. At the hearing, the only issue for consideration shall be whether the applicant is fit, willing and able to perform the proposed charter operations and the issue of need shall not be considered. On the issue of its fitness, willingness and ability to perform the proposed charter operations, the applicant in its application and at any hearing shall present evidence from which the Commission may find that: (i) the applicant has sufficient assets to perform properly the proposed operations; (ii) the operation will be conducted only with properly qualified drivers; (iii) the applicant will maintain safe, clean and attractive buses and equipment; (iv) the applicant will maintain insurance for the protection of the public as provided in this Chapter; (v) the applicant has sufficient equipment to conduct the proposed operation; and (vi) the applicant will observe all applicable laws, rules and regulations of this State.

(j) Any bus company authorized and engaged solely in charter operations shall not be required to transport passengers over a fixed route in this State as an incidence to its charter operations. (1985, c. 676, s. 20.)

§ 62-262.2. Discontinuance or reduction in service.

(a) When a bus company proposes to discontinue service over any intrastate route or proposes to reduce its level of service to any points on a route to a level which is less than one trip per day (excluding Saturdays and Sundays), it shall petition the Commission for permission to do so. Within 10 days after the filing of a petition, the Commission shall require notice to be given.

(b) Any person or the Public Staff may object, to the Commission, to the granting of permission to any bus company to discontinue or reduce transportation under this section. If neither objects to the granting of permission to discontinue or reduce service under this section, within 30 days after the notice as required by subsection (a) of this section, the Commission may grant the permission based on the record and without hearing.

(c) If, within 30 days after the notice as required by subsection (a) of this section, any person or the Public Staff objects in writing to the Commission to granting of such permission, the Commission shall grant such permission unless the Commission finds as a fact, that the discontinuance or reduction in service is not consistent with the public interest or that continuing the transportation, without the proposed discontinuance or reduction, will not constitute an unreasonable burden on interstate commerce. In making a finding under this subsection, the Commission shall accord great weight to the extent to which the interstate and intrastate revenues from the transportation proposed to be reduced or discontinued are less than the variable costs of providing the transportation, including depreciation for revenue equipment. The Commission may also consider, to the extent applicable, all other factors which are to be considered by the Interstate Commerce Commission in a proceeding commenced under 49 U.S.C. § 10935. For the purposes of this section, the bus company filing a petition for permission to discontinue or reduce service shall have the burden of proving (i) the amount of its interstate and intrastate revenues received for transportation to, from or between, but not through, points on the involved intrastate route; and (ii) the system variable costs of providing the transportation.

(d) The Commission may make its determination with or without a public hearing. The Commission shall take final action upon the petition not later than 120 days after any written objections to the petition are filed.

(e) The provisions of G.S. 62-262(k) shall not be applicable to bus companies. (1985, c. 676, s. 21; 1989 (Reg. Sess., 1990), c. 1024, s. 15.)

§ 62-263. Application for broker's license.

(a) No person shall engage in the business of a broker in intrastate operations within this State unless such person holds a broker's license issued by the Commission.

(b) The Commission shall prescribe the form of application and such reasonable requirements and information as may in its judgment be necessary.

(c) Upon the filing of an application for license the Commission may fix a time and place for the hearing of the application and require such notices, publications, or other service as it may prescribe by the general rule or regulation.

(d) A license shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this Article and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the license, is or will be consistent with the public interest and policy declared herein.

(e) The Commission shall have the same authority over persons operating under and holding a brokerage license as it has over motor carriers under this Article, and shall require a broker to furnish bond or other security approved by the Commission and sufficient for the protection of travelers by motor vehicle. (1949, c. 1132, s. 13; 1963, c. 1165, s. 1.)

§ 62-264: Repealed by Session Laws 1995, c. 523, s. 19.

§ 62-265. Emergency operating authority.

To meet unforeseen emergencies, the Commission may, upon its own initiative, or upon written request by any person, department or agency of the State, or of any county, city or town, with or without a hearing, grant appropriate authority to any owner of a duly licensed vehicle or vehicles, whether such owner holds a certificate or not, to transport passengers or household goods between such points, or within such area during the period of the emergency and to the extent necessary to relieve the same, as the Commission may fix in its order granting such authority; provided, that unless the emergency is declared by the General Assembly or under its authority, the Commission shall find from such request, or from its own knowledge or conditions, that a real emergency exists and that relief to the extent authorized in its order is immediate, pressing and necessary in the public interest, and that the carrier so authorized has the necessary equipment and is willing to perform the emergency service as prescribed by the order. In all cases, under this section, the Commission shall first afford the holders of certificates operating in the territory affected an opportunity to render the emergency service. Upon the termination of the emergency, the operating privileges so granted shall automatically expire and the Commission shall forthwith withdraw all operating privileges granted to any person under this section. (1947, c. 1008, s. 17; 1949, c. 1132, s. 17; 1963, c. 1165, s. 1; 1995, c. 523, s. 20.)

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

§ 62-266: Repealed by Session Laws 1985, c. 454, s. 13.

§ 62-267. Deviation from regular route operations.

(a) A common carrier of passengers by motor vehicle operating under a certificate issued by the Commission may occasionally deviate from the routes over which it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

(b) Repealed by Session Laws 1995, c. 523, s. 21.

(c) In no event shall the operation of empty equipment by any carrier over any route or highway be construed as a violation of the rights of any carrier. (1947, c. 1008, s. 18; 1949, c. 1132, s. 18; 1963, c. 1165, s. 1; 1995, c. 523, s. 21.)

§ 62-268. Security for protection of public; liability insurance.

No certificate or broker's license shall be issued or remain in force until the applicant shall have procured and filed with the Division of Motor Vehicles such security bond, insurance or self-insurance for the protection of the public as the Commission shall by regulation require. The Commission shall require that every motor carrier for which a certificate or license is required by the provisions of this Chapter, shall maintain liability insurance or satisfactory surety of at least fifty thousand dollars ($50,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, one hundred thousand dollars ($100,000) because of bodily injury to or death of two or more persons in any one accident, and fifty thousand dollars ($50,000) because of injury to or destruction of property of others in any one accident; and the Commission may require any greater amount of insurance as may be necessary for the protection of the public. Notwithstanding any rule or regulation to the contrary, the Commission shall not require that any insurance procured and filed be provided in any single policy of insurance or through a single insurer, if the insurers involved are otherwise qualified. A motor carrier may satisfy the requirements of the Commission by procuring insurance with coverage and limits of liability required by the Commission in one or more policies of insurance issued by one or more insurers.

Notwithstanding any other provisions of this section or Chapter, bus companies shall file with the Commission proof of financial responsibility in the form of bonds, policies of insurance, or shall qualify as a self insurer, with minimum levels of financial responsibility as prescribed for motor carriers of passengers pursuant to the provisions of 49 U.S.C. § 31138. Provided, further, that no bus company operating solely within the State of North Carolina and which is exempt from regulation under the provisions of G.S. 62-260(a)(7) shall be required to file with the Commission proof of the financial responsibility in excess of one million five hundred thousand dollars ($1,500,000). (1947, c. 1008, s. 19; 1949, c. 1132, s. 19; 1963, c. 1165, s. 1; 1973, c. 1206; 1977, c. 920; 1985, c. 454, s. 14; c. 676, s. 22; 1987, c. 374; 1995, c. 523, s. 22; 1998-217, s. 8.)

CASE NOTES

Applied in Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

Cited in American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

§ 62-269. Accounts, records and reports.

The Commission may prescribe the forms of any and all accounts, records and memoranda to be kept by motor carriers, brokers, and lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys; and it shall be unlawful for such carriers, brokers, and lessors, to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission may issue orders specifying such operating, accounting, or financial papers, records, books, blanks, stubs, correspondence, or documents of motor carriers, brokers, or lessors, as may after a reasonable time be destroyed, and prescribing the length of time they shall be preserved. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of motor carriers, brokers, and lessors; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, brokers, and lessors, and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier. Motor carriers, brokers, lessors, and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this section, and motor carriers, brokers, and lessors, shall submit their lands, buildings, and equipment for examination and inspection, to any duly authorized special agent, accountant, auditor, inspector, or examiner of the Commission upon demand and the display of proper credentials. (1947, c. 1008, s. 28; 1949, c. 1132, s. 25; 1959, c. 639, ss. 5, 6, 9, 10; 1961, c. 472, s. 10; 1963, c. 1165, s. 1.)

§ 62-270. Orders, notices, and service of process.

It shall be the duty of every motor carrier operating under a certificate issued under the provisions of this Article to file with the Division of Motor Vehicles a designation in writing of the name and post-office address of a person upon whom service of notices or orders may be made under this Article. Such designation may from time to time be changed by like writing similarly filed. Service of notice or orders in proceedings under this Article may be made upon a motor carrier by personal service upon it or upon the person so designated by it, or by registered mail, return receipt requested, or by certified mail with return receipt requested, addressed to it or to such person at the address filed. In proceedings before the Commission involving the lawfulness of rates, charges, classifications, or practices, service of notice upon the person or agent who has filed a tariff or schedule in behalf of such carrier shall be deemed to be due and sufficient service upon the carrier. (1947, c. 1008, s. 29;

1949, c. 1132, s. 26; 1957, c. 1152, ss. 6, 11; 1963, c. 1165, s. 1; 1985, c. 454, s. 15; 1995, c. 523, s. 23.)

§ 62-271. Collection of rates and charges of motor carriers of household goods.

No common carriers of household goods by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in intrastate commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice; provided, that the provisions of this section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for the State, or political subdivision thereof. Where any common carrier by motor vehicle is instructed by a shipper or consignor to deliver household goods transported by such carrier to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such household goods (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the household goods have been delivered to him, if the consignee (i) is an agent only and had no beneficial title in the household goods, and (ii) prior to delivery of the household goods has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the household goods. In such cases the shipper and consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this section. On shipments reconsigned or diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. (1947, c. 1008, s. 31; 1963, c. 1165, s. 1; 1995, c. 523, s. 24.)

§ 62-272. Allowance to shippers for transportation services.

If the owner of household goods transported under the provisions of this Article directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in the tariffs or schedules filed in the manner provided in this Article and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order. (1947, c. 1008, s. 32; 1963, c. 1165, s. 1; 1995, c. 523, s. 25.)

§ 62-273. Embezzlement of C.O.D. shipments.

Household goods received by any motor carrier to be transported in intrastate commerce and delivered upon collection on such delivery and remittance to the shipper of the sum of money stated in the shipping instructions to be collected and remitted to the shipper, and the money collected upon delivery of such party, are hereby declared to be held in trust by any carrier having possession thereof or the carrier making the delivery or collection, and upon failure of any such carrier to account for the household goods so received, either to the shipper to whom the collection is payable or the carrier making delivery to any carrier handling the household goods or making the collection, within 15 days after demand in writing by the shipper, or carrier, or upon failure of the delivering carrier to remit the sum so directed to be collected and remitted to the shipper, within 15 days after collection is made, shall be prima facie evidence that the household goods so received, or the funds so received, have been wilfully converted by such carrier to its own use, and the carrier so offending shall be guilty of a Class H felony and such carrier may be indicted, tried, and punished in the county in which such shipment was delivered to the carrier or in any other county into or through which such shipment was transported by such carrier. (1947, c. 1008, s. 33; 1963, c. 1165, s. 1; 1993, c. 539, s. 1277; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 523, s. 26.)

CASE NOTES

The lessor-holders of a certificate of convenience and necessity are liable and answerable jointly with the lessee-operator to the shipper for losses sustained by reason of wrongful conversion of C.O.D. moneys collected by the lessee-operator company. Hough-Wylie Co. v. Lucas, 236 N.C. 90, 72 S.E.2d 11 (1952).

§ 62-274. Evidence; joinder of surety.

No report by any carrier of any accident arising in the course of the operations of such carrier, made pursuant to any requirement of the Commission, and no report by the Commission of any investigation of any such accident, shall be admitted as evidence, or used for any other purpose in any suit or action for damages growing out of any matter mentioned in such report or investigation; nor shall the discharge by any carrier of any truck driver or other employee after any such accident be offered or admitted in evidence for any purpose, in any suit or action against such carrier for damages arising out of any such accident; nor shall any insurance company or surety executing any insurance policy, bond, or other security for the protection of the public, as provided in G.S. 62-268, or as provided in G.S. 62-112, be joined with the assured carrier in any action or suit for damages, debt, or claim thereby secured; nor shall evidence of any such policy, bond, or other security be offered or received in any such action or suit against the carrier, but the surety or insurer shall be obligated within the amount of such policy, bond or other security to pay any final judgment against the carrier. (1947, c. 1008, s. 34; 1949, c. 1132, s. 31; 1963, c. 1165, s. 1.)

CASE NOTES

No North Carolina statute other than this section authorizes or prohibits suit against a liability insurer alone or jointly with its insured by a person allegedly injured by the negligence of the insured. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

§ 62-275: Repealed by Session Laws 1985, c. 676, s. 23.

§ 62-276. Construction of Article.

Nothing herein contained shall be construed to relieve any motor carrier from any regulation otherwise imposed by law or lawful authority, and this Article shall not be construed to relieve any such motor carrier from any obligation or duty imposed by Chapter 20 of the General Statutes of North Carolina. (1949, c. 1132, s. 35; 1963, c. 1165, s. 1.)

§ 62-277: Repealed by Session Laws 1985, c. 454, s. 16.

§ 62-278. Revocation of license plates by Utilities Commission.

(a) The license plates of any carrier of persons or household goods by motor vehicle for compensation may be revoked and removed from the vehicles of any such carrier for wilful violation of any provision of this Chapter, or for the wilful violation of any lawful rule or regulation made and promulgated by the Utilities Commission. To that end the Commission shall have power upon complaint or upon its own motion, after notice and hearing, to order the license plates of any such offending carrier revoked and removed from the vehicles of such carrier for a period not exceeding 30 days, and it shall be the duty of the Department of Motor Vehicles to execute such orders made by the Utilities Commission upon receipt of a certified copy of the same.

(b) This section shall be in addition to and independent of other provisions of law for the enforcement of the motor carrier laws of this State. (1951, c. 1120; 1963, c. 1165, s. 1; 1995, c. 523, s. 27.)

§ 62-279. Injunction for unlawful operations.

If any motor carrier, or any other person or corporation, shall operate a motor vehicle in violation of any provision of this Chapter applicable to motor carriers or motor vehicles generally, except as to the reasonableness of rates or charges and the discriminatory character thereof, or shall operate in violation of any rule, regulation, requirement or order of the Commission, or of any term or condition of any certificate, the Commission or any holder of a certificate duly issued by the Commission may apply to a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or 7A-48 in the district or set of districts as defined in G.S. 7A-41.1 in which the motor carrier or other person or corporation so operates, for the enforcement of any provisions of this Article, or of any rule, regulation, requirement, order, term or condition of the Commission. Such court shall have jurisdiction to enforce obedience to this Article or to any rule, order, or decision of the Commission by a writ of injunction or other process, mandatory or otherwise, restraining such carrier, person or corporation, or its officers, agents, employees and representatives from further violation of this Article or of any rule, order, regulation, or decision of the Commission. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 95; 1995, c. 523, s. 28.)

CASE NOTES

Restraining Illegal Operation Along Route. — A franchise carrier may maintain an action in the superior court to restrain another carrier from illegal operation along his route without a certificate or permit from the Utilities Commission, when such illegal operation by such other carrier interferes with its franchise rights. Bryant v. Barber, 237 N.C. 480, 75 S.E.2d 410 (1953).

As to right of common carrier to apply to court for injunctive relief against wrongful acts of another carrier under former statute repealed and superseded by Bus Act of 1949, see Burke Transit Co. v. Queen City Coach Co., 228 N.C. 768, 47 S.E.2d 297 (1948).

Cited in State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

§ 62-280: Reserved for future codification purposes.

§ 62-281: Repealed by Session Laws 1985, c. 454, s. 17.

§§ 62-282 through 62-289: Reserved for future codification purposes.

ARTICLE 12A.

Human Service Transportation.

§ 62-289.1. Short title.

This Article shall be known and may be cited as the "North Carolina Act to Remove Barriers to Coordinating Human Service and Volunteer Transportation". (1981, c. 792, s. 1.)

§ 62-289.2. Purpose.

In order to promote improved transportation for the elderly, handicapped and residents of rural areas and small towns through an expanded and coordinated transportation network, it is the intent of the General Assembly to recognize human service transportation and volunteer transportation as separate but contributing components of the North Carolina transportation system. Further, it is the intent of the General Assembly to remove barriers to low cost human service transportation. (1981, c. 792, s. 1.)

§ 62-289.3. Definitions.

As used in this Article:

(1) "Human service agency" means any charitable or governmental agency including, but not limited to: county departments of social services, area mental health, mental retardation or substance abuse authorities, local health departments, councils on aging, community action agencies, sheltered workshops, group homes and State residential institutions.

(2) "Human service transportation" means motor vehicle transportation provided on a nonprofit basis by a human service agency for the purpose of transporting clients or recipients in connection with programs sponsored by the agency. "Human service transportation" shall also mean motor vehicle transportation provided by for-profit persons under exclusive contract with a human service agency for the transportation of clients or recipients, and such provider shall also qualify as a human service agency for the purpose of motor vehicle registration during the term of the contract. The motor vehicle may be owned, leased, borrowed, or contracted for use by or from the human service agency.

(3) "Nonprofit" as applied to human service transportation means motor vehicle transportation provided at cost.
(4) "Person" means an individual, corporation, company, association, partnership or other legal entity.
(5) "Volunteer transportation" means motor vehicle transportation provided by any person under the direction, sponsorship, or supervision of a human service agency. The person may receive an allowance to defray the actual cost of operating the vehicle but shall not receive any other compensation. (1981, c. 792, s. 1; 1987, c. 407.)

§ 62-289.4. Classification of transportation.

The forms of transportation defined in G.S. 62-289.3(2) and (5) shall be classified as "human service transportation" and "volunteer transportation" for purposes of regulation, insurance, and general administration. (1981, c. 792, s. 1.)

§ 62-289.5. Inapplicable laws and regulations.

Human services transportation and volunteer transportation shall not be considered as for-hire transportation, commercial transportation or motor carriers, as defined by G.S. 62-3(17). Such transportation shall not be subject to regulation as motor carriers under G.S. 62-261. (1981, c. 792, s. 1.)

§ 62-289.6. Insurance for volunteers.

Human service agencies are authorized to purchase insurance to cover persons who provide volunteer transportation. (1981, c. 792, s. 1.)

§ 62-289.7. Municipal licenses and taxes.

No county, city, town, municipal corporation or other unit of local government may impose a special tax on or require a special license for human service transportation or volunteer transportation other than that customarily used or imposed on private passenger automobiles unless the tax or license is provided for by a statute, ordinance, or regulation specifically addressing human service transportation or volunteer transportation. (1981, c. 792, s. 1.)

ARTICLE 13.

Reorganization of Public Utilities.

§ 62-290. Corporations whose property and franchises sold under order of court or execution.

When the property and franchises of a public utility corporation are sold under a judgment or decree of a court of this State, or of the district court of the United States, or under execution, to satisfy a mortgage debt or other encumbrance thereon, such sale vests in the purchaser all the right, title, interest and property of the parties to the action in which such judgment or decree was made, to said property and franchises, subject to all the conditions, limitations and restrictions of the corporation; and the purchaser and his associates thereupon become a new corporation, by such name as they select, and they are the stockholders in the ratio of the purchase money by them contributed; and are entitled to all the rights and franchises and subject to all the conditions, limitations and penalties of the corporation whose property and franchises have been so sold. In the event of the sale of a railroad in foreclosure of a mortgage or deed of trust, whether under a decree of court or otherwise, the corporation created by or in consequence of the sale succeeds to all the franchises, rights and privileges of the original corporation only when the sale is of all the railroad owned by the company and described in the mortgage or deed of trust, and when the railroad is sold as an entirety. If a purchaser at any such sale is a corporation, such purchasing corporation shall succeed to all the properties, franchises, powers, rights, and privileges of the original corporation: Provided, that this shall not affect vested rights and shall not be construed to alter in any manner the public policy of the State now or hereafter established with reference to trusts and contracts in restraint of trade. (Code, ss. 697, 698; 1897, c. 305; 1901, c. 2, s. 99; Rev., s. 1238; 1913, c. 25, s. 1; 1919, c. 75; C.S., s. 1221; 1955, c. 1371, s. 2; 1963, c. 1165, s. 1.)

Legal Periodicals. — For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

§ 62-291. New owners to meet and organize; special rule for railroads.

(a) The persons for whom the property and franchises have been purchased pursuant to G.S. 62-290 shall meet within 30 days after the delivery of the conveyance made by virtue of said judgment or decree, and organize the new corporation, 10 days' written notice of the time and place of the meeting having been given to each of said persons. At this meeting they shall adopt a corporate name and seal, determine the amount of the capital stock of the corporation, and shall have power and authority to make and issue certificates of stock in shares of such amounts as they see fit. The corporation may then, or at any time thereafter, create and issue preferred stock to such an amount, and at such time, as they may deem necessary.

(b) Whenever the purchaser of the real estate, track and fixtures of any railroad corporation which has heretofore been sold, or may hereafter be sold, by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court, shall acquire title to the same in the manner prescribed by law, such purchaser may associate with him any number of persons, and make and acknowledge and file articles of association as prescribed by this Chapter. Such purchaser and his associates shall thereupon be a new corporation, with all the powers, privileges and franchises and subject to all of the provisions of this Chapter.

(c) When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation upon compliance with law. (1871-2, c. 138, s. 5; Code, ss. 1936, 2005; 1901, c. 2, ss. 100, 101, 102; Rev., ss. 1239, 1240, 2552, 2565; C.S., ss. 1222, 3462, 3463; 1955, c. 1371, s. 2; 1963, c. 1165, s. 1.)

Legal Periodicals. — For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

Railroad May Be Sold. — A railroad is the subject of private property, and in that character is liable to be sold, unless the sale be forbidden by the legislature; not the franchise, but the land itself constituting the road. State v. Rives, 27 N.C. 297 (1844).

A railroad corporation is not dissolved by the sale of its road. State v. Rives, 27 N.C. 297 (1844).

When Sale Effects Dissolution. — In order that the sale of the franchise and property of a railroad corporation under mortgage shall have the effect of a dissolution of such corporation, another corporation must be provided to take its place and assume and discharge the obligations to the public growing out of the grant of the franchise; until that is done the old corporation continues to exist, and when it is done the new corporation will be a domestic corporation. James v. Western N.C.R.R., 121 N.C. 523, 28 S.E. 537 (1897).

Effect of Sale Under Second Mortgage. — The sale of a railroad under a second mortgage and a conveyance thereunder, subject to the first mortgage upon its franchise and corporate property, did not extinguish the corporate existence of the company nor release it from liability to the public for the manner in which it was operated. James v. Western N.C.R.R., 121 N.C. 523, 28 S.E. 537 (1897).

The effect of the sale of a railroad company's franchises and property under a second mortgage, subject to a first mortgage which was assumed by the purchaser, was to place the purchaser in the place of the mortgagor in its relation to the trustee of the first mortgage, with the right to run and operate the road as agent of the mortgagor; however, the old corporation was not extinguished, but was still in existence and liable for damages caused by the maladministration of its agent, which liability could be enforced against the property which it allowed the purchaser to use. James v. Western N.C.R.R., 121 N.C. 523, 28 S.E. 537 (1897).

Purchaser Takes Rights of Old Company. — On the foreclosure of a mortgage given by a railroad company, the purchaser takes the rights that the company had acquired in relation to its right-of-way under its charter. Barker v. Southern R.R., 137 N.C. 214, 49 S.E. 115 (1904).

The legislative purpose is that the property of railroads must be kept in association with their franchises, to preserve value, to give credit to such corporations, to secure creditors, and to keep railroads in operation for the benefit of the public, which was the primary object of the legislature in bestowing such corporate franchises. Bradley v. Ohio R. & C. Ry., 78 F. 387 (W.D.N.C. 1896).

§ 62-292. Certificate to be filed with Secretary of State.

It is the duty of the new corporation provided for by this Article, within one month after its organization, to make certificate thereof, under its common seal, attested by the signature of its president, specifying the date of the organization, the name adopted, the amount of capital stock, and the names of its president and directors, and transmit the certificate to the Secretary of State, to be filed and recorded in his office. A certified copy of this certificate so filed shall be recorded in the office of the clerk of the superior court of the county in which is located the principal office of the corporation, and is the charter and evidence of the corporate existence of the new corporation. (1901, c. 2, s. 103; Rev., s. 1241; C.S., s. 1223; 1955, c. 1371, s. 2; 1963, c. 1165, s. 1.)

§ 62-293. Effect on liens and other rights.

Nothing contained in this Article in any manner impairs the lien of a prior mortgage, or other encumbrance, upon the property or franchises conveyed under a sale pursuant to this Article when by the terms of the judgment or decree under which the sale was made, or by operation of law, the sale was made subject to the lien of any such prior mortgage or other encumbrance. No such sale and conveyance or organization of such new corporation in any way affects the rights of any person or body politic not a party to the action in which the judgment or decree was made, nor of any party except as determined by the judgment or decree. When a trustee has been made a party to such action and his cestui que trust, for reason satisfactory to the court, has not been made a party thereto, the rights and interest of the cestui que trust are concluded by the decree. (1901, c. 2, s. 103; Rev., s. 1241; C.S., s. 1224; 1955, c. 1371, s. 2; 1963, c. 1165, s. 1.)

§§ 62-294 through 62-299: Reserved for future codification purposes.

ARTICLE 14.

Fees and Charges.

§ 62-300. Particular fees and charges fixed; payment.

(a) The Commission shall receive and collect the following fees and charges in accordance with the classification of utilities as provided in rules and regulations of the Commission, and no others:

(1) Twenty-five dollars ($25.00) with each notice of appeal to the Court of Appeals or the Supreme Court, and with each notice of application for a writ of certiorari.

(2) With each application for a new certificate for motor carrier rights, the fee shall be two hundred fifty dollars ($250.00) when filed by Class 1 motor carriers, one hundred dollars ($100.00) when filed by Class 2 motor carriers, and twenty-five dollars ($25.00) when filed by Class 3 motor carriers, and twenty-five dollars ($25.00) as filing fee for any amendment thereto so as to extend or enlarge the scope of operations thereunder, and twenty-five dollars ($25.00) for each broker who applies for a brokerage license under the provisions of this Chapter.

(3) With each application for a general increase in rates, fares and charges and for each filing of a tariff which seeks general increases in rates, fares and charges, the fee will be five hundred dollars ($500.00) for Class A utilities and Class 1 motor carriers, two hundred fifty dollars ($250.00) for Class B utilities and Class 2 motor carriers, one hundred dollars ($100.00) for Class C utilities and twenty-five dollars ($25.00) for Class D utilities and Class 3 motor carriers; provided that in the case of an application or tariff for a general increase in rates filed by a tariff agent for more than one carrier, the applicable fee shall be the highest fee prescribed for any motor carrier included in the application or tariff. This fee shall not apply to applications for adjustments in particular rates, fares, or charges for the purpose of eliminating inequities, preferences or discriminations or to applications to adjust rates and charges based solely on the increased cost of fuel used in the generation or production of electric power.

(4) One hundred dollars ($100.00) with each application by motor carrier of passengers for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate.

(4a) Repealed by Session Laws 1998-128, s. 10.

(5) With each application for a certificate of public convenience and necessity or for any amendment thereto so as to extend or enlarge the scope of operations thereunder, the fee shall be two hundred fifty dollars ($250.00) for Class A utilities, one hundred dollars ($100.00) for Class B utilities, and twenty-five dollars ($25.00) for Class C and D utilities and twenty-five dollars ($25.00) for any other person seeking a certificate of public convenience and necessity.

(5a) With each application by a bus company for an original certificate of authority or for any amendment thereto or to an existing certificate of public convenience and necessity so as to extend or enlarge the scope of operations thereunder the fee shall be two hundred fifty dollars ($250.00).

(6) With each application for approval of the issuance of securities or for the approval of any sale, lease, hypothecation, lien, or other transfer of any household goods or operating rights of any carrier or public utility over which the Commission has jurisdiction, the fee shall be

two hundred fifty dollars ($250.00) for Class A utilities and Class 1 motor carriers, one hundred dollars ($100.00) for Class B utilities and Class 2 motor carriers, and twenty-five dollars ($25.00) for Class C and D utilities and Class 3 motor carriers; provided, that in the case of sales, leases and transfers between two or more carriers or utilities, the applicable fee shall be the highest fee prescribed for any party to the transaction.

(7) Ten dollars ($10.00) with each application, petition, or complaint not embraced in (2) through (6) of this section, wherein such application, petition, or complaint seeks affirmative relief against a carrier or public utility over which the Commission has jurisdiction. This fee shall not apply to applications for adjustments in particular rates, fares or charges for the purpose of eliminating inequities, preferences or discriminations; nor shall this fee apply to applications, petitions, or complaints made by any county, city or town; nor shall this fee apply to applications or petitions made by individuals seeking service or relief from a public utility.

(8) Repealed by Session Laws 1985, c. 454, s. 18.

(9) One dollar ($1.00) for each page (8 ½ x 11 inches) of transcript of testimony, but not less than five dollars ($5.00) for any such transcript.

(10) Twenty cents (20¢) for each page of copies of papers, orders, certificates or other records, but not less than one dollar ($1.00) for any such order or record, plus five dollars ($5.00) for formal certification of any such paper, order or record.

(11), (12) Repealed by Session Laws 1985, c. 454, s. 18.

(13) Two hundred fifty dollars ($250.00) with each application for a certificate of public convenience and necessity to construct a transmission line.

(14) Twenty-five dollars ($25.00) with each filing by a person otherwise exempt from Commission regulation under Public Law 103-305 to participate in standard transportation practices as set out by the Commission.

(15) One hundred dollars ($100.00) for each application for exemption filed by nonprofit and consumer-owned water or sewer utilities pursuant to G.S. 62-110.5.

(b) All witness fees, officers' fees serving papers, and cost of serving notice by publication shall be paid by the party at whose instance or for whose benefit such fees and costs are incurred.

(c) No application, petition, complaint, notice of appeal, notice of application for writ of certiorari, or other document or paper, the filing of which requires the payment of a fee under this Article, shall be deemed filed until the fees herein required shall have been paid to the Commission.

(d) The fees and charges as set forth in subdivisions (1), (7), (9) and (10) of subsection (a) of this section shall not apply to the State of North Carolina or to any board, department, commission, institution or other agency of the State; and all applications, petitions or complaints submitted by the State of North Carolina or any board, department, commission, institution or other agency of the State shall be filed without the payment of the fees required by this section. All transcripts, papers, orders, certificates, or other records necessary to perfect an appeal, or to determine whether an appeal is to be taken, shall be furnished without charge to the Attorney General upon his request in cases in which the Attorney General appears in the public interest or as representing any board, department, commission, institution or other agency of the State.

(e) The provisions of this section shall apply with respect to the regulation of electric membership corporations as provided in G.S. 117-18.1. (1953, c. 825,

s. 1; 1955, c. 64; 1957, c. 1152, s. 15; 1961, c. 472, ss. 2-4; 1963, c. 1165, s. 1; 1967, c. 1039; c. 1190, s. 7; 1969, c. 721, s. 2; 1971, c. 736, s. 2; 1975, c. 447, s. 1; 1977, c. 1003; 1977, 2nd Sess., c. 129, s. 32; 1979, c. 792; 1985, c. 311, ss. 1-4; c. 454, ss. 18, 19; c. 676, s. 24; 1991, c. 189, s. 2; 1995, c. 523, ss. 29, 32; 1997-437, s. 3; 1998-128, s. 10; 1999-180, s. 6.)

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

§ **62-301:** Repealed by Session Laws 1989, c. 787, s. 2.

§ 62-302. Regulatory fee.

(a) Fee Imposed. — It is the policy of the State of North Carolina to provide fair regulation of public utilities in the interest of the public, as provided in G.S. 62-2. The cost of regulating public utilities is a burden incident to the privilege of operating as a public utility. Therefore, for the purpose of defraying the cost of regulating public utilities, every public utility subject to the jurisdiction of the Commission shall pay a quarterly regulatory fee, in addition to all other fees and taxes, as provided in this section. The fees collected shall be used only to pay the expenses of the Commission and the Public Staff in regulating public utilities in the interest of the public.

It is also the policy of the State to provide limited oversight of certain electric membership corporations as provided in G.S. 62-53. Therefore, for the purpose of defraying the cost of providing the oversight authorized by G.S. 62-53 and G.S. 117-18.1, each fiscal year each electric membership corporation whose principal purpose is to furnish or cause to be furnished bulk electric supplies at wholesale as provided in G.S. 117-16 shall pay an annual fee as provided in this section.

(b) Public Utility Rate. —

(1) Repealed by Session Laws 2000-140, s. 56, effective July 21, 2000.

(2) The public utility regulatory fee for each fiscal year shall be the greater of (i) a percentage rate, established by the General Assembly, of each public utility's North Carolina jurisdictional revenues for each quarter or (ii) six dollars and twenty-five cents ($6.25) each quarter.

When the Commission prepares its budget request for the upcoming fiscal year, the Commission shall propose a percentage rate of the public utility regulatory fee. For fiscal years beginning in an odd-numbered year, that proposed rate shall be included in the budget message the Governor submits to the General Assembly pursuant to G.S. 143C-3-5. For fiscal years beginning in an even-numbered year, that proposed rate shall be included in a special budget message the Governor shall submit to the General Assembly. The General Assembly shall set the percentage rate of the public utility regulatory fee by law.

The percentage rate may not exceed the amount necessary to generate funds sufficient to defray the estimated cost of the operations of the Commission and the Public Staff for the upcoming fiscal year, including a reasonable margin for a reserve fund. The amount of the reserve may not exceed the estimated cost of operating the Commission and the Public Staff for the upcoming fiscal year. In calculating the amount of the reserve, the General Assembly shall consider all relevant factors that may affect the cost of operating the Commission or the Public Staff or a possible unanticipated increase or decrease in North Carolina jurisdictional revenues.

(3) If the Commission, the Public Staff, or both experience a revenue shortfall, the Commission shall implement a temporary public utility regulatory fee surcharge to avert the deficiency that would otherwise occur. In no event may the total percentage rate of the public utility regulatory fee plus any surcharge established by the Commission exceed twenty-five hundredths percent (0.25%).

(4) As used in this section, the term "North Carolina jurisdictional revenues" means:

a. All revenues derived or realized from intrastate tariffs, rates, and charges approved or allowed by the Commission or collected pursuant to Commission order or rule, but not including tap-on fees or any other form of contributions in aid of construction.

b. All revenues derived from retail services no longer otherwise regulated by the operation of G.S. 62-133.5(h) for a local exchange company or competing local provider that has elected to be regulated under that subsection.

(b1) Electric Membership Corporation Rate. — The electric membership corporation regulatory fee for each fiscal year shall be a dollar amount as established by the General Assembly by law.

When the Commission prepares its budget request for the upcoming fiscal year, the Commission shall propose the amount of the electric membership corporation regulatory fee. For fiscal years beginning in an odd-numbered year, the proposed amount shall be included in the budget message the Governor submits to the General Assembly pursuant to G.S. 143C-3-5. For fiscal years beginning in an even-numbered year, the proposed amount shall be included in a special budget message the Governor shall submit to the General Assembly.

The amount of the electric membership corporation regulatory fee proposed by the Commission may not exceed the amount necessary to defray the estimated cost of the operations of the Commission and the Public Staff for the regulation of the electric membership corporations in the upcoming fiscal year, including a reasonable margin for a reserve fund. The amount of the reserve may not exceed the estimated cost of the Commission and the Public Staff for the regulation of the electric membership corporations for the upcoming fiscal year.

(c) When Due. — The electric membership corporation regulatory fee imposed under this section shall be paid in quarterly installments. The fee is due and payable to the Commission on or before the 15th day of the second month following the end of each quarter.

The public utility regulatory fee imposed under this section is due and payable to the Commission on or before the 15th day of the second month following the end of each quarter. Every public utility subject to the public utility regulatory fee shall, on or before the date the fee is due for each quarter, prepare and render a report on a form prescribed by the Commission. The report shall state the public utility's total North Carolina jurisdictional revenues for the preceding quarter and shall be accompanied by any supporting documentation that the Commission may by rule require. Receipts shall be reported on an accrual basis.

If a public utility's report for the first quarter of any fiscal year shows that application of the percentage rate would yield a quarterly fee of twenty-five dollars ($25.00) or less, the public utility shall pay an estimated fee for the entire fiscal year in the amount of twenty-five dollars ($25.00). If, after payment of the estimated fee, the public utility's subsequent returns show that application of the percentage rate would yield quarterly fees that total more than twenty-five dollars ($25.00) for the entire fiscal year, the public utility shall pay the cumulative amount of the fee resulting from application of the percentage rate, to the extent it exceeds the amount of fees, other than any surcharge, previously paid.

(d) Use of Proceeds. — A special fund in the office of State Treasurer, the Utilities Commission and Public Staff Fund, is created. The fees collected pursuant to this section and all other funds received by the Commission or the Public Staff, except for the clear proceeds of civil penalties collected pursuant to G.S. 62-50(d) and the clear proceeds of funds forfeited pursuant to G.S. 62-310(a), shall be deposited in the Utilities Commission and Public Staff Fund. The Fund shall be placed in an interest bearing account and any interest or other income derived from the Fund shall be credited to the Fund. Moneys in the Fund shall only be spent pursuant to appropriation by the General Assembly.

The Utilities Commission and Public Staff Fund shall be subject to the provisions of the State Budget Act except that no unexpended surplus of the Fund shall revert to the General Fund. All funds credited to the Utilities Commission and Public Staff Fund shall be used only to pay the expenses of the Commission and the Public Staff in regulating public utilities in the interest of the public as provided by this Chapter and in regulating electric membership corporations as provided in G.S. 117-18.1.

The clear proceeds of civil penalties collected pursuant to G.S. 62-50(d) and the clear proceeds of funds forfeited pursuant to G.S. 62-310(a) shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1989, c. 787, s. 1; 1998-215, s. 126; 1999-180, s. 5; 2000-140, s. 56; 2006-203, s. 18; 2009-238, s. 6.)

Editor's Note. — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before July 1, 2007, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2008-107, s. 28.14(a), (b), provides: "(a) The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is twelve one-hundredths of one percent (0.12%) for each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 2008.

"(b) The electric membership corporation regulatory fee imposed under G.S. 62-302(b1) for the 2008-2009 fiscal year is two hundred thousand dollars ($200,000)."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

The preamble to Session Laws 2009-238, provides: "Whereas, the technology used to provide communications services has evolved and continues to evolve at an ever-increasing pace; and

"Whereas, the resulting competition between traditional telephone service providers, cable companies offering communications services, Voice-over Internet Protocol (VoIP) providers, wireless communications service providers, and other communications service providers promotes and continues to promote additional consumer choices for these services; and

"Whereas, traditional telephone service providers remain subject to certain antiquated statutory and regulatory restrictions that do not apply to other communications service providers; and

"Whereas, this disparity may deprive consumers of traditional telephone companies of the full range of timely and competitive options and offerings that otherwise would be available to them; and

"Whereas, the General Assembly finds that relaxing certain restrictions for traditional telephone companies will relieve consumers of unnecessary costs and burdens, encourage investment, and promote timely deployment of more innovative offerings at more competitive prices for customers; and

"Whereas, in order to make the full range of competitive options and offerings available to consumers of communications services while maintaining inflation-based price controls for those existing customers who currently receive and wish to continue receiving only stand-alone basic residential lines from traditional telephone companies, the General Assembly hereby enacts the 'Consumer Choice and Investment Act of 2009'; Now, therefore,"

Session Laws 2009-451, s. 14.26(a) and (b), provides: "(a) The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is twelve one-hundredths of one percent (0.12%) for each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 2009.

"(b) The electric membership corporation regulatory fee imposed under G.S. 62-302(b1) for the 2009-2010 fiscal year is two hundred thousand dollars ($200,000)."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-203, s. 18, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "G.S. 143C-3-5" for "G.S. 143-11" in the first undesignated paragraphs following the second paragraph of subdivision (b)(2) and subsection (b1); and substituted "State Budget Act" for "Executive Budget Act" in the first sentence of the second paragraph of subsection (d).

Session Laws 2009-238, s. 6, effective June 30, 2009, designated the previously existing provisions of subdivision (b)(4) as subdivisions (b)(4) and (b)(4)a; added subdivision (b)(4)b, and made a related stylistic and punctuation change.

§§ 62-303 through 62-309: Reserved for future codification purposes.

Article 15.

Penalties and Actions.

§ 62-310. Public utility violating any provision of Chapter, rules or orders; penalty; enforcement by injunction.

(a) Any public utility which violates any of the provisions of this Chapter or refuses to conform to or obey any rule, order or regulation of the Commission shall, in addition to the other penalties prescribed in this Chapter forfeit and pay a sum up to one thousand dollars ($1,000) for each offense, to be recovered in an action to be instituted in the Superior Court of Wake County, in the name of the State of North Carolina on the relation of the Utilities Commission; and each day such public utility continues to violate any provision of this Chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the Commission shall be a separate offense.

(b) If any person or corporation shall furnish water or sewer utility service in violation of any provision of this Chapter applicable to water or sewer utilities, except as to the reasonableness of rates or charges and the discriminatory character thereof, or shall provide such service in violation of any rule, regulation or order of the Commission, the Commission shall apply to a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or 7A-48 in the district or set of districts as defined in G.S. 7A-41.1 in which the person or corporation so operates, for the enforcement of any provision of this Chapter or of any rule, regulation or order of the Commission. The court shall have jurisdiction to enforce obedience to this Chapter or to any rule, regulation or order of the Commission by appropriate writ, order or other process restraining such person, corporation, or their representatives from further violation of this Chapter or of any rule, regulation or order of the Commission. (1899, c. 164, s. 23; Rev., s. 1087; C.S., s. 1106; 1933, c. 134, s. 8; c. 307, ss. 36, 37; 1941, c. 97; 1963, c. 1165, s. 1; 1973, c. 1073; 1987 (Reg. Sess., 1988), c. 1037, s. 96.)

CASE NOTES

Action Ex Contractu. — It would seem that an action against a railroad company for a penalty for a statutory violation is an action ex contractu for breach of an implied contract to perform a statutory duty. State ex rel. Carter v. Wilmington & W.R.R., 126 N.C. 437, 36 S.E. 14 (1900).

Construction of Penal Statute. — The rule that a penal statute must be strictly construed means no more than that the court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and when there is reasonable doubt as to the meaning of the words used in the statute, the court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886).

Cited in State ex rel. Utils. Comm'n v. United Tank Lines, 34 N.C. App. 543, 239 S.E.2d 266 (1977).

§ 62-311. Willful acts of employees deemed those of public utility.

The willful act of any officer, agent, or employee of a public utility, acting within the scope of his official duties of employment, shall, for the purpose of this Article, be deemed to be the willful act of the utility. (1933, c. 307, s. 29; 1963, c. 1165, s. 1.)

§ 62-312. Actions to recover penalties.

Except as otherwise provided in this Chapter, an action for the recovery of any penalty under this Chapter shall be instituted in Wake County, and shall be instituted in the name of the State of North Carolina on the relation of the Utilities Commission against the person incurring such penalty; or whenever such action is upon the complaint of any injured person, it shall be instituted in the name of the State of North Carolina on the relation of the Utilities Commission upon the complaint of such injured person against the person incurring such penalty. Such action may be instituted and prosecuted by the Attorney General, the district attorney of the Wake County Superior Court, or the injured person. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as provided by law in other civil actions. (Code, s. 1976; 1885, c. 221; 1899, c. 164, ss. 8, 15; Rev., ss. 1092, 1113, 2647; C.S., ss. 1062, 1111, 3415; 1933, c. 134, s. 8; c. 307, s. 30; 1941, c. 97; 1963, c. 1165, s. 1; 1973, c. 47, s. 2.)

Cross References. — As to venue of actions against railroads, see G.S. 1-81.

CASE NOTES

The penalty prescribed by G.S. 62-200 for failure to transport within a reasonable time is given directly to the party aggrieved, and an action therefor is not required to be brought in the name of the State. Robertson v. Atlantic C.L.R.R., 148 N.C. 323, 62 S.E. 413 (1908).

As to duty of Attorney General under former statute, see Southern Ry. v. McNeill, 155 F. 756 (E.D.N.C. 1907).

Plan requiring compensation to local exchange companies for lost revenues during transition period did not impose a "penalty" or constitute money damages, and could more appropriately be considered as a prerequisite to receiving a certificate. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

§ 62-313. Refusal to permit Commission to inspect records made misdemeanor.

Any public utility, its officers or agents in charge thereof, that fails or refuses upon the written demand of the Commission, or a majority of said Commission, and under the seal of the Commission, to permit the Commission, its authorized representatives or employees to examine and inspect its books, records, accounts and documents, or its plant, property, or facilities, as provided for by law, shall be guilty of a Class 3 misdemeanor. Each day of such failure or refusal shall constitute a separate offense and each such offense shall be punishable only by a fine of not less than five hundred dollars ($500.00) and not more than five thousand dollars ($5,000). (1963, c. 1165, s. 1; 1993, c. 539, s. 483; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 62-314. Violating rules, with injury to others.

If any public utility doing business in this State by its agents or employees shall be guilty of the violation of the rules and regulations provided and prescribed by the Commission, and if after due notice of such violation given to the principal officer thereof, if residing in the State, or, if not, to the manager or superintendent or secretary or treasurer if residing in the State, or, if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person as may be directed by the Commission shall not be made within 30 days from the time of such notice, such public utility shall incur a penalty for each offense of five hundred dollars ($500.00). (1899, c. 164, s. 15; Rev., s. 1086; C.S., s. 1105; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

Validity. — A statute giving authority to the Commission to proceed in the courts to enforce the penalties prescribed for failure of any railroad company to make full and ample recompense for the violation of rules and regulations, after notice, is valid without providing in detail the methods of procedure. Atlantic Express Co. v. Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393 (1892).

Duty of Commission to Enforce Rules and Orders. — While the Commission has no power to render a judgment for the payment of money, etc., it is its duty to enforce its rules and orders. State ex rel. N.C. Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

Right to Investigate Complaint. — The Commission had the undoubted right and it was eminently proper for it to institute an inquiry and inform itself as to whether a complaint was grounded in truth. The Commission was not required to institute an action for the penalty simply because a citizen feeling himself aggrieved had made a complaint before it. It did have the right to investigate the matter for itself, but the end of such investigation was simply to afford it information and enable it to act intelligently in determining whether it would sue for the penalty given by the statute. State ex rel. N.C. Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

§ 62-315. Failure to make report; obstructing Commission.

Every officer, agent or employee of any public utility, who shall willfully neglect or refuse to make and furnish any report required by the Commission for the purposes of this Chapter, or who shall willfully or unlawfully hinder, delay or obstruct the Commission in the discharge of the duties hereby imposed upon it, shall forfeit and pay five hundred dollars ($500.00) for each offense, to be recovered in an action in the name of the State. A delay of 10 days to make and furnish such report shall raise the presumption that the same was willful. (1899, c. 164, s. 18; Rev., s. 1089; C.S., s. 1108; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

CASE NOTES

Under Code of 1883, s. 1960, which provided a similar penalty against corporations for failure to make returns into court, the penalty could only be recovered in an action brought by the State. A private relator could not maintain the action. State ex rel. Hodge v. Marietta & N.G.R.R., 108 N.C. 24, 12 S.E. 1041 (1891).

§ 62-316. Disclosure of information by employee of Commission unlawful.

It shall be unlawful for any agent or employees of the Commission knowingly and willfully to divulge any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of this Chapter, except as he may be directed by the Commission or by a court or judge thereof. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1; 1971, c. 736, s. 1.)

§ 62-317. Remedies for injuries cumulative.

The remedies given by this Chapter to persons injured shall be regarded as cumulative to the remedies otherwise provided by law against public utilities. (1899, c. 164, s. 26; Rev., s. 1093; C.S., s. 1112; 1963, c. 1165, s. 1.)

§ 62-318. Allowing or accepting rebates a misdemeanor.

If any person shall participate in illegally pooling freights or shall directly or indirectly allow or accept rebates on freights, he shall be guilty of a Class 1 misdemeanor. (1879, c. 237, s. 2; Code, s. 1968; Rev., s. 3762; C.S., s. 3520; 1963, c. 1165, s. 1; 1993, c. 539, s. 484; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 62-319. Riding on train unlawfully; venue.

If any person, with the intention of being transported free in violation of law, rides or attempts to ride on top of any car, coach, engine or tender, on any railroad in this State, or on the drawheads between cars, or under cars, on truss rods, or trucks, or in any freight car, or on a platform of any baggage car, express car or mail car on any train, he shall be guilty of a Class 3 misdemeanor. Any person charged with a violation of this section may be tried in any county in this State through which such train may pass carrying such person, or in any county in which such violation may have occurred or may be discovered. (1899, c. 625; 1905, c. 32; Rev., s. 3748; C.S., s. 3508; 1963, c. 1165, s. 1; 1993, c. 539, s. 485; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Effect on Liability of Insurance Company. — A policy of accident insurance that excepts from the company's full liability "sickness due to immorality or the violation of law" did not of itself exclude such liability for an injury caused by the plaintiff's stealing a ride on a railway train, made a misdemeanor by statute, unless the plaintiff's act was so reckless as to withdraw it from the class of accidents covered by the policy. Poole v. Imperial Mut. Life & Health Ins. Co., 188 N.C. 468, 125 S.E. 8 (1924).

§ 62-320: Repealed by Session Laws 1995, c. 523, s. 30.

§ 62-321. Penalty for nondelivery of intrastate telegraph message.

Any telegraph company doing business in this State that shall fail to transmit and deliver any intrastate message within a reasonable time shall forfeit and pay to anyone who may sue for same a penalty of twenty-five dollars ($25.00). Such penalty shall be in addition to any right of action that any person may have for the recovery of damages. Proof of the sending of any message from one point in this State to another point in this State shall be prima facie evidence that it is an intrastate message. (1919, c. 175; C.S., s. 1704; 1963, c. 1165, s. 1.)

CASE NOTES

Transmission of a message through two states is interstate commerce as a matter of fact. The fact must be tested by the actual transmission, not by whether it was necessary to cross the territory of another state in order to reach the final point. Western Union Tel. Co. v. Speight, 254 U.S. 17, 41 S. Ct. 11, 65 L. Ed. 104 (1920).

§ 62-322. Unauthorized manufacture or sale of switch-lock keys a misdemeanor.

It shall be unlawful for any person to make, manufacture, sell or give away to any other person any duplicate key to any lock used by any railroad company in this State on its switches or switch tracks, except upon the written order of that officer of such railroad company whose duty it is to distribute and issue switch-lock keys to the employees of such railroad company. Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1909, c. 795; C.S., s. 3477; 1963, c. 1165, s. 1; 1993, c. 539, s. 487; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 62-323. Willful injury to property of public utility a misdemeanor.

If any person shall willfully do or cause to be done any act or acts whatever whereby any building, construction or work of any public utility, or any engine, machine or structure or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, he shall be guilty of a Class 1 misdemeanor. (1871-2, c. 138, s. 39; Code, s. 1974; Rev., s. 3756; C.S., s. 3478; 1963, c. 1165, s. 1; 1993, c. 539, s. 488; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to injury to property of railroads and other carriers, see G.S. 14-278, 14-279.

§ 62-324. Disclosure of information as to shipments unlawful.

(a) It shall be unlawful for any common carrier engaged in intrastate commerce or any officer, receiver, trustee, lessee, agent, or employee of such carrier, or for any other person authorized by such carrier, to receive information, knowingly to disclose to, or permit to be acquired by any person other than the shipper or consignee without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for such transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

(b) Nothing in this section shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or any officer or agent of the State or of the government of the United States, in the exercise of his power, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crimes or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers. (1947, c. 1008, s. 30; 1961, c. 472, s. 8; 1963, c. 1165, s. 1.)

§ 62-325. Unlawful motor carrier operations.

(a) Any person, whether carrier, passenger, shipper, consignee, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this Chapter, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulations as in this Chapter provided for motor carriers, shall be deemed guilty of a Class 3 misdemeanor and upon conviction thereof only be fined not more than five hundred dollars ($500.00) for the first offense and not more than two thousand dollars ($2,000) for any subsequent offense.

(b) Any motor carrier, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission as required by this Article, or other applicable law, or to make specific and full, true, and correct answer to any question within 30 days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully neglect or fail to make true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this Article to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, shall be deemed guilty of a Class 3 misdemeanor and upon conviction thereof only be subject for each offense to a fine of not more than five thousand dollars ($5,000). As used in this subsection the words "kept" and "keep" shall be construed to mean made, prepared, or compiled, as well as retained. It shall be the duty of the Commission to prescribe and enforce such general rules and regulations as it may deem necessary to compel all motor carriers to keep accurate records of all revenue received by them to the end that any tax levied and assessed by the State of North Carolina upon revenues may be collected. Any agent or employee of a motor carrier who shall willfully and knowingly make a false report or record of fares, charges, or other revenue received by a carrier or collected in its behalf shall be guilty of a Class 1 misdemeanor.

(c) Any person who, at any bus terminal, solicits or otherwise attempts to induce any person to use some form of transportation for compensation other than that lawfully using said terminal premises by contract with the terminal operator or by valid order of the Commission shall be guilty of a Class 3 misdemeanor. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1; 1993, c. 539, s. 489; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 62-326. Furnishing false information to the Commission; withholding information from the Commission.

(a) Every person, firm or corporation operating under the jurisdiction of the Utilities Commission or who is required by law to file reports with the Commission who shall knowingly or willfully file or give false information to the Utilities Commission in any report, reply, response, or other statement or document furnished to the Commission shall be guilty of a Class 1 misdemeanor.

(b) Every person, firm, or corporation operating under the jurisdiction of the Utilities Commission or who is required by law to file reports with the Commission who shall willfully withhold clearly specified and reasonably obtainable information from the Commission in any report, response, reply or statement filed with the Commission in the performance of the duties of the Commission or who shall fail or refuse to file any report, response, reply or statement required by the Commission in the performance of the duties of the Commission shall be guilty of a Class 1 misdemeanor. (1969, c. 765, s. 1; 1993, c. 539, s. 490; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 62-327. Gifts to members of Commission, Commission employees, or public staff.

It shall be unlawful for any officer, agent, employee, or attorney of any public utility or any public utility holding company, subsidiary, or affiliated company, to knowingly offer or make to any member of the Commission, Commission staff, or public staff, any gift of money, property, or anything of value. It shall be unlawful for any member of the Commission, Commission staff, or public staff to knowingly accept any gift of money, property, or anything of value from any officer, agent, employee, or attorney of any public utility or any public utility holding company, subsidiary, or affiliated company; provided, however, that it shall not be unlawful for members of the Commission, Commission staff, or public staff to attend public breakfasts, lunches, dinners, or banquets sponsored by such entities. Any person violating this section shall be guilty of a Class 3 misdemeanor and may only be fined in the discretion of the court; provided, further, that any member of the Commission staff, or member of the public staff violating this section shall also be subject to dismissal for cause. (1977, c. 468, s. 16; 1993, c. 539, s. 491; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 62-328. Unauthorized use of Citizens Band equipment.

(a) As used in this section, "Citizens Band radio equipment" means Citizens Band radio equipment authorized by the Federal Communications Commission.

(b) It shall be unlawful for any person willfully and knowingly to use Citizens Band radio equipment not authorized by the Federal Communications Commission. Unauthorized Citizens Band radio equipment includes the use of power amplifiers or equipment prohibited under applicable federal regulations.

(c) This section does not apply to any licensee that is exempted under the provisions of 47 U.S.C. § 302a(f)(2).

(d) Any person willfully and knowingly violating the provisions of this section shall be guilty of a Class 3 misdemeanor. (2004-72, s. 1.)

§§ 62-329 through 62-332: Reserved for future codification.

ARTICLE 16.

Security Provisions.

§ 62-333. Screening employment applications.

The Chief Personnel Officer or his designee of any public utility franchised to do business in North Carolina shall be permitted to obtain from the State Bureau of Investigation a confidential copy of criminal history record information for screening an applicant for employment with or an employee of a utility or utility contractor where the employment or job to be performed falls within a class or category of positions certified by the North Carolina Utilities Commission as permitting or requiring access to nuclear power facilities or access to or control over nuclear material.

The State Bureau of Investigation shall charge a reasonable fee to defray the administrative costs of providing criminal history record information for purposes of employment application screening. The State Bureau of Investigation is authorized to retain fees charged pursuant to this section and to expend those fees in accordance with the Executive Budget Act for the purpose of discharging its duties under this section. (1979, c. 796; 1979, 2nd Sess., c. 1212, s. 10.)

§§ 62-334 through 62-349: Reserved for future codification.

ARTICLE 17.

Miscellaneous Provisions.

§ 62-350. (See Editor's note) Regulation of pole attachments.

(a) A municipality, or a membership corporation organized under Chapter 117 of the General Statutes, that owns or controls poles, ducts, or conduits shall allow any communications service provider to utilize its poles, ducts, and conduits at just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements. A request to utilize poles, ducts, or conduits under this section may be denied only if there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering principles, and those limitations cannot be remedied by rearranging, expanding, or otherwise reengineering the facilities at the reasonable and actual cost of the municipality or membership corporation to be reimbursed by the communications service provider. In granting a request under this section, a municipality or membership corporation shall require the requesting entity to comply with applicable safety requirements, including the

National Electrical Safety Code and the applicable rules and regulations issued by the Occupational Safety and Health Administration.

(b) Following receipt of a request from a communications service provider, a municipality or membership corporation shall negotiate concerning the rates, terms, and conditions for the use of or attachment to the poles, ducts, or conduits that it owns or controls. Following a request from a party to an existing agreement made pursuant to the terms of the agreement or made within 120 days prior to or following the end of the term of the agreement, the communications service provider and the municipality or membership corporation which is a party to that agreement shall negotiate concerning the rates, terms, and conditions for the continued use of or attachment to the poles, ducts, or conduits owned or controlled by one of the parties to the agreement. The negotiations shall include matters customary to such negotiations, including a fair and reasonable rate for use of facilities, indemnification by the attaching entity for losses caused in connection with the attachments, and the removal, replacement, or repair of installed facilities for safety reasons. Upon request, a party shall state in writing its objections to any proposed rate, terms, and conditions of the other party.

(c) In the event the parties are unable to reach an agreement within 90 days of a request to negotiate pursuant to subsection (b) of this section, or if either party believes in good faith that an impasse has been reached prior to the expiration of the 90-day period, either party may bring an action in Business Court in accordance with the procedures for a mandatory business case set forth in G.S. 7A-45.4, and the Business Court shall have exclusive jurisdiction over such actions. The parties shall identify with specificity in their respective pleadings the issues in dispute, and the Business Court shall (i) establish a procedural schedule which, unless otherwise agreed by the parties, is intended to resolve the action within a time period not to exceed 180 days of the commencement of the action, (ii) resolve any dispute identified in the pleadings consistent with the public interest and necessity so as to derive just and reasonable rates, terms, and conditions, taking into consideration and applying such other factors or evidence that may be presented by a party, including without limitation the rules and regulations applicable to attachments by each type of communications service provider under section 224 of the Communications Act of 1934, as amended, and (iii) apply any new rate adopted as a result of the action retroactively to the date immediately following the expiration of the 90-day negotiating period or initiation of the lawsuit, whichever is earlier. If the new rate is for the continuation of an existing agreement, the new rate shall apply retroactively to the date immediately following the end of the existing agreement. Prior to commencing any action under this subsection, a party must pay any undisputed fees related to the use of poles, ducts, or conduits which are due and owing under a preexisting agreement with the municipality or membership corporation. In any action brought under this subsection, the court may resolve any existing disputes regarding fees alleged to be owing under a preexisting agreement or regarding safety compliance arising under subsection (d) of this section. The provisions of this section do not apply to an entity whose poles, ducts, and conduits are subject to regulation under section 224 of the Communications Act of 1934, as amended.

(d) In the absence of an agreement between an attaching party and the involved municipality or membership corporation that provides otherwise, the following shall apply:

(1) When the lines, equipment, or attachments of a communications service provider that are attached to the poles, ducts, or conduits of a municipality or membership corporation do not comply with applicable safety rules and regulations set forth in subsection (a) of this

section, the municipality or membership corporation may provide written notice of the noncompliant lines, equipment, or attachments, and make demand that the communications service provider bring such lines, equipment, and attachments into compliance with the specified safety rules and regulations. Within the 60-day period following the date of the notice and demand, the communications service provider shall either contest the notice of noncompliance in writing or bring its lines, equipment, and attachments into compliance with the specified applicable safety rules and regulations. If the work required to bring the facilities into compliance is not reasonably capable of being completed within the 60-day period, the period for compliance shall be extended as may be deemed reasonable under the circumstances so long as the communications service provider promptly commences and diligently pursues within the 60-day period such actions as are reasonably necessary to cause the facilities to be brought into compliance.

(2) When the communications service provider or, if applicable, another responsible attaching party fails to bring any noncompliant lines, equipment, or attachments into compliance (i) within the 60-day period following the date of notice and demand pursuant to subdivision (1) of this subsection, or (ii) within 120 days following the date of notice and demand when the period is extended pursuant to subdivision (1) of this subsection, the municipality or membership corporation shall be entitled to take such remedial actions as are reasonably necessary to bring the lines, equipment, and attachments of the communications service provider into compliance, including removal of the lines, equipment, or attachments should removal be required to achieve compliance with the applicable safety rules and regulations.

(3) A municipality or membership corporation that removes or brings into compliance the noncompliant lines, equipment, or attachments of a communications service provider pursuant to subdivision (2) of this subsection shall be entitled to recover its reasonable and actual costs for such activities from the communications service provider or other attaching party whose action or inaction caused the noncompliance, and the responsible attaching party shall reimburse the municipality or membership corporation within 45 days of being billed for such costs.

(4) All attaching parties shall work cooperatively to determine the causation of, and to effectuate any remedy for, noncompliant lines, equipment, and attachments. In the event of disputes under this subsection, the involved municipality or membership corporation or any attaching party may bring an action in the Business Court in accordance with the procedures for a mandatory business case set forth in G.S. 7A-45.4, and the Business Court shall have exclusive jurisdiction over such actions. The Business Court shall resolve such disputes consistent with the public interest and necessity. Nothing herein shall prevent a municipality or membership corporation from taking such action as may be necessary to remedy any exigent issue which is an imminent threat of death or injury to persons or damage to property.

(e) For purposes of this section, the term "communications service provider" means a person or entity that provides or intends to provide: (i) telephone service as a public utility under Chapter 62 of the General Statutes or as a telephone membership corporation organized under Chapter 117 of the General Statutes; (ii) broadband service, but excluding broadband service over energized electrical conductors owned by a municipality or membership corporation; or (iii) cable service over a cable system as those terms are defined in Article 42 of Chapter 66 of the General Statutes.

(f) The Business Court may adopt such rules as it deems necessary to implement its jurisdiction and authority under this section.

(g) Nothing herein shall preclude a party from bringing civil action in the appropriate division of the General Court of Justice seeking enforcement of an agreement concerning the rates, terms, and conditions for the use of or attachment to the poles, ducts, or conduits of a municipality or membership corporation. (2009-278, s. 1.)

Editor's Note. — Session Laws 2009-278, s. 3, made this section effective July 10, 2009.

Session Laws 2009-278, s. 1, enacted this section as G.S. 62-55. It has been recodified under Article 17 of Chapter 62 as this section at the direction of the Revisor of Statutes.

Session Laws 2009-278, s. 2, provides: "This act does not constitute certification of State regulation of pole attachments for purposes of section 224 of the Communications Act of 1934, as amended. If a court of competent jurisdiction determines that this act is tantamount to certification, this act shall become null and void."

Chapter 62A.
Public Safety Telephone Service and Wireless Telephone Service.

Article 1.

Public Safety Telephone Service.

Sec.
62A-1 through 62A-12. [Repealed].
62A-13 through 62A-20. [Reserved.]

Article 2.

Wireless Telephone Service.

62A-21 through 62A-32. [Repealed.]
62A-33 through 62A-39. [Reserved.]

Article 3.

Emergency Telephone Service.

62A-40. Definitions.
62A-41. 911 Board.

Sec.
62A-42. Powers and duties of the 911 Board.
62A-43. Service charge for 911 service.
62A-44. 911 Fund.
62A-45. Fund distribution to CMRS providers.
62A-46. Fund distribution to PSAPs.
62A-47. PSAP Grant Account.
62A-48. Recovery of unauthorized use of funds.
62A-49. Conditions for providing enhanced 911 service.
62A-50. Audit.
62A-51. Subscriber records.
62A-52. Proprietary information.
62A-53. Limitation of liability.
62A-54 through 62A-58. [Reserved.]

ARTICLE 1.

Public Safety Telephone Service.

§§ 62A-1 through 62A-12: Repealed by Session Laws 2007-383, s. 2(a), effective January 1, 2008.

Cross References. — For present comparable provisions, see G.S. 62A-40 et seq.

Editor's Note. — Session Laws 2007-383, s. 2(b), provides: "Any funds remaining in the Emergency Telephone System Fund or required to be remitted by a service supplier to the local fiscal officer for deposit to the fund, collected pursuant to Article 1 of Chapter 62A of the General Statutes prior to the effective date of this act, are transferred to the General Fund of the local governing entity to be used for any lawful purpose. Any local governing entity is not relieved of any prior obligation incurred for uses authorized by G.S. 62A-8."

§§ 62A-13 through 62A-20: Reserved for future codification purposes.

ARTICLE 2.

Wireless Telephone Service.

§§ 62A-21 through 62A-32: Repealed by Session Laws 2007-383, s. 3(a), effective January 1, 2008.

Editor's Note. — Session Laws 2007-383, s. 3(b), provides: "The records, personnel, property, and unexpended balances of appropriations, allocations, and other funds, including the functions of budgeting and purchasing, of the Wireless 911 Board created under Article 2 of Chapter 62A of the General Statutes and repealed by subsection (a) of this section, are transferred to the 911 Board created under Article 3 of Chapter 62A of the General Statutes, as enacted by Section 1 of this act. All rules, decisions, and actions adopted, made, or taken by the Wireless 911 Board created under Article 2 of Chapter 62A of the General Statutes that have not been repealed or rescinded continue in effect until repealed or rescinded by the 911 Board created under Article 3 of Chapter 62A of the General Statutes, as enacted by Section 1 of this act."

Session Laws 2007-383, s. 3(c), provides:

"The members of the Wireless 911 Board created under Article 2 of Chapter 62A of the General Statutes, other than a member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives to represent CMRS providers, serve as 11 of the initial members of the 911 Board created under Article 3 of Chapter 62A of the General Statutes, as enacted by Section 1 of this act, without reappointment by the Governor or the General Assembly. The State Chief Information Officer must designate which of the initial members who transfer to the 911 Board from the Wireless 911 Board serve four-year terms and which serve six-year terms so that the terms of half the members of the 911 Board, other than the State Chief Information Officer, will expire every two years.

"The following membership positions for the 911 Board have no counterparts on the Wireless 911 Board and must be appointed in accordance with Article 3 of Chapter 62A of the General Statutes:

"(1) Of the appointments by the Governor, an individual representing a VoIP provider and an individual representing the North Carolina chapter of the National Emergency Number Association (NENA).

"(2) Of the appointments by the General Assembly upon the recommendation of the Speaker of the House of Representatives, two individuals who represent local exchange carriers operating in North Carolina, one of whom represents a local exchange carrier with less than 50,000 access lines.

"(3) Of the appointments by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, an individual who represents a local exchange carrier with less than 200,000 access lines."

Session Laws 2007-383, s. 7(b), provides: "Notwithstanding G.S. 62A-23 [repealed], the charge imposed by that section does not apply to prepaid wireless telephone service effective August 1, 2007."

§§ 62A-33 through 62A-39: Reserved for future codification.

Article 3.

Emergency Telephone Service.

§ 62A-40. Definitions.

The following definitions apply in this Article.

(1) 911 Board. — The 911 Board established in G.S. 62A-41.

(2) 911 Fund. — The North Carolina 911 Fund established in G.S. 62A-43.

(3) 911 State Plan. — A document prepared, maintained, and updated by the 911 Board that provides a comprehensive plan for communicating 911 call information across networks and among PSAPs, addresses all aspects of the State's 911 system, and describes the allowable uses of revenue in the 911 Fund.

(4) 911 system. — An emergency telephone system that does all of the following:

a. Enables the user of a voice communications service connection to reach a PSAP by dialing the digits 911.

b. Provides enhanced 911 service.

(5) Call taking. — The act of processing a call for emergency assistance up to the point that the call is ready for dispatch, including the use of equipment, call classification, location of a caller, and determination of the appropriate response level for emergency responders.

(6) Commercial Mobile Radio Service (CMRS). — Defined in 47 C.F.R. § 20.3.

(7) CMRS connection. — Each mobile handset telephone number assigned to a CMRS subscriber with a place of primary use in North Carolina.

(8) CMRS provider. — An entity, whether facilities-based or nonfacilities-based, that is licensed by the Federal Communications Commission to provide CMRS or that resells CMRS within North Carolina.

(9) Enhanced 911 service. — Directing a 911 call to an appropriate PSAP by selective routing based on the geographical location from which the

call originated and providing information defining the approximate geographic location and the telephone number of a 911 caller, in accordance with the FCC Order.

(10) Exchange access facility. — The access from a subscriber's premises to the telephone system of a service supplier. The term includes service supplier provided access lines, private branch exchange trunks, and centrex network access registers, as defined by applicable tariffs approved by the North Carolina Utilities Commission. The term does not include service supplier owned and operated telephone pay station lines, Wide Area Telecommunications Service (WATS), Foreign Exchange (FX), or incoming only lines.

(11) FCC Order. — The Order of the Federal Communications Commission, FCC Docket No. 94-102, adopted on December 1, 1997, and any consent decrees, rules, and regulations adopted by the Federal Communications Commission pursuant to the Order.

(12) GIS mapping. — Computerized geographical information that can be used to assist in locating a person who calls emergency assistance, including street centerlines, ortho photography, and oblique imaging.

(13) Interconnected VoIP service. — Defined in 47 C.F.R. § 9.3.

(14) Local exchange carrier. — An entity that is authorized to provide telephone exchange service or exchange access in North Carolina.

(15) Prepaid wireless telephone service. — A right that meets all of the following requirements:

a. Authorizes the purchase of CMRS, either exclusively or in conjunction with other services.

b. Must be paid for in advance.

c. Is sold in units or dollars whose number or dollar value declines with use and is known on a continuous basis.

(16) Primary PSAP. — The first point of reception of a 911 call by a public safety answering point.

(17) Proprietary information. — Subscriber lists, technology descriptions, technical information, or trade secrets that are developed, produced, or received internally by a voice communications service provider or by a voice communications service provider's employees, directors, officers, or agents.

(18) Public safety answering point (PSAP). — The public safety agency that receives an incoming 911 call and dispatches appropriate public safety agencies to respond to the call.

(19) Service supplier. — An entity that provides exchange telephone service to a telephone subscriber.

(20) Subscriber. — A person who purchases a voice communications service and is able to receive it or use it periodically over time.

(21) Voice communications service. — Any of the following:

a. The transmission, conveyance, or routing of real-time, two-way voice communications to a point or between or among points by or through any electronic, radio, satellite, cable, optical, microwave, wireline, wireless, or other medium or method, regardless of the protocol used.

b. The ability to receive and terminate voice calls to and from the public switched telephone network.

c. Interconnected VoIP service.

(22) Voice communications service connection. — Each telephone number assigned to a residential or commercial subscriber by a voice communications service provider, without regard to technology deployed.

(23) Voice communications service provider. — An entity that provides voice communications service to a subscriber.

(24) VoIP provider. — An entity that provides interconnected VoIP service. (2007-383, s. 1(a).)

Editor's Note. — At the direction of the Revisor of Statutes, subdivisions (21) and (22) of this section as enacted by Session Laws 2007-383, s. 1, were redesignated as subdivisions (22) and (21), respectively, to maintain alphabetical order.

The preamble to Session Laws 2007-383, provides: "Whereas, maintaining an efficient Enhanced 911 system across the State benefits all citizens and not just certain localities; and

"Whereas, the Wireless 911 Board has successfully administered the statewide wireless Enhanced 911 system for many years; and

"Whereas, local governments have administered a similar wireline Enhanced 911 system for their local jurisdictions; and'Whereas, the average monthly 911 service charges paid to local governments by local exchange company customers exceeds the average monthly 911 service charges paid to the Wireless 911 Board by wireless company customers, thereby creating an unfair competitive advantage for wireless companies; and

"Whereas, some VoIP-enabled providers do not currently support the Enhanced 911 system by collecting 911 service charges; and

"Whereas, the consolidation of the State's Enhanced 911 system under a single board with a uniform 911 service charge will improve the integration of the State's 911 system, enhance efficiency and accountability, and create a level competitive playing field among voice communications technologies; Now, therefore."

Session Laws 2007-383, s. 2(b), provides: "Any funds remaining in the Emergency Telephone System Fund or required to be remitted by a service supplier to the local fiscal officer for deposit to the fund, collected pursuant to Article 1 [repealed] of Chapter 62A of the General Statutes prior to the effective date of this act, are transferred to the General Fund of the local governing entity to be used for any lawful purpose. Any local governing entity is not relieved of any prior obligation incurred for uses authorized by G.S. 62A-8 [repealed]."

Session Laws 2007-383, s. 3(b), provides: "The records, personnel, property, and unexpended balances of appropriations, allocations, and other funds, including the functions of budgeting and purchasing, of the Wireless 911 Board created under Article 2 of Chapter 62A of the General Statutes and repealed by subsection (a) of this section, are transferred to the 911 Board created under Article 3 of Chapter 62A of the General Statutes, as enacted by Section 1 of this act. All rules, decisions, and actions adopted, made, or taken by the Wireless 911 Board created under Article 2 of Chapter 62A of the General Statutes that have not been repealed or rescinded continue in effect until repealed or rescinded by the 911 Board created under Article 3 of Chapter 62A of the General Statutes, as enacted by Section 1 of this act."

Session Laws 2007-383, s. 8, made this Article effective January 1, 2008.

§ 62A-41. 911 Board.

(a) Membership. — The 911 Board is established in the Office of Information Technology Services. The 911 Board consists of 17 members as follows:

(1) Four members appointed by the Governor as follows:
  a. An individual who represents municipalities appointed upon the recommendation of the North Carolina League of Municipalities.
  b. An individual who represents counties appointed upon the recommendation of the North Carolina Association of County Commissioners.
  c. An individual who represents a VoIP provider.
  d. An individual who represents the North Carolina chapter of the National Emergency Number Association (NENA).

(2) Six members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives as follows:
  a. An individual who is a sheriff.
  b. Two individuals who represent CMRS providers operating in North Carolina.
  c. An individual who represents the North Carolina chapter of the Association of Public Safety Communications Officials (APCO).
  d. Two individuals who represent local exchange carriers operating in North Carolina, one of whom represents a local exchange carrier with less than 50,000 access lines.

(3) Six members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate as follows:
  a. An individual who is a chief of police.
  b. Two individuals who represent CMRS providers operating in North Carolina.
  c. An individual who represents the North Carolina chapter of the National Emergency Number Association (NENA).
  d. Two individuals who represent local exchange carriers operating in North Carolina, one of whom represents a local exchange carrier with less than 200,000 access lines.

(4) The State Chief Information Officer or the State Chief Information Officer's designee, who serves as the chair.

(b) Term. — A member's term is four years. Members remain in office until their successors are appointed and qualified. Vacancies are filled in the same manner as the original appointment. The Governor may remove any member for misfeasance, malfeasance, or nonfeasance in accordance with G.S. 143B-13(d).

(c) Meetings. — Members of the 911 Board serve without compensation. Members receive per diem, subsistence, and travel allowances at the rate established in G.S. 138-5. A quorum of the 911 Board is nine members. The 911 Board meets upon the call of the chair.

(d) Public Servants. — The members of the 911 Board are public servants under G.S. 138A-3 and are subject to the provisions of Chapter 138A of the General Statutes. (2007-383, s. 1(a).)

Editor's Note. — Session Laws 2007-383, s. 3(c), provides: "The members of the Wireless 911 Board created under Article 2 of Chapter 62A of th General Statutes, other than a member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives to represent CMRS providers, serve as 11 of the initial members of the 911 Board created under Article 3 of Chapter 62A of the General Statutes, as enacted by Section 1 of this act, without reappointment by the Governor or the General Assembly. The State Chief Information Officer must designate which of the initial members who transfer to the 911 Board from the Wireless 911 Board serve four-year terms and which serve six-year terms so that the terms of half the members of the 911 Board, other than the State Chief Information Officer, will expire every two years.

"The following membership positions for the 911 Board have no counterparts on the Wireless 911 Board and must be appointed in accordance with Article 3 of Chapter 62A of the General Statutes:

"(1) Of the appointments by the Governor, an individual representing a VoIP provider and an individual representing the North Carolina chapter of the National Emergency Number Association (NENA).

"(2) Of the appointments by the General Assembly upon the recommendation of the Speaker of the House of Representatives, two individuals who represent local exchange carriers operating in North Carolina, one of whom represents a local exchange carrier with less than 50,000 access lines.

"(3) Of the appointments by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, an individual who represents a local exchange carrier with less than 200,000 access lines."

§ 62A-42. Powers and duties of the 911 Board.

(a) Duties. — The 911 Board has the following powers and duties:

(1) To develop the 911 State Plan. In developing and updating the plan, the 911 Board must monitor trends in voice communications service technology and in enhanced 911 service technology, investigate and incorporate GIS mapping and other resources into the plan, and formulate strategies for the efficient and effective delivery of enhanced 911 service.

(2) To administer the 911 Fund and the monthly 911 service charge authorized by G.S. 62A-43.

(3) To distribute revenue in the 911 Fund to CMRS providers and PSAPs in accordance with this Article and advise CMRS providers and PSAPs of the requirements for receiving a distribution from the 911 Fund.

(4) To establish policies and procedures to fund advisory services and training for PSAPs and to provide funds in accordance with these policies and procedures.

(5) To investigate the revenues and expenditures associated with the operation of a PSAP to ensure compliance with restrictions on the use of amounts distributed from the 911 Fund.

(6) To make and enter into contracts and agreements necessary or incidental to the performance of its powers and duties under this Article and to use revenue available to the 911 Board under G.S. 62A-44 for administrative expenses to pay its obligations under the contracts and agreements.

(7) To accept gifts, grants, or other money for the 911 Fund.

(8) To undertake its duties in a manner that is competitively and technologically neutral as to all voice communications service providers.

(9) To adopt rules to implement this Article. This authority does not include the regulation of any enhanced 911 service, such as the establishment of technical standards.

(10) To take other necessary and proper action to implement the provisions of this Article.

(b) Prohibition. — In no event shall the 911 Board or any other State agency lease, construct, operate, or own a communications network for the purpose of providing 911 service. (2007-383, s. 1(a).)

§ 62A-43. Service charge for 911 service.

(a) Charge Imposed. — A monthly 911 service charge is imposed on each active voice communications service connection that is capable of accessing the 911 system. The service charge is seventy cents (70¢) or a lower amount set by the 911 Board under subsection (d) of this section. The service charge is payable by the subscriber to the voice communications service provider. The provider may list the service charge separately from other charges on the bill. Partial payments made by a subscriber are applied first to the amount the subscriber owes the provider for the voice communications service.

(b) Prepaid Wireless. — A voice communications service provider of prepaid wireless telephone service must collect and remit to the 911 Board the monthly service charge imposed upon prepaid wireless telephone subscribers in the State under one of the following methods:

(1) Collecting the service charge from each active prepaid wireless telephone service subscriber whose account balance is equal to or greater than the amount of the service charge.

(2) Dividing the provider's total earned prepaid wireless telephone service revenue received for the month from each active prepaid wireless telephone service subscriber by fifty dollars ($50.00) and multiplying the quotient by the amount of the service charge.

(c) Remittance to 911 Board. — A voice communications service provider must remit the service charges collected by it under this section to the 911 Board. The provider must remit the collected service charges by the end of the calendar month following the month the provider received the charges from its subscribers. A provider may deduct and retain from the service charges it receives from its subscribers and remits to the 911 Board an administrative allowance equal to the greater of one percent (1%) of the amount of service charges remitted or fifty dollars ($50.00) a month.

(d) Adjustment of Charge. — The 911 Board must monitor the revenues generated by the service charge. If the 911 Board determines that the rate produces revenue in excess of the amount needed, the 911 Board must reduce the rate. The reduced rate must ensure full cost recovery for voice communications service providers and for primary PSAPs over a reasonable period of time. A change in the amount of the rate becomes effective only on July 1 of an even-numbered year. The 911 Board must notify providers of a change in the rate at least 90 days before the change becomes effective.

(e) Collection. — A voice communications service provider has no obligation to take any legal action to enforce the collection of the service charge billed to a subscriber. The 911 Board may initiate a collection action, and reasonable costs and attorneys' fees associated with that collection action may be assessed against the subscriber. At the request of the 911 Board, but no more than annually, a voice communications service provider must report to the 911 Board the amount of the provider's uncollected service charges. The 911 Board may request, to the extent permitted by federal privacy laws, the name, address, and telephone number of a subscriber who refuses to pay the 911 service charge.

(f) Restriction. — A local government may not impose a service charge or other fee on a subscriber to support the 911 system. (2007-383, s. 1(a).)

Editor's Note. — Session Laws 2007-383, s. 7(a), provides: "The Joint Legislative Utility Review Committee is directed to determine the best method for collecting the service charge imposed by G.S. 62A-43 from prepaid telephone wireless subscribers. The Committee is further directed to submit a final report of its findings and recommendations to the 2007 General Assembly, Regular Session 2008."

Session Laws 2007-383, s. 7(b), provides: "Notwithstanding G.S. 62A-23 [repealed], the charge imposed by that section does not apply to prepaid wireless telephone service effective August 1, 2007."

Session Laws 2007-383, s. 7(c), as amended by Session Laws 2008-134, s. 1(d), and as amended by Session Laws 2009-90, s. 1, provides: "Notwithstanding G.S. 62A-43, the charge imposed by that section does not apply to prepaid wireless telephone service for the 2008, 2009, and 2010 calendar years."

§ 62A-44. 911 Fund.

(a) Fund. — The 911 Fund is created as an interest-bearing special revenue fund within the State treasury. The 911 Board administers the Fund. The 911 Board must credit to the 911 Fund all revenues remitted to it from the service charge imposed by G.S. 62A-43 on voice communications service connections in the State. Revenue in the Fund may only be used as provided in this Article.

(b) Allocation of Revenues. — The 911 Board may deduct and retain for its administrative expenses up to one percent (1%) of the total service charges remitted to it under G.S. 62A-43 for deposit in the 911 Fund. The remaining revenues remitted to the 911 Board for deposit in the 911 Fund are allocated as follows:

(1) A percentage of the funds remitted by CMRS providers to the 911 Fund are allocated for reimbursements to CMRS providers pursuant to G.S. 62A-45.

(2) A percentage of the funds remitted by CMRS providers and all funds remitted by all other voice communications service providers are allocated for monthly distributions to primary PSAPs pursuant to G.S. 62A-46 and grants to PSAPs pursuant to G.S. 62A-47.

(3) The percentage of the funds remitted by CMRS providers allocated to CMRS providers and PSAPs shall be set by the 911 Board and may be adjusted by the 911 Board as necessary to ensure full cost recovery for CMRS providers and, to the extent there are excess funds, for distributions to primary PSAPs.

(c) Report. — In February of each odd-numbered year, the 911 Board must report to the Joint Legislative Commission on Governmental Operations, the Revenue Laws Study Committee, and the Joint Legislative Utility Review Committee. The report must contain complete information regarding receipts and expenditures of all funds received by the 911 Board during the period covered by the report, the status of the 911 system in North Carolina at the time of the report, and the results of any investigations by the Board of PSAPs that have been completed during the period covered by the report.

(d) Nature of Revenue. — The General Assembly finds that distributions of revenue from the 911 Fund are not State expenditures for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold revenue in the 911 Fund. (2007-383, s. 1(a); 2008-134, s. 1(a).)

Effect of Amendments. — Session Laws 2008-134, s. 1(a), effective July 28, 2008, in subdivision (b)(1), substituted "A percentage of" for "Fifty-three percent (53%) of"; in subdivision (b)(2), substituted "A percentage of" for "Forty-seven percent (47%) of"; and added subdivision (b)(3).

§ 62A-45. Fund distribution to CMRS providers.

(a) Distribution. — CMRS providers are eligible for reimbursement from the 911 Fund for the actual costs incurred by the CMRS providers in complying with the requirements of enhanced 911 service. Costs of complying include costs incurred for designing, upgrading, purchasing, leasing, programming, installing, testing, or maintaining all necessary data, hardware, and software required to provide service as well as the recurring and nonrecurring costs of providing the service. To obtain reimbursement, a CMRS provider must comply with all of the following:

(1) Invoices must be sworn.
(2) All costs and expenses must be commercially reasonable.
(3) All invoices for reimbursement must be related to compliance with the requirements of enhanced 911 service.
(4) Prior approval must be obtained from the 911 Board for all invoices for payment of costs that exceed the lesser of:
  a. One hundred percent (100%) of the eligible costs allowed under this section.
  b. One hundred twenty-five percent (125%) of the service charges remitted to the 911 Board by the CMRS provider.

(b) Payment Carryforward. — If the total amount of invoices submitted to the 911 Board and approved for payment in a month exceeds the amount available from the 911 Fund for reimbursements to CMRS providers, the amount payable to each CMRS provider is reduced proportionately so that the amount paid does not exceed the amount available for payment. The balance of the payment is deferred to the following month. A deferred payment accrues interest at a rate equal to the rate earned by the 911 Fund until it is paid.

(c) Grant Reallocation. — If the amount of reimbursements to CMRS providers approved by the 911 Board for a fiscal year is less than the amount of funds allocated for reimbursements to CMRS providers for that fiscal year, the 911 Board may reallocate part or all of the excess amount to the PSAP Grant Account established under G.S. 62A-47. The 911 Board may reallocate funds under this subsection only once each calendar year and may do so only within the three-month period that follows the end of the fiscal year. If the 911 Board reallocates more than three million dollars ($3,000,000) to the PSAP Grant Account in a calendar year, it must consider reducing the amount of the service charge in G.S. 62A-44 to reflect more accurately the underlying costs of providing 911 system services.

The 911 Board must make the following findings before it reallocates funds to the PSAP Grant Account:

(1) There is a critical need for additional funding for PSAPs in rural or high-cost areas to ensure that enhanced 911 service is deployed throughout the State.

(2) The reallocation will not impair cost recovery by CMRS providers.

(3) The reallocation will not result in the insolvency of the 911 Fund. (2007-383, s. 1(a).)

§ 62A-46. Fund distribution to PSAPs.

(a) Monthly Distribution. — The 911 Board must make monthly distributions to primary PSAPs from the amount allocated to the 911 Fund for PSAPs. The amount to be distributed to each primary PSAP is the sum of the following:

(1) The PSAP's base amount. — The PSAP's base amount is the amount the PSAP received in the fiscal year ending June 30, 2007, and deposited in the Emergency Telephone System Fund of its local governing entity, as reported to the State Treasurer's Office, Local Government Division.

(2) The PSAP's per capita amount. — The PSAP's per capita amount is the PSAP's per capita share of the amount designated by the Board under subsection (b) of this section for the per capita distribution. The 911 Board must use the most recent population estimates certified by the State Budget Officer in making the per capita distribution under this subdivision. A PSAP is not eligible for a distribution under this subdivision unless it provides enhanced 911 service.

(b) Percentage Designations. — The 911 Board must determine how revenue that is allocated to the 911 Fund for distribution to primary PSAPs and is not needed to make the base amount distribution required by subdivision (a)(1) of this section is to be used. The 911 Board must designate a percentage of the remaining funds to be distributed to primary PSAPs on a per capita basis and a percentage to be allocated to the PSAP Grant Account established in G.S. 62A-47. If the 911 Board does not designate an amount to be allocated to the PSAP Grant Account, the 911 Board must distribute all of the remaining funds on a per capita basis. The 911 Board may not change the percentage designation more than once each fiscal year.

(c) Use of Funds. — A PSAP that receives a distribution from the 911 Fund may not use the amount received to pay for the lease or purchase of real estate, cosmetic remodeling of emergency dispatch centers, hiring or compensating telecommunicators, or the purchase of mobile communications vehicles, ambulances, fire engines, or other emergency vehicles. Distributions received by a PSAP may be used only to pay for the following:

(1) The lease, purchase, or maintenance of emergency telephone equipment, including necessary computer hardware, software, and database provisioning, addressing, and nonrecurring costs of establishing a 911 system.

(2) Expenditures for in-State training of 911 personnel regarding the maintenance and operation of the 911 system. Allowable training expenses include the cost of transportation, lodging, instructors, certifications, improvement programs, quality assurance training, and training associated with call taking, and emergency medical, fire, or law enforcement procedures. Training outside the State is not an eligible expenditure unless the training is unavailable in the State or the PSAP documents that the training costs are less if received out-of-state. Training specific to the receipt of 911 calls is allowed only for intake and related call taking quality assurance and improvement.

Instructor certification costs and course required prerequisites, including physicals, psychological exams, and drug testing, are not allowable expenditures.

(3) Charges associated with the service supplier's 911 service and other service supplier recurring charges. The PSAP providing 911 service is responsible to the voice communications service provider for all 911 installation, service, equipment, operation, and maintenance charges owed to the voice communications service provider. A PSAP may contract with a voice communications service provider on terms agreed to by the PSAP and the provider.

(d) Local Fund. — The fiscal officer of a PSAP to whom a distribution is made under this section must deposit the funds in a special revenue fund, as defined in G.S. 159-26(b)(2), designated as the Emergency Telephone System Fund. The fiscal officer may invest money in the Fund in the same manner that other money of the local government may be invested. Income earned from the invested money in the Emergency Telephone System Fund must be credited to the Fund. Revenue deposited into the Fund must be used only as permitted in this section.

(e) Compliance. — A PSAP, or the governing entity of a PSAP, must comply with all of the following in order to receive a distribution under this section:

(1) A county or municipality that has one or more PSAPs must submit in writing to the 911 Board information that identifies the PSAPs in the manner required by the FCC Order.

(2) A participating PSAP must annually submit to the 911 Board a copy of its governing agency's proposed or approved budget detailing the revenues and expenditures associated with the operation of the PSAP. The PSAP budget must identify revenues and expenditures for eligible expense reimbursements as provided in this Article and rules adopted by the 911 Board.

(3) A PSAP must be included in its governing entity's annual audit required under the Local Government Budget and Fiscal Control Act. The Local Government Commission must provide a copy of each audit of a local government entity with a participating PSAP to the 911 Board.

(4) A PSAP must comply with all requests by the 911 Board for financial information related to the operation of the PSAP.

(f) Application to Cherokees. — The Eastern Band of Cherokee Indians is an eligible PSAP. The Tribal Council of the Eastern Band is the local governing entity of the Eastern Band for purposes of this section. The Tribal Council must give the 911 Board information adequate to determine the Eastern Band's base amount. The 911 Board must use the most recent federal census estimate of the population living on the Qualla Boundary to determine the per capita distribution amount. (2007-383, s. 1(a); 2008-134, ss. 1(b), (c).)

Editor's Note. — Session Laws 2008-134, s. 1(e), provides, in part, that the addition of subsection (f) to this section by s. 1(c) of the act is applicable to distributions for the 2007-2008 fiscal year and subsequent fiscal years.

Effect of Amendments. — Session Laws 2008-134, ss. 1(b) and 1(c), effective July 28, 2008, substituted "fiscal year" for "calendar year" at the end of subsection (b); and added subsection (f). See Editor's note for applicability.

§ 62A-47. PSAP Grant Account.

(a) Account Established. — A PSAP Grant Account is established within the 911 Fund for the purpose of making grants to PSAPs in rural and other high-cost areas. The Account consists of revenue allocated by the 911 Board under G.S. 62A-45(c) and G.S. 62A-46.

(b) Application. — A PSAP may apply to the 911 Board for a grant from the PSAP Grant Account. An application must be submitted in the manner prescribed by the 911 Board. The 911 Board may approve a grant application and enter into a grant agreement with a PSAP if it determines all of the following:

(1) The costs estimated in the application are reasonable and have been or will be incurred for the purpose of promoting a cost-effective and efficient 911 system.

(2) The expenses to be incurred by the applicant are consistent with the 911 State Plan.

(3) There are sufficient funds available in the fiscal year in which the grant funds will be distributed.

(4) The costs are authorized PSAP costs under G.S. 62A-46(c).

(c) Agreement. — A grant agreement between the 911 Board and a PSAP must include the purpose of the grant, the time frame for implementing the project or program funded by the grant, the amount of the grant, and a provision for repaying grant funds if the PSAP fails to comply with any of the terms of the grant. The amount of the grant may vary among grantees. If the grant is intended to promote the deployment of enhanced 911 service in a rural area of the State, the grant agreement must specify how the funds will assist with this goal. The 911 Board must publish one or more notices each fiscal year advertising the availability of grants from the PSAP Grant Account and detailing the application process, including the deadline for submitting applications, any required documents specifying costs, either incurred or anticipated, and evidence demonstrating the need for the grant. Any grant funds awarded to PSAPs under this section are in addition to any funds reimbursed under G.S. 62A-46. (2007-383, s. 1(a).)

§ 62A-48. Recovery of unauthorized use of funds.

The 911 Board must give written notice of violation to any voice communications service provider or PSAP found by the 911 Board to be using monies from the 911 Fund for purposes not authorized by this Article. Upon receipt of notice, the voice communications service provider or PSAP must cease making any unauthorized expenditures. The voice communications service provider or PSAP may petition the 911 Board for a hearing on the question of whether the expenditures were unauthorized, and the 911 Board must grant the request within a reasonable period of time. If, after the hearing, the 911 Board concludes the expenditures were in fact unauthorized, the 911 Board may require the voice communications service provider or PSAP to refund the monies improperly spent within 90 days. Money received under this section must be credited to the 911 Fund. If a voice communications service provider or PSAP does not cease making unauthorized expenditures or refuses to refund improperly spent money, the 911 Board must suspend funding to the provider or PSAP until corrective action is taken. (2007-383, s. 1(a).)

§ 62A-49. Conditions for providing enhanced 911 service.

In accordance with the FCC Order, no CMRS provider is required to provide enhanced 911 service until all of the following conditions are met:

(1) The provider receives a request for the service from the administrator of a PSAP that is capable of receiving and utilizing the data elements associated with the service.

(2) Funds for reimbursement of the CMRS provider's costs are available pursuant to G.S. 62A-45.

(3) The local exchange carrier is able to support the requirements of enhanced 911 service. (2007-383, s. 1(a).)

§ 62A-50. Audit.

The State Auditor may perform audits of the 911 Board pursuant to Article 5A of Chapter 147 of the General Statutes to ensure that funds in the 911 Fund are being managed in accordance with the provisions of this Article. The State Auditor must perform an audit of the 911 Board at least every two years. The 911 Board must reimburse the State Auditor for the cost of an audit of the 911 Board. (2007-383, s. 1(a).)

§ 62A-51. Subscriber records.

Each CMRS provider must provide its 10,000 number groups to a PSAP upon request. This information remains the property of the disclosing CMRS provider and must be used only in providing emergency response services to 911 calls. CMRS voice communications service provider connection information obtained by PSAP personnel for public safety purposes is not public information under Chapter 132 of the General Statutes. No person may disclose or use, for any purpose other than the 911 system, information contained in the database of the telephone network portion of a 911 system. (2007-383, s. 1(a).)

§ 62A-52. Proprietary information.

All proprietary information submitted to the 911 Board or the State Auditor is confidential. Proprietary information submitted pursuant to this Article is not subject to disclosure under Chapter 132 of the General Statutes, and it may not be released to any person other than to the submitting CMRS voice communications service provider, the 911 Board, and the State Auditor without the express permission of the submitting CMRS voice communications service provider. Proprietary information is considered a trade secret under the Trade Secrets Protection Act, Article 24 of Chapter 66 of the General Statutes. General information collected by the 911 Board or the State Auditor may be released or published only in aggregate amounts that do not identify or allow identification of numbers of subscribers or revenues attributable to an individual CMRS voice communications service provider. (2007-383, s. 1(a).)

§ 62A-53. Limitation of liability.

Except in cases of wanton or willful misconduct, a voice communications service provider and its employees, directors, officers, and agents are not liable for any damages in a civil action resulting from death or injury to any person or from damage to property incurred by any person in connection with developing, adopting, implementing, maintaining, or operating the 911 system or in complying with emergency-related information requests from State or local government officials. This section does not apply to actions arising out of the operation or ownership of a motor vehicle. (2007-383, s. 1(a).)

§§ 62A-54 through 62A-58: Reserved for future codification purposes.

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ARTICLE 1.

Municipal Airports.

§ 63-1. Definitions; singular and plural.

(a) Definitions. — For the purpose of this Chapter the following words, terms, and phrases shall have the meanings herein given, unless otherwise specifically defined, or unless another intention clearly appears, or the context otherwise requires:

(1) "Aeronautics" means transportation by aircraft; the operation, construction, repair, or maintenance of aircraft, aircraft power plants and accessories, including the repair, packing, and maintenance of parachutes; the design, establishment, construction, extension, operation, improvement, repair, or maintenance of airports, restricted landing areas, or other air navigation facilities, and air instruction.

(2) "Aeronautics instructor" means any individual engaged in giving instruction or offering to give instruction in aeronautics, either in flying or ground subjects, or both, for hire or reward, without advertising such occupation, without calling his facilities an "air school" or anything equivalent thereto, and without employing or using other instructors. It does not include any instructor in any public school or university of this State, or any institution of higher learning duly accredited and approved for carrying on collegiate work, while engaged in his duties as such instructor.

(3) "Aircraft" means any contrivance now known, or hereafter invented, used or designed for navigation of or flight in the air.

(4) "Air instruction" means the imparting of aeronautical information by any aeronautics instructor or in or by any air school or flying club.

(5) "Airman" means any individual who engages, as the person in command, or as pilot, mechanic, or member of the crew, in the navigation of aircraft while underway and (excepting individuals employed outside the United States, any individual employed by a manufacturer of aircraft, aircraft engines, propellers, or appliances to perform

duties as inspector or mechanic in connection therewith, and any individual performing inspection or mechanical duties in connection with aircraft owned or operated by him) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air traffic control tower operator.

(6) "Air navigation" means the operation or navigation of aircraft in the air space over this State, or upon any airport or restricted landing area within this State.

(7) "Air navigation facility" means any facility other than one owned or controlled by the federal government, used in, available for use in, or designed for use in aid of air navigation, including airports, restricted landing areas, and any structures, mechanisms, lights, beacons, marks, communicating systems, or other instrumentalities or devices used or useful as an aid, or constituting an advantage or convenience to the safe taking off, navigation, and landing of aircraft, or the safe and efficient operation or maintenance of an airport or restricted landing area, and any combination of any or all of such facilities.

(8) "Airport" means any area of land or water, except a restricted landing area, which is designed for the landing and take off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo, and all appurtenant areas used or suitable for airport buildings or other airport facilities, and all appurtenant rights-of-way, whether heretofore or hereafter established.

(9) "Airport hazard" means any structure, object of natural growth, or use of land, which obstructs the air space required for the flight of aircraft in landing or taking off at any airport or restricted landing area or is otherwise hazardous to such landing or taking off.

(10) "Airport protection privileges" means easements through, or other interests in, air space over land or water, interests in airport hazards outside the boundaries of airports or restricted landing areas, and other protection privileges, the acquisition or control of which is necessary to insure safe approaches to the landing areas of airports and restricted landing areas and the safe and efficient operation thereof.

(11) "Air school" means any person engaged in giving or offering to give instruction in aeronautics, either in flying or ground subjects, or both, for or without hire or reward, and advertising, representing, or holding himself out as giving or offering to give such instruction. It does not include any public school or university of this State, or any institution of higher learning duly accredited and approved for carrying on collegiate work.

(12) "Civil aircraft" means any aircraft other than a public aircraft.

(13) "Flying club" means any person other than an individual which, neither for profit nor reward, owns, leases, or uses one or more aircraft for the purpose of instruction or pleasure, or both.

(14) "Municipality" means any county, city, or town of this State, and any other political subdivision, public corporation, authority, or district in this State, which is or may be authorized by law to acquire, establish, construct, maintain, improve, and operate airports and other air navigation facilities.

(15) "Navigable air space" means air space above the minimum altitudes of flight prescribed by the laws of this State, or by regulations of the Commission consistent therewith.

(16) "Operation of aircraft" or "operation aircraft" means the use of aircraft for the purpose of air navigation and includes the navigation or piloting of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of the statutes of this State.

(17) "Person" means any individual, firm, partnership, corporation, company, association, joint stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

(18) "Public aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any state, territory, or possession of the United States, or the District of Columbia, but not including any government owned aircraft engaged in carrying persons or property for commercial purposes.

(19) "Restricted area" means any area of land, water, or both, which is used or is made available for the landing and take off of aircraft, the use of which shall, except in case of emergency, be only as provided from time to time by the Commission.

(20) "State" or "this State" means the State of North Carolina.

(21) "State airway" means a route in the navigable air space over and above the lands or water of this State designated by the Commission as a route suitable for air navigation.

(b) Singular and Plural. — The singular shall include the plural, and the plural the singular. (1945, c. 490, s. 1; 1949, c. 865, s. 3; 1971, c. 936, s. 2.)

Cross References. — For other provisions as to municipal airports, see G.S. 63-49 to 63-58.

CASE NOTES

This Chapter contemplates full cooperation and compliance with federal statutes and rules and regulations of appropriate federal agencies. City of Charlotte v. Spratt, 263 N.C. 656, 140 S.E.2d 341 (1965); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970).

"Operation of Aircraft". — Subdivision (16) of this section merely says that the owner is "engaged in the operation of aircraft." It does not make it unlawful to operate an aircraft so as to cause harm nor does it deem a pilot to automatically be an agent of the owner. Broadway v. Webb, 462 F. Supp. 429 (W.D.N.C. 1977).

Strict Liability Not Imposed. — The North Carolina legislature has not expressed a clear intent to impose strict liability on an owner-lessor in the field of aviation. Broadway v. Webb, 462 F. Supp. 429 (W.D.N.C. 1977).

The law in North Carolina concerning the liability of an owner-lessor of an aircraft is governed by the common law of bailments. There is no strict or vicarious liability imposed upon the owner-lessor by the enactment of subdivision (16) of this section. Broadway v. Webb, 462 F. Supp. 429 (W.D.N.C. 1977).

North Carolina's aviation statute is copied from the model Federal Act. Broadway v. Webb, 462 F. Supp. 429 (W.D.N.C. 1977).

Applied in Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975).

Cited in Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280 (1987).

§ 63-2. Cities and towns authorized to establish airports.

The governing body of any city or town in this State is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft, either within or without the limits of such cities and towns and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city or town. (1929, c. 87, s. 2.)

Cross References. — As to public airports and related facilities, see G.S. 63-49 to 63-58. As to power of eminent domain, see G.S. 63-5 and 63-6. As to airport zoning regulations, see G.S. 63-31 et seq.

CASE NOTES

Franchise for Limousine Service to Airport. — The provisions of former G.S. 160-1 and G.S. 63-2, 63-49, 63-50, 63-53 and 62-260 authorize a municipal corporation to award a franchise contract granting the right to provide limousine service to a municipal airport upon certain terms and conditions set forth in the franchise ordinance. Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967).

Cited in Turner v. City of Reidsville, 224 N.C. 42, 29 S.E.2d 211 (1944); Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979); Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981).

§ 63-3. Counties authorized to establish airports.

The governing body of any county in this State is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such counties, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such county. (1929, c. 87, s. 3.)

CASE NOTES

Proprietary Function. — The operation of an airport by a county is a proprietary function. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Applied in Time Warner Entertainment-Advance/Newhouse P'ship v. Carteret-Craven Elec. Mbrshp. Corp., 451 F. Supp. 2d 736, 2006 U.S. Dist. LEXIS 64195 (E.D.N.C. 2006).

§ 63-4. Joint airports established by cities, towns and counties.

The governing bodies of any city, town and county in this State are hereby authorized to jointly acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such cities, towns and counties, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be jointly owned or controlled by such city, town and county. (1929, c. 87, s. 4.)

Local Modification. — City of Laurinburg and town of Maxton: 1977 (2nd Sess.), c. 1166; 1993, c. 414, s. 10.

CASE NOTES

The legislature has power to create a municipal authority to construct, maintain and operate an airport, and county and cities located therein may lawfully join in the construction, maintenance and operation of an airport if each of them is benefited by it. Greensboro-High Point Airport Auth. v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946).

Section Not Repealed or Modified by Supplementary Acts. — This section, permitting municipalities to act jointly in the creation of an airport authority, is not repealed or modified or its authority in any way affected by the supplementary public-local and private acts under which the purpose and policy of this section are carried out in the creation of a single airport authority to serve three municipalities. Greensboro-High Point Airport Auth. v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946).

Applied in Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967), commented on in 46 N.C.L. Rev. 188 (1967).

§ 63-5. Airport declared public purpose; eminent domain.

Any lands acquired, owned, controlled, or occupied by such cities, towns, and/or counties, for the purposes enumerated in G.S. 63-2, 63-3 and 63-4, shall and are hereby declared to be acquired, owned, controlled and occupied for a public purpose, and such cities, towns and/or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public purpose. (1929, c. 87, s. 5.)

Legal Periodicals. — For comment on Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967), see 46 N.C.L. Rev. 188 (1967).

For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970).

CASE NOTES

City or County May Appropriate and Expend Public Funds for Acquisition or Construction. — The acquisition of land for, and the construction and operation of, an airport for use by the public is a purpose for which a city or a county or both may appropriate and expend public funds and for which it or they may acquire land by the exercise of the power of eminent domain. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

Materiality of Amount of Use in Immediate Future. — In a taking of land for the construction of an airport, as in the case of a taking for the construction of a road, if the taking is, in reality, for the purpose of making the property available for use by the public, it is immaterial that, in the immediate future, only a small segment of the public will be likely to make actual use of it. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

The fact that at the time of the taking of land by eminent domain for the purpose of building an airport there are no commitments from commercial air lines and the immediate prospect is for use only by a small number of private planes, is irrelevant where there is no suggestion that the airport would not be available and eventually used as a public facility. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

Taking of Land to Provide Clear Approach to Runway. — The taking of land so as to provide for airplanes an approach to the runway of the airport free from trees and structures of considerable height is reasonably incidental to the construction of such an airport. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

Operation of Airport Is Proprietary and Nongovernmental Function. — The operation and maintenance of a municipal airport and its facilities is a proprietary or nongovernmental function or undertaking of the city for a public purpose, and for which the municipality may be held liable in tort for negligence in the operation thereof. Jewell Ridge Coal Corp. v. City of Charlotte, 204 F. Supp. 256 (W.D.N.C. 1962).

Flights over Private Land as Taking. — Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981), cert. denied, 304 N.C. 725, 288 S.E.2d 380 (1982).

A compensable taking of a flight or aviation easement does not occur until overflights constitute a material interference with the use and enjoyment of property, such that there is substantial diminution in fair market value. Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981), cert. denied, 304 N.C. 725, 288 S.E.2d 380 (1982).

Inverse Condemnation Action for Frequent Overflights. — Failure to condemn directly under this section for damage to property caused by frequent overflights allows plaintiffs, if they wish compensation for the diminution in value of their properties, the sole alternative of an action for inverse condemnation. Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981), cert. denied, 304 N.C. 725, 288 S.E.2d 380 (1982).

Judgments in Aviation Easement Cases. — Because the interest taken vests in the governmental entity, judgments in aviation easement cases should describe the easement acquired in terms of (1) frequency of flight, (2) permissible altitude, (3) type of aircraft, and (4) duration. Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981), cert. denied, 304 N.C. 725, 288 S.E.2d 380 (1982).

Applied in Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

Cited in Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970); Greensboro-High Point Airport Auth. v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390 (1978); Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

§ 63-6. Acquisition of sites; appropriation of moneys.

Private property needed by a city, town and/or county for an airport or landing field may be acquired by gift or devise or shall be acquired by purchase if the city, town and/or county is or are able to agree with the owners on the terms thereof, and otherwise by condemnation, in the manner provided by Chapter 40A. The purchase price, or award for property acquired for an airport or landing field may be paid for by appropriation of moneys available therefor, or wholly or partly from the proceeds of the sale of bonds of the city, town and/or county, as the governing body and/or bodies of such city, town and/or county shall determine. (1929, c. 87, s. 6; 1981, c. 919, s. 7.)

Cross References. — As to proceedings for eminent domain, see Chapter 40A. As to zoning regulations and acquisition of air rights, see G.S. 63-31, 63-32 and 63-36.

§ 63-7. Airports already established declared public charge; regulations and fees for use of.

The governing body or bodies of a city, town and/or county which has or have established an airport or landing field, and acquired, leased, or set apart real property for such purpose, may construct, improve, equip, maintain, and operate the same. The expenses of such construction, improvement, maintenance, and operation shall be a city, town and/or county charge as the case may be. The governing body or bodies of a city, town and/or county may adopt regulations and establish fees or charges for the use of such airport or landing field. (1929, c. 87, s. 7.)

§ 63-8. Appropriations.

The governing body or bodies of a city, town and/or county to which this Article is applicable, having power to appropriate, individually or jointly, money therein, are hereby authorized to annually appropriate and cause to be raised by taxation in such city, town and/or county or to use from the net proceeds derived from the operation, by such city, town or county, of any public utility a sum sufficient to carry out the provisions of this Article in such proportion and upon such pro-rata basis as may be determined upon by a joint board to be appointed by and from the governing body or bodies of the city, town and/or the county or individually as the case may be. Provided, nothing herein shall be construed to permit the governing bodies of any county, city or town to issue bonds under the provisions of this Article without a vote of the people. (1929, c. 87, s. 8.)

§ 63-8.1: Repealed by Session Laws 1973, c. 803, s. 3.

§ 63-9. Partial invalidity.

If any part or parts of this Article shall be held to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this

Article. The General Assembly expressly declares that it would have passed the remaining parts of this Article, if it had known that such part or parts thereof would be declared unconstitutional. (1929, c. 87, s. 9.)

ARTICLE 2.

State Regulation.

§ 63-10: Repealed by Session Laws 1971, c. 936, s. 1.

§ 63-11. Sovereignty in space.

Sovereignty in space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States. (1929, c. 190, s. 2.)

CASE NOTES

An Aircraft Can Lawfully Fly Over the Land and Water of This State. — G.S. 63-13 did not delineate a public policy of aviation safety in North Carolina that would be an exception to the dismissal of an at-will employee. To the extent the statute mentioned air safety, the General Assembly, by G.S. 63-11, limited G.S. 63-13's application to airspace within North Carolina's sovereignty; regardless, because the flight in question was between Vermont and North Carolina, G.S. 63-13 did not apply. McDonnell v. Tradewind Airlines, Inc., — N.C. App. —, 670 S.E.2d 302, 2009 N.C. App. LEXIS 22 (2009).

Cited in United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946); Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959).

§ 63-12. Ownership of space.

The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in G.S. 63-13. (1929, c. 190, s. 3.)

CASE NOTES

Purpose of this section was to subject the common-law rights recognized and described therein to the right of flight established in G.S. 63-13, not to prohibit a conveyance of air rights independent of the land beneath. Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987).

Flight of Planes over Property as Taking. — Holding that flights by planes at low levels over plaintiff's land deprived plaintiffs of use and enjoyment of their property and constituted "taking" entitling them to compensation was not inconsistent with this section. United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946), discussed in 25 N.C.L. Rev. 64.

Cited in Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959).

§ 63-13. Lawfulness of flight.

Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable as provided in G.S. 63-14. (1929, c. 190, s. 4; 1947, c. 1001, s. 1.)

Editor's Note. — G.S. 63-14, referred to at the end of this section, was repealed by Session Laws 1947, c. 1069, s. 3.

CASE NOTES

An aircraft can lawfully fly over the land and water of this State, unless done in violation of the provisions of this section. Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959).

G.S. 63-13 did not delineate a public policy of aviation safety in North Carolina that would be an exception to the dismissal of an at-will employee. To the extent the statute mentioned air safety, the General Assembly, by G.S. 63-11, limited G.S. 63-13's application to airspace within North Carolina's sovereignty; regardless, because the flight in question was between Vermont and North Carolina, G.S. 63-13 did not apply. McDonnell v. Tradewind Airlines, Inc., — N.C. App. —, 670 S.E.2d 302, 2009 N.C. App. LEXIS 22 (2009).

And flying a plane over the land or pond of another does not constitute a trespass unless the flight is at such low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property below. Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959).

Proof of Adverse Use. — A use, to be adverse, must be over property as to which another possesses the right of lawful control. This section restricts the right of an owner to control the airspace over his property. Plaintiff, to establish adverse use, thus has the burden of proving that planes overflew defendant's property at such heights as to interfere with the then existing use of the land or airspace, or as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land. City of Statesville v. Credit & Loan Co., 58 N.C. App. 727, 294 S.E.2d 405 (1982).

The burden of proof is upon the party asserting a violation of this section, and evidence merely that the plane engaged in crop spraying operations was seen flying over the land of plaintiff at an altitude of 100 feet or more, without evidence that such flight disturbed any person on the ground or was imminently dangerous to persons or property, is insufficient to make out a cause of action for trespass. Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959).

Cited in United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946); Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

§ 63-14: Repealed by Session Laws 1947, c. 1069, s. 3.

§ 63-15. Collision of aircraft.

The liability of the owners of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land. (1929, c. 190, s. 6.)

CASE NOTES

This section appears merely to declare the common law. Jewell Ridge Coal Corp. v. City of Charlotte, 204 F. Supp. 256 (W.D.N.C. 1962).

Liability of a carrier of passengers by aircraft must be based on negligence. Such carrier is not an insurer of the safety of its passengers. Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960).

Any recovery for wrongful death must be based on actionable negligence under the general rules of tort liability. Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

Causal Connection Between Negligence and Injury. — There must be a causal connection between the negligence complained of and the injury inflicted. Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

Res Ipsa Loquitur Inapplicable. — In a case involving an airplane crash the doctrine of res ipsa loquitur does not apply. Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960).

In a case involving an airplane crash the doctrine of res ipsa loquitur does not apply, it being common knowledge that airplanes do fall without fault of the pilot. Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

Cited in First Fin. Sav. Bank, Inc. v. American Bankers Ins. Co., 783 F. Supp. 963 (E.D.N.C. 1991).

§ 63-16. Jurisdiction over crimes and torts.

All crimes, torts, and other wrongs committed by or against an airman or passenger while in flight over this State shall be governed by the laws of this State; and the question whether damage occasioned by or to an aircraft while in flight over this State constitutes a tort, crime or other wrong by or against the owner of such aircraft shall be determined by the laws of this State. (1929, c. 190, s. 7; 1971, c. 936, s. 3.)

Cross References. — As to jurisdiction, see also G.S. 63-24.

CASE NOTES

Jurisdiction Where Crash Occurs in Another State. — A court of this State has jurisdiction of an action between residents to recover for negligent injury and death in an airplane crash occurring in another state while the plane was on a trip under contract made in this State. Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960).

Cited in Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

§ 63-17. Jurisdiction over contracts.

All contractual and other legal relations entered into by airmen or passengers while in flight over this State shall have the same effect as if entered into on the land or water beneath. (1929, c. 190, s. 8; 1971, c. 936, s. 3.)

§ 63-18. Dangerous flying a misdemeanor.

Any airman or passenger who, while in flight over a thickly inhabited area or over a public gathering within this State, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall except while in landing or taking off, fly at such a low level as to disturb the public peace or the rights of private persons in the enjoyment of their homes, or injure the health, or endanger the persons or property on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a Class 1 misdemeanor. (1929, c. 190, s. 9; 1947, c. 1001, s. 2; 1971, c. 936, s. 3; 1993, c. 539, s. 493; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

OPINIONS OF ATTORNEY GENERAL

Impact of Federal Law on Statute. — The prohibition against "flying at such a low level as to disturb the public peace or the rights of private persons in the enjoyment of their homes" contained in the statute should be read as a prohibition against flying contrary to that mandated by federal law. See opinion of Attorney General to Raymond D. Large, Jr., Hunter, Large & Sherrill, P.L.L.C., 2002 N.C. AG LEXIS 23 (7/10/02).

§ 63-19: Repealed by Session Laws 1943, c. 543.

§ 63-20. Qualifications of operator; federal license.

The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that a person engaging within this State in operating aircraft, in any form of aerial navigation for which a license to operate aircraft issued by the United States government would then be required if such aerial navigation were interstate, should have the qualifications necessary for obtaining and holding such a license, it shall be unlawful for any person to engage in operating aircraft within the State, in any such form of aerial navigation, unless he have such federal license. (1929, c. 190, s. 11.)

CASE NOTES

Federal Regulations Specifically Made Applicable to Intrastate Flying. — See Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

Applicability of Federal Regulation Placing Responsibility on Pilot. — The federal regulation that the pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to the operation of the aircraft is made applicable to all flights in North Carolina by state statute. No in-flight negligence of the pilot can be imputed to the passengers who chartered the plane. Nothing short of physical interference with the pilot's operation of the plane would remove the pilot from actual control. Haley v. United States, 654 F. Supp. 481 (W.D.N.C.), aff'd, 829 F.2d 1120 (4th Cir. 1987).

Licensing. — Plain meaning of G.S. 63-20 and the holding in Mann address licensing to operate aircraft and do not speak to declarations of public policy or a public policy exception to the law governing at-will employment. McDonnell v. Tradewind Airlines, Inc., — N.C. App. —, 670 S.E.2d 302, 2009 N.C. App. LEXIS 22 (2009).

Cited in Bolick v. Sunbird Airlines, 96 N.C. App. 443, 386 S.E.2d 76 (1989).

§ 63-21. Possession and exhibition of license certificate.

The certificate of the license, herein required, shall be kept in the personal possession of the licensee when he is operating aircraft within this State and must be presented for inspection upon the demand of any passenger, any peace officer of this State, or any official, manager or person in charge of any airport or landing field in this State upon which he shall land. (1929, c. 190, s. 12.)

§ 63-22. Aircraft; construction, design and airworthiness; federal registration.

The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that aircraft to be operated within this State should conform, with respect to design, construction and airworthiness, to standards then prescribed by the United States government with respect to aerial navigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to operate an aircraft within this State unless it is registered pursuant to the lawful rules and regulations of the United States government then in force, if the circumstances of such aerial navigation are of a character that such registration would be required in the case of interstate aerial navigation. (1929, c. 190, s. 13.)

§ 63-23. Penalties.

A person who violates any provision of G.S. 63-20, 63-21 or 63-22 of this Article shall be guilty of a Class 2 misdemeanor; provided, however, that acts or omissions made unlawful by G.S. 63-20, 63-21 or 63-22 of this Article shall not be deemed to include any act or omission which violates the laws or lawful regulations of the United States. (1929, c. 190, s. 14; 1993, c. 539, s. 494; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 63-24. Jurisdiction of State over crimes and torts retained.

Provided that this Article shall not be construed as a waiver of jurisdiction of the courts of the State of North Carolina over any crime or tort committed within the State of North Carolina, and provided, further, that the General Assembly of North Carolina may at any time amend, regulate or control any of the powers which may be assumed by the United States Department of Commerce under this Article. (1929, c. 190, s. 15.)

CASE NOTES

Jurisdiction Where Crash Occurs in Another State. — A court of this State has jurisdiction of an action between residents to recover for negligent injury and death in an airplane crash occurring in another state while the plane was on a trip under contract made in this State. Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960).

Article 3.

Stealing, Tampering with, or Operating Aircraft While Intoxicated.

§ 63-25. Taking of aircraft made crime of larceny.

Any person who, under circumstances not constituting larceny shall, without the consent of the owner, take, use or operate or cause to be taken, used or operated, an airplane or other aircraft or its equipment, for his own profit, purpose or pleasure, steals the same, is guilty of a Class H felony. (1929, c. 90, s. 1; 1993, c. 539, s. 1278; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to punishment, see G.S. 14-1.1 and 14-2. As to larceny generally, see G.S. 14-70 et seq.

§ 63-26. Tampering with aircraft made crime.

Any person who shall, without the consent of the owner, go upon or enter, tamper with or in any way damage or injure any airplane or other aircraft, or any personal property under the control of or being used by any public or private airport or aircraft landing facility shall be guilty of a Class 1 misdemeanor, and the showing of willful or malicious intent shall not be necessary to sustain a conviction hereunder. (1929, c. 90, s. 2; 1987, c. 818, s. 3; 1993, c. 539, s. 495; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 63-26.1. Trespass upon airport property made a crime.

(a) It shall be unlawful for any person to trespass upon airport property. For purposes of this section "airport property" means property that is under the control of or is being used by any public or private airport or aircraft landing facility.

(b) A person commits the offense of trespass upon airport property if, without authorization, he enters or remains on airport property that is so enclosed or posted or secured as to demonstrate clearly an intent to keep out intruders. Violation of this section is a Class 2 misdemeanor. (1987, c. 818, s. 4; 1993, c. 539, s. 496; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 63-27. Operation of aircraft while impaired.

(a) Offense. — A person commits the offense of operation of an aircraft while impaired if he operates an aircraft, whether on the ground or in the air or on water, within this State:

(1) While under the influence of an impairing substance; or
(2) After having consumed sufficient alcohol that he has, at any relevant time after the operating of an aircraft, an alcohol concentration of 0.04 or more.

The relevant definitions contained in G.S. 20-4.01 shall apply to this section.

(b) Defense precluded. — The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(c) Pleading. — In any prosecution for operating an aircraft while impaired, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant operated the aircraft within this State while subject to an impairing substance.

(d) Chemical Analysis. — Any person who operates an airplane or other aircraft, whether on the ground or in the air or on the water within the territorial limits of this State gives consent to chemical analysis if he is charged with the offense of operating an aircraft while impaired. The charging officer must designate the type of chemical analysis to be administered, and it may be administered when he has reasonable grounds to believe that the person charged has committed the specified crime. The chemical analysis shall be performed pursuant to the procedures established under Chapter 20 of the General Statutes applying to motor vehicle violations with the exception that if the person charged refuses to be tested, the charging officer shall, in writing, notify the local office of the Federal Aviation Administration of the individual's refusal. The results of any chemical tests administered pursuant to this section will be admissible into evidence at trial on the offense charged and a written report of the test results shall be made available to the local office of the Federal Aviation Administration.

(e) Punishment. — A person violating this section shall be guilty of a Class 1 misdemeanor. Provided, however, for a second and all subsequent convictions of this section, a person shall be guilty of a Class I felony. (1929, c. 90, s. 3; 1953, c. 675, s. 8; 1987, c. 818, s. 1; 1993, c. 539, ss. 497, 1279; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 63-28. Infliction of serious bodily injury by operation of an aircraft while impaired.

(a) Offense. — A person commits the offense of infliction of serious bodily injury by operation of an aircraft while impaired if, while in violation of G.S. 63-27, he does serious bodily injury to another.

(b) Defense precluded. — The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(c) Pleading. — In any prosecution for infliction of serious bodily injury by operation of an aircraft while impaired, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant did serious bodily injury to another while operating an aircraft within this State while subject to an impairing substance.

(d) Punishment. — Violation of this section is a Class F felony. (1929, c. 90, s. 4; 1953, c. 675, s. 9; 1987, c. 818, s. 2; 1993, c. 539, s. 1280; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 4.

Model Airport Zoning Act.

§ 63-29: Repealed by Session Laws 1971, c. 936, s. 1.

§ 63-30. Airport hazards not in public interest.

It is hereby found and declared that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and is therefore not in the interest of the public health, public safety, or general welfare. (1941, c. 250, s. 2.)

Legal Periodicals. — For comment on this Article, see 19 N.C.L. Rev. 548 (1941).

CASE NOTES

Cited in Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949); Progress Energy Carolinas, Inc. v. Strickland, 181 N.C.App. 610, 640 S.E.2d 856, 2007 N.C. App. LEXIS 404 (2007).

§ 63-31. Adoption of airport zoning regulations.

(a) Every political subdivision may adopt, administer, and enforce, under the police power and in the manner and upon the conditions hereinafter prescribed, airport zoning regulations, which regulations shall divide the area surrounding any airport within the jurisdiction of said political subdivision into zones, and, within such zones, specify the land uses permitted, and regulate and restrict the height to which structures and trees may be erected or allowed to grow. In adopting or revising any such zoning regulations, the political subdivision shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, the possibility of lowering or removing existing obstructions, and the views of the agency of the federal government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport.

(b) In the event that a political subdivision has adopted, or hereafter adopts, a general zoning ordinance regulating, among other things, the height of buildings, any airport zoning regulations adopted for the same area or portion thereof under this Article may be incorporated in and made a part of such general zoning regulations, and be administered and enforced in connection therewith, but such general zoning regulations shall not limit the effectiveness or scope of the regulations adopted under this Article.

(c) Any two or more political subdivisions may agree, by ordinance duly adopted, to create a joint board and delegate to said board the powers herein conferred to promulgate, administer and enforce airport zoning regulations to protect the aerial approaches of any airport located within the corporate limits of any one or more of said political subdivisions. Such joint board shall have as members two representatives appointed by the chief executive officer of each political subdivision participating in the creation of said board and a chairman elected by a majority of the members so appointed.

(d) The jurisdiction of each political subdivision is hereby extended to the promulgating, adopting, administering and enforcement of airport zoning regulations to protect the approaches of any airport or landing field which is owned by said political subdivision, although the area affected by the zoning regulations may be located outside the corporate limits of said political subdivision. In case of conflict with any airport zoning or other regulations promulgated by any political subdivision, the regulations adopted pursuant to this section shall prevail.

(e) All airport zoning regulations adopted under this Article shall be reasonable, and none shall require the removal, lowering, or other change or alteration of any structure or tree not conforming to the regulations when adopted or amended, or otherwise interfere with the continuance of any nonconforming use, except as provided in G.S. 63-32, subsection (a).

(f) A political subdivision may not adopt an airport zoning regulation in violation of G.S. 63A-18. (1941, c. 250, s. 3; 1945, cc. 300, 635; 1991, c. 749, s. 3.)

§ 63-32. Permits, new structures, etc., and variances.

(a) Permits. — Where advisable to facilitate the enforcement of zoning regulations adopted pursuant to this Article, a system may be established by any political subdivision for the granting of permits to establish or construct new structures and other uses and to replace existing structures and other uses or make substantial changes therein or substantial repairs thereof. In any event, before any nonconforming structure or tree may be replaced, substantially altered or repaired, rebuilt, allowed to grow higher, or replanted, a permit must be secured from the administrative agency authorized to administer and enforce the regulations, authorizing such replacement, change or repair. No such permit shall be granted that would allow the structure or tree in question to be made higher or become a greater hazard to air navigation than it was when the applicable regulation was adopted; and whenever the administrative agency determines that a nonconforming structure or tree has been abandoned or more than eighty percent (80%) torn down, destroyed, deteriorated, or decayed: (i) no permit shall be granted that would allow said structure or tree to exceed the applicable height limit or otherwise deviate from the zoning regulations; and (ii) whether application is made for a permit under this paragraph or not, the said agency may by appropriate action compel the owner of the nonconforming structure or tree, at his own expense, to lower, remove, reconstruct, or equip such object as may be necessary to conform to the regulations or, if the owner of the nonconforming structure or tree shall neglect or refuse to comply with such order for 10 days after notice thereof, the said agency may proceed to have the object so lowered, removed, reconstructed, or equipped. Except as indicated, all applications for permits for replacement, change or repair of nonconforming uses shall be granted.

(b) Variances. — Any person desiring to erect any structures, or increase the height of any structure, or permit the growth of any tree, or otherwise use his property, in violation of airport zoning regulations adopted under this Article, may apply to the board of appeals, as provided in G.S. 63-33, subsection (c), for a variance from the zoning regulations in question. Such variances shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of the regulations and this Article.

(c) Obstruction Marking and Lighting. — In granting any permit or variance under this section, the administrative agency or board of appeals may, if it deems such action advisable to effectuate the purposes of this Article and reasonable in the circumstances, so condition such permit or variance as to require the owner of the structure or tree in question to permit the political subdivision, at its own expense, to install, operate, and maintain suitable obstruction markers and obstruction lights thereon. (1941, c. 250, s. 4.)

§ 63-33. Procedure.

(a) Adoption of Zoning Regulations. — No airport zoning regulations shall be adopted, amended, or changed under this Article except by action of the legislative body of the political subdivision in question, or the joint board provided for in G.S. 63-31, subsection (c), after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 10 days' notice of the hearing shall be published in an official paper, or a paper of general circulation, in the political subdivision or subdivisions in which the airport is located.

(b) Administration of Zoning Regulations — Administrative Agency. — The legislative body of any political subdivision adopting airport zoning regulations under this Article may delegate the duty of administering and enforcing such regulations to any administrative agency under its jurisdiction, or may create a new administrative agency to perform such duty, but such administrative agency shall not be or include any member of the board of appeals. The duties of such administrative agency shall include that of hearing and deciding all permits under G.S. 63-32, subsection (a), but such agency shall not have or exercise any of the powers delegated to the board of appeals.

(c) Administration of Airport Zoning Regulations — Board of Appeals. — Airport zoning regulations adopted under this Article shall provide for a board of appeals to have and exercise the following powers:

(1) To hear and decide appeals from any order, requirement, decision, or determination made by the administrative agency in the enforcement of this Article or of any ordinance adopted pursuant thereto;
(2) To hear and decide special exceptions to the terms of the ordinance upon which such board may be required to pass under such ordinance;
(3) To hear and decide specific variances under G.S. 63-32, subsection (b).

Where a zoning board of appeals or adjustment already exists, it may be appointed as the board of appeals. Otherwise, the board of appeals shall consist of five members, each to be appointed for a term of three years and to be removable for cause by the appointing authority upon written charges and after public hearing.

The board shall adopt rules in accordance with the provisions of any ordinance adopted under this Article. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the board and shall be a public record.

Appeals to the board may be taken by any person aggrieved, or by any officer, department, board, or bureau of the political subdivision affected, by any decision of the administrative agency. An appeal must be taken within a reasonable time, as provided by the rules of the board, by filing with the agency from which the appeal is taken and with the board, a notice of appeal specifying the grounds thereof. The agency from which the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal shall stay all proceedings in furtherance of the action appealed from, unless the agency from which the appeal is taken certifies to the board, after the notice of appeal has been filed with it, that by reason of the facts stated in the certificate a stay would, in its opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board or by a court of record on application on notice to the agency from which the appeal is taken and on due cause shown.

The board shall fix a reasonable time for the hearing of the appeal, give public notice and due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

The board may, in conformity with the provisions of this Article, reverse or affirm, wholly or partly, or modify, the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the administrative agency from which the appeal is taken.

The concurring vote of a majority of the members of the board shall be sufficient to reverse any order, requirement, decision, or determination of the administrative agency, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance. (1941, c. 250, s. 5; 1981, c. 891, s. 11.)

Local Modification. — City of Wilson: 1961, c. 635; 1963, c. 151.

§ 63-34. Judicial review.

(a) Any person aggrieved by any decision of the board of appeals, or any taxpayer, or any officer, department, board, or bureau of the political subdivision, may present to the superior court a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. Such petition shall be presented to the court within 30 days after the decision is filed in the office of the board. Such petition shall comply with the provisions of G.S. 160A-393.

(b) The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

(c) The board of appeals shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

(d) Repealed by Session Laws 2009-421, s. 3, effective January 1, 2010.

(e) Costs shall not be allowed against the board of appeals unless it appears to the court that it acted with gross negligence, in bad faith, or with malice, in making the decision appealed from. (1941, c. 250, s. 6; 2009-421, s. 3.)

Effect of Amendments. — Session Laws 2009-421, s. 3, effective January 1, 2010, and applicable to quasi-judicial decisions rendered on or after that date, in subsection (a), added the last sentence; in subsection (b), deleted the former first sentence, which read: "Upon presentation of such petition the court may allow a writ of certiorari directed to the board of appeals to review such decision of the board"; and deleted former subsection (d), which read; "The court shall have exclusive jurisdiction to affirm, modify, or set aside the decision brought up for review, in whole or in part, and if need be, to order further proceedings by the board of appeals. The findings of fact by the board, if supported by substantial evidence, shall be accepted by the court as conclusive, and no objection to a decision of the board shall be considered by the court unless such objection shall have been urged before the board, or if it was not so urged, unless there were reasonable grounds for failure to do so."

§ 63-35. Enforcement and remedies.

Each violation of this Article or of any regulations, order, or ruling promulgated or made pursuant to this Article, shall constitute a Class 3 misdemeanor, and each day a violation continues to exist shall constitute a separate offense. In addition, the political subdivision within which the property is located may institute in any court of competent jurisdiction, an action to prevent, restrain, correct or abate any violation of this Article, or of airport zoning regulations adopted under this Article, or of any order or ruling made in connection with their administration or enforcement, and the court shall adjudge to the plaintiff such relief, by way of injunction (which may be mandatory) or otherwise, as may be proper under all the facts and circumstances of the case, in order fully to effectuate the purposes of this Article and of the regulations adopted and orders and rulings made pursuant thereto. (1941, c. 250, s. 7; 1993, c. 539, s. 498; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 63-36. Acquisition of air rights.

In any case in which:

(1) It is desired to remove, lower, or otherwise terminate a nonconforming use; or

(2) The approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this Article; or

(3) It appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations,

the political subdivision within which the property or nonconforming use is located or the political subdivision owning the airport or served by it may acquire, in the manner provided by the law under which municipalities are authorized to acquire real property for public purposes, such an air right, easement, or other estate or interest in the property or nonconforming use in question as may be necessary to effectuate the purposes of this Article.

If any political subdivision, or if any board or administrative agency appointed or selected by a political subdivision, shall adopt, administer or enforce any airport zoning regulations which results in the taking of, or in any other injury or damage to any existing structure, such political subdivision shall be liable therefor in damages to the owner or owners of any such property and the liability of the political subdivision shall include any expense which the owners of such property are required to incur in complying with any such zoning regulations. (1941, c. 250, s. 8.)

§ 63-37. Short title.

This Article shall be known and may be cited as the "Model Airport Zoning Act." (1941, c. 250, s. 10.)

§ 63-37.1. Airport obstructions illegal.

Any person, other than the owner or operator of an airport, who intentionally obstructs the lawful takeoff and landing operations and patterns of aircraft at an existing public or private airport shall be guilty of a Class 1 misdemeanor. (1995, c. 507, s. 19.5(m).)

CASE NOTES

Cited in Progress Energy Carolinas, Inc. v. Strickland, 181 N.C. App. 610, 640 S.E.2d 856, 2007 N.C. App. LEXIS 404 (2007).

Article 5.

Aeronautics Commission; Federal Regulations.

§§ 63-38 through 63-44: Repealed by Session Laws 1949, c. 865, s. 1.

§ 63-45. Enforcement of Article.

It shall be the duty of every State, county and municipal officer charged with the enforcement of State and municipal laws to enforce and assist in the enforcement of this Article. (1945, c. 198, s. 8.)

§ 63-46: Repealed by Session Laws 1949, c. 865, s. 2.

§ 63-47. Enforcement of regulations of Civil Aeronautics Administration.

In the general public interest and safety, the safety of persons receiving instructions concerning or operating, using or traveling in aircraft, and of persons and property on the ground, and in the interest of aeronautical progress, the public officers of the State, counties and cities shall enforce the rules and regulations of the Civil Aeronautics Administration. (1945, c. 198, s. 10.)

Article 6.

Public Airports and Related Facilities.

§ 63-48: Transferred to G.S. 63-1 by Session Laws 1971, c. 936, s. 2.

§ 63-49. Municipalities may acquire airports.

(a) Every municipality is hereby authorized, through its governing body, to acquire property, real or personal, for the purpose of establishing, constructing, and enlarging airports and other air navigation facilities and to acquire, establish, construct, enlarge, improve, maintain, equip, operate, and regulate such airports and other air navigation facilities and structures and other property incidental to their operation, either within and without the territorial limits of such municipality and within or without this State; to make, prior to any such acquisition, investigations, surveys, and plans; to construct, install, and maintain airport facilities for the servicing of aircraft and for the comfort and accommodation of air travelers; and to purchase and sell equipment and supplies as an incident to the operation of its airport properties. It may not, however, acquire or take over any airport or other air navigation facility owned or controlled by any other municipality of the State without the consent of such municipality. It may use for airport purposes any available property that is now or may at any time hereafter be owned or controlled by it. Such air navigation facilities as are established on airports shall be supplementary to and coordinated in design and operation with those established and operated by the federal government.

(b) All property needed by a municipality for an airport or restricted landing area, or for the enlargement of either, or for other airport purposes, may be acquired by purchase, gift, devise, lease or other means if such municipality is able to agree with the owners of said property on the terms of such acquisition, and otherwise by condemnation in the manner provided by the Chapter entitled Eminent Domain, full power to exercise the right of eminent domain for such purposes being hereby granted every municipality both within and without its territorial limits. If but one municipality is involved and the charter of such municipality prescribes a method of acquiring property by condemnation, proceedings shall be had pursuant to the provisions of such charter and may be followed as to property within or without its territorial limits. The fact that the property needed has been acquired by any agency or corporation authorized to institute condemnation proceedings under power of eminent domain shall not prevent its acquisition by the municipality by the exercise of the right of eminent domain herein conferred when such right is exercised on the approach zone or on the airport site. For the purpose of making surveys and examinations relative to any condemnation proceedings, it shall be lawful to enter upon any land, doing no unnecessary damage. Provided that municipalities building airports after the ratification of this Article shall not acquire by condemnation any property of any corporation engaged in the operation of a railroad or railroad bridge in this State if such property is used in the business of such corporation.

(c) Where necessary, in order to provide unobstructed air space for the landing and taking off of aircraft utilizing airports or restricted landing areas acquired or operated under the provisions of this Article, every municipality is authorized to acquire, in the same manner as is provided for the acquisition of property for airport purposes, easements through or other interests in air space over land or water, interests in airport hazards, or airport hazards outside the boundaries of the airports or restricted landing areas and such other airport protection privileges as are necessary to insure safe approaches to the landing areas of said airports or restricted landing areas and the safe and efficient operation thereof. It is also hereby authorized to acquire, in the same manner, land for the removal of airport hazards and the right of easement for a term of years or perpetually, to place or maintain suitable marks for the daytime marking and suitable lights for the nighttime marking of airport hazards, including the right of ingress or egress to or from such airport hazards for the purpose of maintaining and repairing such lights and marks. This authority shall not be so construed as to limit any right, power or authority to zone property adjacent to airports and restricted landing areas under the provisions of any law of this State.

(d) It shall be unlawful for anyone to build, rebuild, create, or cause to be built, rebuilt, or created any object, or plant, cause to be planted, or permit to grow higher any tree or trees or other vegetation which shall encroach upon any airport protection privileges acquired pursuant to the provisions of this section. Any such encroachment is declared to be a public nuisance and may be abated in the manner prescribed by law for the abatement of public nuisances, or the municipality in charge of the airport or restricted landing area for which airport protection privileges have been acquired as in this section provided, may go upon the land of others and remove any such encroachment without being liable for damages in so doing. (1945, c. 490, s. 2; c. 810; 1981, c. 919, s. 8.)

Cross References. — As to eminent domain, see Chapter 40A. For other provisions as to municipal airports, see G.S. 63-1 to 63-9.

CASE NOTES

One purpose of the 1945 act enacting this Article was to make uniform the law with reference to public airports. Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967).

Franchise for Limousine Service to Airport. — See same catchline in note to G.S. 63-2.

§ 63-50. Airports a public purpose.

The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports and other air navigation facilities, and the exercise of any other powers herein granted to municipalities, are hereby declared to be public, governmental and municipal functions exercised for a public purpose and matters of public necessity, and such lands and other property, easements and privileges acquired and used by such municipalities in the manner and for the purposes enumerated in this Article, shall and are hereby declared to be acquired and used for public, governmental and municipal purposes and as a matter of public necessity. (1945, c. 490, s. 3.)

Legal Periodicals. — For brief comment on this section, see 28 N.C.L. Rev. 332 (1950).

CASE NOTES

A municipality is liable for torts committed by it in the operation and maintenance of a municipal airport, since such activity is a proprietary or corporate function of the municipality, and this section, declaring such activity to be a public, governmental and municipal function exercised for a public purpose, does not purport to exempt it from tort liability. Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371, rehearing denied, 230 N.C. 759, 53 S.E.2d 313 (1949).

Franchise for Limousine Service to Airport. — See same catchline in note to G.S. 63-2.

Cited in Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

§ 63-51. Prior acquisition of airport property validated.

Any acquisition of property within or without the limits of any municipality for airports and other air navigation facilities or of airport protection privileges heretofore made by any such municipality in any manner, together with the conveyance and acceptance thereof, is hereby legalized and made valid and effective. (1945, c. 490, s. 4.)

§§ 63-51.1, 63-52: Repealed by Session Laws 1973, c. 695, s. 10.

§ 63-53. Specific powers of municipalities operating airports.

In addition to the general powers in this Article conferred, and without limitation thereof, a municipality which has established or may hereafter establish airports, restricted landing areas or other air navigation facilities, or which has acquired or set apart or may hereafter acquire or set apart real property for such purpose or purposes is hereby authorized:

(1) To vest authority for the construction, enlargement, improvement, maintenance, equipment, operation and regulation thereof in an officer, a board or body of such municipality by ordinance or resolution which shall prescribe the powers and duties of such officer, board or body. The expense of such construction, enlargement, improvement, maintenance, equipment, operation and regulation shall be a responsibility of the municipality.

(2) To adopt and amend all needful rules, regulations and ordinances for the management, government and use of any properties under its control whether within or without the territorial limits of the municipality; to appoint airport guards or police with full police powers; to fix by ordinance, penalties for the violation of said ordinances and enforce said penalties in the same manner in which penalties prescribed by other ordinances of the municipality are enforced. It may also adopt ordinances designed to safeguard the public upon or beyond the limits of private airports or landing strips within such municipality or its police jurisdiction against the perils and hazards of instrumentalities used in aerial navigation. Such ordinances shall be published as provided by general law or the charter of the municipality for the publication of similar ordinances. They must conform to and be consistent with the laws of this State and shall be kept in conformity, as nearly as may be, with the then current federal legislation governing aeronautics and the regulations duly promulgated thereunder and rules and standards issued from time to time pursuant thereto.

(3) To lease such airports or other air navigation facilities, or real property acquired or set apart for airport purposes, to private parties, to any municipal or State government or to the national government, or to any department of either thereof, for operation; to lease to private parties, to any municipal or State government or to the national government, or any department of either thereof, for operation or use consistent with the purpose of this Article, space, area, improvements, or equipment on such airports; to sell any part of such airports, other air navigation facilities or real property to any municipal government, or to the United States or to any department or instrumentality thereof, for aeronautical purposes or purposes incidental thereto, and to confer the privileges of concessions of supplying upon its airports goods, commodities, things, services and facilities; provided that in each case in so doing the public is not deprived of its rightful, equal, and uniform use thereof.

(4) To sell or lease any property, real or personal, acquired for airport purposes and belonging to the municipality, which, in the judgment of its governing body, may not be required for aeronautic purposes in accordance with the laws of this State or the provisions of the charter of the municipality governing the sale or leasing of similar municipally owned property.

(5) To determine the charge or rental for the use of any properties under its control and the charges for any services or accommodations and

the terms and conditions under which such properties may be used, provided that in all cases the public is not deprived of its rightful, equal, and uniform use of such property. Charges shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality. The municipality shall have and may enforce liens as provided by law for liens and enforcement thereof, for repairs to or improvement or storage or care of any personal property, to enforce the payment of any such charges.

(6) To engage, on an airport, in commercial and industrial land development projects which relate to, develop, or further airborne commerce and cargo and passenger traffic, and, in connection with any project, to improve real estate on an airport and lease that improved real estate to public or private commercial and industrial enterprises, or contract with others to do so.

(7) To exercise all powers necessarily incidental to the exercise of the general and special powers herein created. (1945, c. 490, s. 6; 1991, c. 501, s. 1.)

Local Modification. — (As to subdivision 4) city of Laurinburg: 1957, c. 1210; town of Maxton: 1957, c. 1210; Goldsboro-Wayne Airport Authority: 1987 (Reg. Sess., 1988), c. 1006. s. 5.

CASE NOTES

Constitutionality. — Subdivisions (2), (3) and (5) of this section are not violative of equal protection as being devoid of appropriate standards. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Although the standard set out in subdivision (2) of this section for the enactment of managerial rules and regulations is limited to the word "needful," such a standard is sufficiently definite to serve as a reasonable and workable guide to an administrative body, whose activities require flexibility and a practical approach, without leaving that body to its own unfettered discretion. The standard for municipal action with respect to safety ordinances is definite enough to withstand constitutional scrutiny. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Subdivision (3) of this section is not constitutionally infirm on its face. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

The requirement of some flexibility in landing fees must be considered implicit in the concept of reasonableness which forms the foundation of subdivision (5). Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (E.D.N.C. 1976).

A fee reasonable under subdivision (5) will also meet the test of reasonableness under the commerce clause of the United States Constitution. Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (E.D.N.C. 1976).

There are no constitutional infirmities in the fixing of landing fees and space use charges so long as the municipality complies with the provisions of subdivision (5). Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (E.D.N.C. 1976).

Municipality May Award Franchise for Limousine Service to and from Airport. — The provisions of this section and G.S. 63-2, 63-49, 63-50, and 62-260 authorize a municipal corporation to award a franchise contract granting the right to provide limousine service to a municipal airport upon certain terms and conditions set forth in the franchise ordinance. Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967).

A municipal corporation, owning and operating a public airport, is authorized to grant an exclusive franchise for the operation of a common carrier limousine service for the transportation of passengers and their baggage to and from the airport. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

And, in so doing the municipality is acting in a proprietary capacity. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

Under Like Rules and Regulations as Pursued by Private Individuals. — When given authority to do so a governmental entity is expected to perform a proprietary function under like rules and regulations as those pursued by private individuals. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

Municipality may grant one or more concessions to car rental companies. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

Or Taxicab Concession. — The authority of a municipality extends to the granting of an exclusive taxicab or limousine or car rental concession at the airport. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

And may permit them to enter and remain upon its airport premises for the solicitation of business. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

While Denying Such Privilege to Other Such Companies. — See Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

But it may not forbid the other companies to enter its premises and remain thereon for such time as is reasonably necessary to discharge an outgoing passenger, with his baggage, or to pick up an incoming passenger, with his baggage, pursuant to an actual, previously made contract or a previously received request for such service. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

A municipal corporation, operating a public airport, or other public transportation terminal, has no more extensive authority to exclude persons or vehicles from the terminal grounds than does a privately owned common carrier operating such a terminal for the use and convenience of its passengers. There is no basis for a distinction in this respect between an airport and a railroad or steamship terminal. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

The operation of an airport by a county is a proprietary function. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

A municipality operating an airport acts in a proprietary capacity. Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975).

Fixing of Fees Not Administrative Decision. — The fixing by a municipal airport authority of fees it will charge for the use of its property is not an "administrative decision." Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975).

In determining the fee it will charge for the privilege of landing an aircraft upon its runway and the rent it will charge for the use of its properties, a municipal airport authority is acting as the proprietor of the property, not as a regulatory agency. Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975).

Unilateral fixing of fees under subdivision (5) is nowhere prohibited in this section, and no set procedure is required or commanded. Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (E.D.N.C. 1976).

And Notice Not Required. — Nothing in this section requires a municipal airport authority to give notice to present or prospective users of its properties that the authority is contemplating a change in such fees and rental charges. Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975); Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (E.D.N.C. 1976).

Nor Hearing. — No provision in this section requires that a municipal airport authority conduct a hearing, receive evidence and make findings of fact or that it follow any other procedural course in determining the landing fees or rentals to be charged by it. Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975); Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (E.D.N.C. 1976).

The proviso at the end of subdivision (3) contemplates that limits of some sort will be placed upon the activities of municipalities while engaged in the proprietary activity of operating a publicly owned airport. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Federal Antitrust Scrutiny of Exclusive Grant. — The legislative intent behind this section was not to direct or authorize a grant by a county of an exclusive fixed base operator status at an airport. Thus federal antitrust scrutiny of such an alleged arrangement would be proper. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Where a night watchman at a municipal airport kills a person on the property in the nighttime, the question of whether he was acting in his capacity as servant or agent of the airport, or in his capacity as a police officer, is a question of fact to be determined by the jury on an issue raised by proper pleadings. Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371, rehearing denied, 230 N.C. 759, 53 S.E.2d 313 (1949).

Cited in Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960); Town of Spencer v. Town of E. Spencer, 129 N.C. App. 751, 501 S.E.2d 367 (1998); Ashton v. City of Concord, 337 F. Supp. 2d 735, 2004 U.S. Dist. LEXIS 19217 (M.D.N.C. 2004).

§ 63-54. Federal aid.

(a) A municipality is authorized to accept, receive, and receipt for federal moneys and other moneys, either public or private, for the acquisition, construction, enlargement, improvement, maintenance, equipment, or operation of airports and other air navigation facilities and sites therefor, and to comply with the provisions of the laws of the United States and any rules and regulations made thereunder for the expenditures of federal moneys upon such airports and other air navigation facilities.

(b) The governing body of any municipality is authorized, if necessary, to comply with any federal law or regulation of any agency thereof to designate the North Carolina Aeronautics Commission as its agents to accept, receive, and receipt for federal moneys in its behalf for airport purposes. Such moneys as are paid over by the United States government shall be paid over to said municipality under such terms and conditions as may be imposed by the United States government in making such grant.

(c) All contracts for the acquisition, construction, enlargement, improvement, maintenance, equipment, or operation of airports or other air navigation facilities made by the municipality shall be made pursuant to the laws of this State governing the making of like contracts, provided, however, that where such acquisition, construction, improvement, enlargement, maintenance, equipment or operation is financed wholly or partly with federal moneys the municipality may let contracts in the manner prescribed by the federal authorities, acting under the laws of the United States and any rules or regulations made thereunder notwithstanding any other State law to the contrary. (1945, c. 490, s. 7.)

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Compliance with Other Laws. — Where an airport authority chooses to let contracts under federal law relying upon subsection (c) of this section, then the requirements of G.S. 143-128.2 and 143-128.3, pertaining to minority business participation, would not apply. See opinion of Attorney General to William O. Cooke, Cooke & Cooke, L.L.P., 2002 N.C.A.G. 32 (11/18/02).

If an airport authority, consistent with authority granted by subsection (c) of this section, chooses to let contracts under federal law, the mandatory reporting requirements of G.S. 143-131(b), requiring a report to the Department of Administration, Office of Historically Underutilized Business, would not apply. See opinion of Attorney General to William O. Cooke, Cooke & Cooke, L.L.P., 2002 N.C.A.G. 32 (11/18/02).

§ 63-55. Airports on public waters and reclaimed land.

(a) The powers herein granted to a municipality to establish and maintain airports shall include the power to establish and maintain such airports in, over, and upon any public waters of this State within the limits or jurisdiction of or bordering on the municipality, any submerged land under such public water, and any artificial or reclaimed land which before the artificial making or reclamation thereof constituted a portion of the submerged land under such public waters, and as well the power to construct and maintain terminal buildings, landing floats, causeways, roadways and bridges for approaches to or connecting with the airport, and landing floats and breakwaters for the protection of any such airport.

(b) All the other powers herein granted municipalities with reference to airports on land or granted to them with reference to such airports in, over, and upon public waters, submerged land under public waters, and artificial or reclaimed land. (1945, c. 490, s. 8.)

§ 63-56. Joint operation of airports.

(a) All powers, rights and authority granted to any municipality in this Article may be exercised and enjoyed by two or more municipalities either within or without the territorial limits of either or any of said municipalities and within or without this State, or by any municipality acting jointly with any other municipality therein either within or without this State, provided the laws of such other state permit such joint action.

(b) Any two or more municipalities may enter into agreements with each other, duly authorized by ordinance or resolution, as may be appropriate, for joint action pursuant to the provisions of this section. Concurrent action by the governing bodies of the municipalities involved shall constitute joint action.

(c) Each such agreement shall specify its terms; the proportionate interest which each municipality shall have in the property, facilities and privileges involved, and the proportion of preliminary costs, costs of acquisition, establishment, construction, enlargement, improvement and equipment, and of expenses of maintenance, operation and regulation to be borne by each, and make such other provisions as may be necessary to carry out the provisions of this section. It shall provide for amendments thereof and for conditions and methods of termination; for the disposition of all or any part of the property, facilities and privileges jointly owned if said property, facilities and privileges, or any part thereof, shall cease to be used for the purposes herein provided or if the agreement shall be terminated, and for the distribution of the proceeds received upon any such disposition, and of any funds or other property jointly owned and undisposed of, and the assumption or payment of any indebtedness arising from the joint venture which remains unpaid, upon any such disposition or upon a termination of the agreement.

(d) Municipalities acting jointly as herein authorized may create a board from the inhabitants of such municipalities for the purpose of acquiring property for establishing, constructing, enlarging, improving, maintaining, equipping, operating and regulating the airports and other air navigation facilities and airport protection privileges to be jointly acquired, controlled, and operated. Such board shall consist of members to be appointed by the governing body of each municipality involved, the number to be appointed by each to be provided for by the agreement for the joint venture. Each member shall serve for such time and upon such terms and as to compensation, if any, as may be provided for in the agreement.

(e) Each such board shall organize, select officers for terms to be fixed by the agreement, and adopt and from time to time amend rules of procedure.

(f) Such board may exercise, on behalf of the municipalities acting jointly by which it is appointed, all the powers of each of such municipalities granted by this Article, except as herein provided, subject, however, to such limitations as may be contained in the agreement between such municipalities. Real property, airports, restricted landing areas, air protection privileges, or personal property costing in excess of a sum to be fixed by the joint agreement, may be acquired, and condemnation proceedings may be instituted, only by authority of the governing bodies of each of the municipalities involved. The total amount of expenditures to be made by the board for any purpose in any calendar year shall be determined by the municipalities involved by the approval by each. No real property and no airport, other air navigation facility, or air protection privilege, owned jointly, shall be disposed of by the board, by sale, or otherwise, except by authority of the appointed governing bodies, but the board may lease space, area or improvements and grant concessions on airports for aeronautical purposes or purposes incidental thereto.

(g) Each municipality is authorized and empowered to enact such ordinances as are provided for by this Article, and to fix by such ordinances penalties for the violation thereof, which ordinances shall have the same force and effect within the municipality which enacted them, and on any property controlled by it, either separately or jointly with another municipality, or adjacent thereto, whether within or without the territorial limits of it, or either or any of them, as ordinances of the municipality involved, and may be enforced in such municipality in like manner as are its other ordinances.

(h) Condemnation proceedings may be instituted in the names of two or more municipalities jointly, and the property acquired by such joint condemnation proceedings shall be held by the municipalities as tenants in common, each municipality being entitled to a pro rata interest in said property as the value of its contribution to the acquisition of said property bears to the total cost of acquiring said property, and in the event one municipality desires to acquire property for expansion of or addition to the facilities, and the other or others do not elect to join in the acquisition of such property, such municipality may institute condemnation proceedings in its name individually, and all property now owned or hereafter acquired by a municipal corporation for additions to or expansions of aeronautical facilities operated jointly shall be and remain the sole property of the municipal corporation acquiring same.

(i) For the purpose of providing funds for necessary expenditures in carrying out the provisions of this section, a joint fund shall be created and maintained, into which each of the municipalities involved shall deposit its proportionate share as provided by the joint agreement, and into which shall be paid the revenues obtained from the ownership, control and operation of the airports and other air navigation facilities jointly controlled.

(j) All disbursements from such fund shall be made by order of the board, subject, however, to such limitations as shall be contained in the agreement between such municipalities.

(k) Specific performance of the provisions of any joint agreement entered into as provided for in this section may be enforced as against any party thereto by the other party or parties thereto.

(*l*) In the event any property is now held or may hereafter be acquired by two or more municipalities for aeronautical purposes, and such municipalities do not agree upon the terms of an agreement, as heretofore provided, and shall not agree to create a board as heretofore provided, then and in that event a board of not less than five nor more than seven members shall be created from the inhabitants of such municipalities, each municipality being entitled to appoint as nearly as possible the proportionate number of representatives on said board as the value of its contribution shall bear to the entire amount of money or property so held by such municipalities for aeronautical purposes. In determining the value of the contribution of any municipality, the value of any funds or property used for the development of said property or the building of facilities on said property shall be taken into consideration.

(m) The said board shall have all powers given by this Article to boards created by agreements between municipalities, provided, however, that any funds appropriated by a municipality and turned over to the board for aeronautical purposes shall only be used for these purposes designated by the municipality furnishing such funds.

(n) The actions of such board shall be determined by a majority vote of the members thereof, and a majority of the members shall constitute a quorum for any meeting of the board, and such boards so created shall have full control of all revenues received by reason of the airport or other aeronautical facilities, and shall have power to expend all sums so received for such aeronautical purposes as the board deems proper, and pay over any surplus to municipalities in proportion to their respective interests.

(o) In the event the aeronautical facilities or any part thereof shall cease to be used for aeronautical purposes, such of the facilities as are jointly owned by two or more municipalities shall be sold, and each municipality shall receive its pro rata proportion of the sums realized from the sale of facilities jointly owned.

(p) In the event aeronautical facilities are now owned or hereafter acquired by two or more municipalities, and are operated under a board as hereinabove provided, and one or more of such municipalities deem it advisable to expand or enlarge the facilities or invest more money in such facilities, all of the municipalities then having representation on the board shall be entitled, if they so desire, to contribute their pro rata part of such additional investment and maintain their pro rata representation on said board, provided, however, that if one or more of the municipalities involved shall fail to contribute its or their proportionate part of such additional investment, the representation of such municipality on such board shall be readjusted, to the end that the representation of each municipality on said board shall represent as nearly as possible its pro rata contribution to the entire investment.

Provided further that where one municipality at the time of the passage of this Article shall have invested more than one half of the total investment in a jointly owned airport, then, and in that event the minority owner or owners shall be allowed five years from the date of the passage of this Article in which to pay over to the majority owner a sum sufficient to equalize the amount of ownership of the present minority owner or owners with the total ownership of the majority owner. Provided further that this Article shall not be construed to amend or impair in any respect contracts or agreements in effect at the time of the adoption of this Article.

(q) In the case of an airport board or commission authorized by agreement between two cities, as defined in G.S. 160A-1(2), pursuant to this section, one of which is located partially but not wholly in the county in which the jointly owned airport is located, and where the board or commission provided water and wastewater services off the airport premises before January 1, 1995, the board or commission shall have the authority to acquire, construct, establish, enlarge, improve, maintain, own, operate and contract for the operation of water supply and distribution systems and wastewater collection, treatment and disposal systems of all types, on and off the airport premises. In no event, however, shall such a board or commission be held liable for damages to those off the airport premises for failure to provide such water or wastewater services. (1945, c. 490, s. 9; 1995 (Reg. Sess., 1996), c. 644, s. 1.)

Funds for Local Government Water and Sewer Improvement Grants. — Session Laws 2007-323, s. 13.13A, provides for the use of certain funds appropriated to the Rural Economic Development Center, Inc. for the 2007-2008 fiscal year for wastewater-related and public water system-related projects. See note at G.S. 160A-311.

Session Laws 2008-107, s. 13.8, provides for the use of certain funds appropriated to the Rural Economic Development Center, Inc. for the 2007-2008 fiscal year for wastewater-related and public water system-related projects. See note at G.S. 160A-311.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008 2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008 2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

§ 63-57. Powers specifically granted to counties.

(a) The purposes of this Article are specifically declared to be county purposes as well as generally public, governmental and municipal.

(b) The powers herein granted to all municipalities are specifically declared to be granted to counties in this State, any other statute to the contrary notwithstanding. (1945, c. 490, s. 10.)

CASE NOTES

Operation of Airport Is Proprietary Function. — In operating and maintaining an airport a county engages in a proprietary or corporate function, in the exercise of which it is subject to tort liability. Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371, rehearing denied, 230 N.C. 759, 53 S.E.2d 313 (1949).

§ 63-58. Municipal jurisdiction exclusive.

Every airport and other air navigation facility controlled and operated by any municipality, or jointly controlled and operated pursuant to the provisions of this Article, shall, subject to federal and State laws, rules, and regulations, be under the exclusive jurisdiction and control of the municipality or municipalities controlling and operating it, and no other municipality in which such airport or air navigation facility is located shall have any police jurisdiction of the same. (1945, c. 490, s. 11.)

CASE NOTES

Cited in Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949).

§§ 63-59 through 63-64: Reserved for future codification purposes.

ARTICLE 7.

State and Federal Aid; Authority of Department of Transportation.

§ 63-65. Authority of Department of Transportation generally; "airport" defined.

(a) The Department of Transportation is hereby authorized, subject to the limitations and conditions of this Article, to provide State aid in form of loans and grants to cities, counties, and public airport authorities of North Carolina for the purpose of planning, acquiring, constructing, or improving municipal, county, and other publicly owned or controlled airport facilities, and to authorize related programs of aviation safety, education, promotions, and long-range planning.

(b) Repealed by Session Laws 1979, c. 148, s. 1. (1967, c. 1006, s. 1; 1975, c. 716, s. 3; 1977, 2nd Sess., c. 1219, s. 39; 1979, c. 148, ss. 1, 5.)

Editor's Note. — This section is former G.S. 113-28.5, as amended and recodified by Session Laws 1979, c. 148, ss. 1 and 5.

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Loans or Grants to Publicly-Owned Airports. — This Article does not permit the Department of Transportation to make loans or grants of State funds to publicly-owned airports for promotional purposes. See opinion of Attorney General to Mr. W.G. Plentl, P.E., Director of

Aeronautics, N.C. Department of Transportation, 53 N.C.A.G. 81 (1984).

§ 63-66. Administration of Article; powers of Department of Transportation.

The Department of Transportation shall carry out the provisions of this Article. In exercising such power, the Department shall:

(1) Promote the further development and improvement of air routes, airport facilities, seaplane bases, heliports, protect their approaches and stimulate the development of aviation, commerce and air facilities. In exercising this power, the Department shall prepare and develop goals, objectives, standards and policies for the most efficient and economical expenditure of State funds as may be appropriated for the purposes of this Article.

(2) Publish and make available to aviation interests, the Federal Aviation Administration, and the people of the State generally, current information regarding such criteria, standards, and policies.

(3) Prepare and keep current a State airport plan and submit annual revisions of that plan to the Federal Aviation Administration.

(4) Make a detailed and thorough study of all applications for State assistance authorized herein and make specific recommendations regarding applications to the Federal Aviation Administration for federal grants.

(5) Develop a plan of priorities and allocations of State funds to be revised annually.

(6) Represent the State before all federal agencies and elsewhere where the aviation interests of the State may be affected.

(7) Subject to the availability of funds for the purpose, promote aviation safety throughout the State and conduct such promotional, educational and other programs as may be necessary to keep the people of the State properly informed with respect to aviation and to further aeronautics generally throughout the State.

In exercising the powers and performing the duties herein provided for by this section, the Department of Transportation shall consult with and seek the advice of the aeronautics council. (1967, c. 1006, s. 1; 1973, c. 507, s. 5; c. 1262, ss. 28, 86; c. 1443, s. 1; 1975, c. 716, s. 3; 1979, c. 148, ss. 2, 5.)

Editor's Note. — This section is former G.S. 113-28.6, as amended and recodified by Session Laws 1979, c. 148, ss. 2 and 5.

§ 63-67. Activities eligible for State aid.

Loans and grants of State funds may be made for the planning, acquisition, construction, or improvement of any airport, seaplane base, or heliport owned or controlled, or which will be owned or controlled by any city, county or public airport authority acting by itself or jointly with any other city or county. An airport, seaplane base, or heliport development project or activity eligible for State aid under this Article shall also be deemed to include projects such as air navigation facilities, aviation easements, and the acquisition of land, lighting, marking, security items, terminal improvements, and the elimination of aviation safety hazards, and the preservation or enhancement of essential air service as defined by the Federal Aviation Act of 1958, as amended. (1967, c. 1006, s. 1; 1973, c. 1443, s. 2; 1977, 2nd Sess., c. 1219, s. 39.1; 1979, c. 148, s. 5; 1987 (Reg. Sess., 1988), c. 1086, s. 164.)

Editor's Note. — This section is former G.S. 113-28.7, as recodified by Session Laws 1979, c. 148, s. 5.

§ 63-68. Limitations on State financial aid.

Grants and loans of funds authorized by this Article shall be subject to the following conditions and limitations:

(1) Loans and grants may be for such projects, activities, or facilities as would in general be eligible for approval by the Federal Aviation Administration or its successor agency or agencies with the exception that the requirement that the airport be publicly owned shall not be applicable. Further, airport terminal and security areas, seaplane bases, and heliports are also eligible for State financial aid.

(2) Loans and grants of State funds shall be limited to a maximum of fifty percent (50%) of the nonfederal share of the total cost of any project for which aid is requested, and shall be made only for the purpose of supplementing such other funds, public or private, as may be available from federal or local sources provided, however, using one hundred percent (100%) State funding in its discretion the Department of Transportation may purchase, install and maintain navigational aids necessary for the safe, efficient use of airspace and may conduct other projects or programs to improve the safety and planning of the air transportation system, including but not limited to, marking serviceable runways and taxiways. Further, the Department of Transportation may contract out the maintenance and installation of state-owned navigational aids when necessary and may give or transfer such aids to the Federal Aviation Administration.

(3) Loans and grants of State funds shall be made from General Assembly appropriations specifically designated for aviation improvement, and from no other source. The Department of Transportation may utilize the State Aviation Grant Funds to cover the direct and indirect costs of administering airport grant projects, other services authorized by this Article including planning, and the costs of services provided by nonadministrative Department of Transportation divisions or other State agencies in connection with these projects.

(4) Notwithstanding the provisions of this section or G.S. 63-67, the Department of Transportation may allow up to ten percent (10%) of State aviation grant funds to be used for maintenance on General Aviation and Air Carrier Airports having a Department of Transportation approved maintenance plan on a seventy-five percent (75%) local — twenty-five percent (25%) State basis.

(5) Notwithstanding the provisions of this section, the Department of Transportation may allow loans and grants of State funds up to eighty percent (80%) of the nonfederal share of the total cost of the development of new or unpaved publicly owned airports identified in the North Carolina Airport System Plan, provided that such funding shall be limited to land acquisition, site preparation, basic runway, taxiway, and apron system construction, together with associated lighting and navigational aids, and construction of the primary airport access road. Electronic navigational aids, terminal buildings, access taxiways, and other items eligible for State airport aid at the rate of fifty percent (50%) of the nonfederal share of project cost shall not be eligible for the foregoing eighty percent (80%) State funding, even though constructed as part of the initial airport development.

(6) Notwithstanding the provisions of this section, the Department of Transportation may allow loans and grants of State funds up to ninety

percent (90%) of the total cost of the development of new or unpaved publicly owned rural airports identified in the North Carolina Airport System Plan and receiving no federal funding. Such State funding shall be limited to land acquisition, site preparation, basic runway, taxiway, and apron system construction, together with associated lighting and navigational aids, and construction of the primary airport access road.

The Department of Transportation shall develop rules and regulations to define rural airports. (1967, c. 1006, s. 1; 1969, c. 293; 1973, c. 1262, s. 28; c. 1443, s. 3; 1975, c. 716, s. 3; 1977, 2nd Sess., c. 1219, s. 39.2; 1979, c. 148, ss. 3, 5; c. 149; 1981, c. 1117, ss. 1, 2; 1983, c. 319; 1983 (Reg. Sess., 1984), c. 1094; 1985, c. 782; 1989, c. 636; 1991, c. 430, s. 1.)

Editor's Note. — This section is former G.S. 113-28.8, as amended and recodified by Session Laws 1979, c. 148, ss. 3 and 5.

§ 63-69. Sources of State funds.

State financial assistance under this Article shall be limited to appropriations of funds made for the purpose by the General Assembly to the Department of Transportation, or to private funds which may become available to the Department for such purpose. (1967, c. 1006, s. 1; 1973, c. 1262, s. 86; 1975, c. 716, s. 3; 1979, c. 148, s. 5.)

Editor's Note. — This section is former G.S. 113-28.9, as recodified by Session Laws 1979, c. 148, s. 5.

§ 63-70. Acceptance, receipt, accounting, and expenditure of State and federal funds.

All North Carolina municipalities, counties and public airport authorities are hereby authorized to accept, receive, receipt for, disburse and expend State funds, and other funds, public and private, which may be made available to them to accomplish any purpose of this Article. All federal funds accepted and expended by any municipality or county shall be accepted, accounted for, and expended according to such terms and conditions as may be prescribed by the United States and not inconsistent with State law. All State funds accepted by any municipality, county or public airport authority shall be accepted, accounted for, and expended according to such terms and conditions as may be prescribed by the Department of Transportation. Unless otherwise prescribed by the federal or State agency from which funds were made available, the chief financial officer of the municipality, county or public airport authority shall deposit all funds received and keep the same in separate funds according to the purpose for which they were received. The accounting of all such funds shall be subject to the municipal and county fiscal control acts. (1967, c. 1006, s. 1; 1973, c. 1262, s. 86; 1975, c. 716, s. 3; 1979, c. 148, s. 5.)

Editor's Note. — This section is former G.S. 113-28.10, as recodified by Session Laws 1979, c. 148, s. 5.

§ 63-71. Receipt of federal grants.

(a) The Department of Transportation is hereby designated the State agency to accept grants for public airport development and improvements made by the United States pursuant to federal law. The Department shall have authority to comply with federal-aid provisions, to obtain and to disburse said grants in accordance with applicable federal laws and regulations, and to enter into contracts with the federal government, municipalities, counties, or airport authorities in connection with said grants. The Department shall also have the authority to enter into contracts with the Federal Aviation Administration or its successor agency for aeronautics related purposes, including joint acquisition and installation of aviation related equipment in accordance with the procurement procedures of the Federal Aviation Administration where such method of acquisition would result in a cost savings to the Department.

(b) The Department of Transportation shall have authority to act as an agent of any public agency which, either individually or jointly with one or more other public agencies, submits to the Secretary of Transportation of the United States an application for federal aid in connection with airport development, improvement, or planning. (1969, c. 1109, ss. 1, 2; 1973, c. 1262, s. 86; 1975, c. 716, s. 3; 1979, c. 148, ss. 4, 5; 1983 (Reg. Sess., 1984), c. 1093.)

Editor's Note. — This section is former G.S. 113-28.11, as amended and recodified by Session Laws 1979, c. 148, ss. 4 and 5.

§ 63-72. Authority of Department of Transportation to operate airports and expend funds therefor.

The Department is authorized to operate state-owned or leased airports or any airport for which the State has obtained a special use permit to operate. The Department may expend funds appropriated for grants to airports for the purpose of operating, maintaining, and improving state-owned or leased airports, or any airport for which the State has obtained a special use permit to operate and maintain. (1969, c. 1109, s. 3; 1973, c. 1262, s. 86; 1975, c. 716, s. 3; 1979, c. 148, s. 5.)

Editor's Note. — This section is former G.S. 113-28.12, as recodified by Session Laws 1979, c. 148, s. 5.

§ 63-73. Letting of contracts.

All contracts that the Department of Transportation may let for construction, repair, maintenance or those services listed in 49 U.S.C. App. § 2210(a)(16) in furtherance of this Article shall be let in accordance with the provisions of G.S. 136-28.1. (1983 (Reg. Sess., 1984), c. 1033, s. 1; 1991, c. 430, s. 2.)

§§ 63-74 through 63-77: Reserved for future codification purposes.

ARTICLE 8.

North Carolina Special Airport Districts Act.

§ 63-78. Short title.

This Article shall be known and may be cited as the "North Carolina Special Airport Districts Act." (1979, c. 689, s. 1.)

§ 63-79. Definitions.

As used in this Article, the following words and terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:

(1) "Aeronautical facilities" means airports, runways, terminals, hangars and other facilities related thereto;

(2) "District" means a special airport district created under the provisions of this Article;

(3) "District board" or "board" means a special airport district board established under the provisions of this Article as the governing body of a district;

(4) "Governing body" means the board, commission, council or other body, by whatever name it may be known, of a unit of local government in which the general legislative powers thereof are vested;

(5) "Unit" or "unit of local government" means counties, cities, towns and incorporated villages. (1979, c. 689, s. 2.)

§ 63-80. Procedure for creation of districts; concurrent resolutions; notice and public hearing; submission of question to voters; publication of notice; actions to set aside proceedings.

(a) Any unit of local government in this State and any one or more other units of local government in this State may, by concurrent resolutions adopted by the governing body of each such unit, create special airport districts under the provisions of this Article which shall be public bodies corporate and politic and political subdivisions of the State. The district shall comprise the territory of the participating units. The district shall be designated "Special Airport District of ____" and shall be of such duration as the participating units shall determine.

(b) Prior to the adoption of any resolutions creating a special airport district, there shall be held a joint public hearing convened by the governing bodies of each of the participating units of government concerning the creation of the proposed special airport district. The presiding officers of the governing body of the units proposing to create such district shall name a time and place within the proposed district at which the public hearing shall be held. The presiding officers shall give prior notice of such hearing at the courthouse of the county or counties within which the district lies and also by publication at least once a week for two successive weeks in a newspaper having general circulation in the proposed district, the first publication to be at least 30 days prior to such hearing. In the event all matters pertaining to the creation of such special airport district cannot be concluded at such hearing, such hearing may be continued to a time and place within the proposed district determined by the governing body of each of the respective units of local government.

(c) Following the joint public hearing but prior to the adoption by a unit of local government of any resolution creating a special airport district, the governing body of such unit may submit the question of the unit's participation in a special airport district to the qualified voters of such unit. The form of the question as stated on the ballot shall be in substantially the following words:

"Shall the governing body of ______ approve ______'s participation in the proposed ________ special airport district?

☐ YES ☐ NO"

If a majority of the qualified voters of the unit who vote thereon approve such participation, the governing body of such unit may adopt a resolution creating the particular special airport district. The election shall be conducted and the results thereof certified, declared and published in the same manner as bond elections within the unit.

(d) Following the adoption of the resolutions creating the district by the governing body of each participating unit, the presiding officer of each such governing body shall cause to be published a single time in a newspaper circulating within the unit a notice in substantially the following form:

The governing body of __________ and the governing body of ______ passed resolutions on ________, _____, and on ________, _____, respectively, creating the Special Airport District of ___________. Notice of the creation of such special airport district is hereby given on the date hereof. Any action or proceeding questioning the validity of the resolutions or the creation of the special airport district must be commenced within 30 days after the publication of this notice.

____
Presiding Officer

(e) Any action or proceeding in any court to set aside the resolutions or the creation of a special airport district, or to obtain any other relief upon the ground that such resolutions or any proceeding or action taken with respect to the creation of such district is invalid, must be commenced within 60 days after the publication of the foregoing notice. After the expiration of such period of limitation, no right of action or defense founded upon the invalidity of the resolutions or the creation of the special airport district shall be asserted nor shall the validity of the resolutions or the creation of such airport district be open to question in any court upon any ground whatever, except in an action or proceeding commenced within such period. (1979, c. 689, s. 3; 1999-456, s. 59.)

§ 63-81. District board; composition, appointment, terms and oaths; organization; meetings; quorum.

(a) Appointment of Board for District. — The board of the special airport district shall be composed of two representatives from each of the participating units of local government appointed annually by the governing body of each of said units of local government, respectively, from among their members at the first regular meeting thereof in January. Each member of the district board must be a member of the governing body of the unit of local government by which he was appointed. Membership on the district board may be held in addition to the offices authorized by G.S. 128-1 or 128-1.1. Said representatives shall hold office from their appointment until their successors are appointed and qualified, except that when any member of the district board ceases for any reason to be a member of the governing body of the unit of local government by which he was appointed, he shall simultaneously cease to be a member of said district board. Upon the occurrence of any vacancy on said district board, the vacancy shall be filled within 30 days after notice thereof by the governing body of the participating unit of local government having a vacancy in its representation. Within 30 days after the expiration of the period set forth in G.S. 63-80 hereof, the governing body of each participating unit of local government shall appoint its representatives to hold office until successors shall be appointed in the manner hereinbefore provided. Each member of the district board, before entering upon his duties, shall take and subscribe an oath or affirmation to support the Constitution and laws of the United States and of this State and to discharge faithfully the duties of his office; and a record of each such oath shall be filed in the minutes of the respective participating units of local government.

(b) District Board Procedures. — The district board shall meet regularly at such places and on such dates as are determined by the board. Special meetings may be called by the chairman on his own initiative and shall be called by him upon request of two or more members of the board. All members shall be notified in writing at least 24 hours in advance of such meeting. A majority of the members of the district board shall constitute a quorum. No vacancy in the membership of the district board shall impair the right of a quorum to exercise all the rights and perform all the duties of the district board. No action, other than an action to recess or adjourn, shall be taken except upon a majority vote of the entire authorized membership of said district board. Each member, including the chairman, shall be entitled to vote on any question.

(c) District Board Officers. — The district board shall elect annually in January from among its members a chairman, vice-chairman, secretary and treasurer. (1979, c. 689, s. 4.)

§ 63-82. Procedure for inclusion of additional units of local government; notice and hearing; actions to set aside proceedings.

(a) If, at any time subsequent to the creation of a special airport district, there shall be filed with the district board a resolution of the governing body of a unit of local government requesting inclusion in the district of such unit of local government, and if the district board shall favor the inclusion in the district of such unit of local government, the district board shall notify the governing body of each of the participating units of local government within which the district lies and shall propose to such governing bodies an appropriate amendment of the concurrent resolutions creating the special airport district.

(b) The procedures set forth in G.S. 63-79 regarding the creation of a special airport district shall apply to the inclusion in such special airport district of additional units of local government.

(c) If all of the participating units of local government agree to the amendment of the concurrent resolutions creating the special airport district to include such unit of local government in the special airport district, the presiding officer of the governing body of each of such participating units of local government, including the unit proposed to be included, shall cause to be published in the manner provided in G.S. 63-79, a notice of the inclusion of such unit of local government.

(d) Any action or proceeding in any court to set aside such amendatory resolutions providing for the inclusion of a unit of local government within a special airport district or to obtain any other relief upon the ground that such amendatory resolutions or any proceeding or action taken with respect to the inclusion of the unit of local government within the district is invalid, must be commenced within 30 days after publication of the notice. After the expiration of such period of limitation, no right of action or defense founded upon the invalidity of the amendatory resolutions or the inclusion of the unit of local government in the district shall be asserted, nor shall the validity of the amendatory resolutions or the inclusion of the unit of local government in the district be open to question in any court upon any ground whatever, except in an action or proceeding commenced within such period. Provided that no such action or proceeding to set aside such amendatory resolutions shall impair or otherwise affect the conclusivity of the concurrent resolutions as provided in G.S. 63-80.

(e) Immediately following the inclusion of any additional unit of local government within an existing district, members representing such additional unit of local government shall be appointed to the district board in the manner provided in G.S. 63-81 hereof.

(f) The annexation by a participating unit of local government of an area lying outside the district shall not be construed as the inclusion within the district of an additional unit of local government within the meaning of the provisions of this section; but any such area so annexed shall become a part of the district and shall be subject to all debts and supplemental tax obligations thereof. (1979, c. 689, s. 5.)

§ 63-83. Powers of districts generally.

Each district shall be deemed to be a public body and body politic and corporate exercising public and essential governmental functions to aid counties, cities, towns, incorporated villages and airport authorities in constructing and financing aeronautical facilities and enhancing the security of airport revenue bonds issued by counties, cities, towns, incorporated villages and airport authorities, and each district is hereby authorized and empowered:

(1) To adopt bylaws for the regulation of its affairs and the conduct of its business not in conflict with this or other laws;
(2) To adopt an official seal and alter the same at pleasure;
(3) To maintain an office at such place or places in the district as it may designate;
(4) To sue and be sued in its own name, plead and be impleaded;
(5) To acquire in the name of the district by gift, purchase or exercise of the power of eminent domain any improved or unimproved lands or rights-in-land and make a conveyance thereof to a county, city, town, incorporated village or airport authority for use as or in connection with aeronautical facilities;
(6) To enter into contracts with any person, firm or corporation, public or private, or any airport authority or other public authority or governmental entity, upon such terms as the district board may determine with respect to aeronautical facilities owned or operated by counties, cities, towns, incorporated villages or airport authorities;
(7) To lend to any airport authority heretofore or hereafter created by statute such sum or sums of money and at such rate of interest and upon such other terms as the district and the airport authority shall contract and agree upon, for the purpose of establishing, enlarging, improving, or maintaining any airport under the control of such airport authority;
(8) To issue bonds or other obligations of the district as hereinafter provided and apply the proceeds thereof to the financing of aeronautical facilities owned or operated by counties, cities, towns, incorporated villages or airport authorities or to the retirement of bonds theretofore issued by such units for such purposes or by the district and to refund, whether or not in advance of maturity or the earliest redemption date, any such bonds or other obligations;
(9) To levy for the life of airport revenue bonds issued by counties, cities, towns, incorporated villages or airport authorities an annual property tax for operating supplements or debt service reserved supplements as hereinafter provided;
(10) To cause taxes to be levied and collected upon all taxable property within the district sufficient to meet the obligations of the district; and
(11) To do all acts and things necessary or convenient to carry out the powers granted by this Article. (1979, c. 689, s. 6.)

§ 63-84. Bonds and notes authorized.

In addition to the powers hereinbefore granted, a district shall have power to issue bonds and notes pursuant to the provisions of the Local Government

Bond Act and the Local Government Revenue Bond Act for the purpose of financing aeronautical facilities and to refund such bonds and notes, whether or not in advance of their maturity or earliest redemption date, and such bond or note issues may include bonds or notes, the proceeds of which are to be applied to the retirement of outstanding bonds or notes of counties, cities, towns, incorporated villages or airport authorities theretofore issued for the purpose of financing aeronautical facilities. (1979, c. 689, s. 7.)

§ 63-85. Taxes for supplementing airport revenue bond projects.

A district shall have power from time to time to levy taxes or cause the levy thereof for operating supplements and debt service reserve supplements with respect to aeronautical facilities under and subject to the Local Government Revenue Bond Act. (1979, c. 689, s. 8.)

§ 63-86. Determination of tax rate by district board; levy and collection of tax; remittance and deposit of funds.

After each assessment for taxes following the creation of the district, the board or boards of commissioners of the county or counties within which the district is located shall file with the district board the valuation of assessable property within the district. The district board shall then determine the amount of funds to be raised by taxation for the ensuing year in excess of available funds to provide for the payment of interest on and principal of all outstanding general obligation bonds as the same shall become due and payable and to pay all obligations incurred by the district in the performance of its lawful undertakings and functions.

The district board shall determine the number of cents per hundred dollars necessary to raise said amount and certify such rate to the appropriate board or boards of commissioners of the appropriate county or counties. The board or boards of commissioners of such county or counties shall include the number of cents per hundred dollars certified by the district board in its next annual levy against all taxable property within the district, which tax shall be collected as other county taxes are collected, and every month the amount of tax so collected shall be remitted to the district board and deposited by the district board in a separate account in a bank in the State. Such levy may include an amount for reimbursing the particular county for the cost to the county of levying and collecting any such taxes. The officer or officers having charge or custody of the funds of the district shall require security for protection of deposits as provided in the Local Government Budget and Fiscal Control Act. (1979, c. 689, s. 9.)

§ 63-87. Bond elections.

Elections for the purpose of authorizing the levy of taxes for the issuance of bonds shall be called by the district board and shall be conducted and the results canvassed by the boards of elections having jurisdiction within the participating units. Such results shall be certified to the district board and such board shall certify and declare the result of the election and publish a statement of the result once as provided in the Local Government Bond Act. (1979, c. 689, s. 10.)

§ 63-88. Advances.

Any participating unit of local government is hereby authorized to make advances, from any moneys that may be available for such purpose, in connection with the creation of the special airport district and to provide for the preliminary expenses of such district. Any such advances may be repaid to such participating units of local government from the proceeds of the bonds issued by such district or from other available funds of the district. (1979, c. 689, s. 11.)

§ 63-89. Inconsistent laws declared inapplicable.

All general, special or local laws, or parts thereof, inconsistent herewith, are hereby declared to be inapplicable, unless otherwise specified in the provisions of this Article. (1979, c. 689, s. 12.)

ARTICLE 9.

Changes in Special Use Airspaces.

§ 63-90. Public purpose declared.

It is the intent of the General Assembly that the legislative branch review and comment on all applications and actions of the Federal Aviation Administration concerning the creation of or changes in special use airspaces for aircraft operation over North Carolina. (1987, c. 494, s. 1.)

§ 63-91. General Assembly review and approval.

The Division of Aviation of the Department of Transportation shall bring before the General Assembly or the Joint Legislative Commission on Governmental Operations all applications to the Federal Aviation Administration and all proposed rule changes by the Federal Aviation Administration for the creation of or changes in special use airspaces, including military operation areas and restricted areas for aircraft operation over North Carolina during the period for public comment. If the General Assembly is in session during that period, information on the pending application or rule change shall be presented to the standing Transportation Committees of the House of Representatives and the Senate. If the comment period occurs when the General Assembly is not in session then the Division of Aviation of the Department of Transportation shall bring the relevant information before the Joint Legislative Commission on Governmental Operations. The General Assembly or the Joint Legislative Commission on Governmental Operations will then review and comment on those applications. (1987, c. 494, s. 1.)

§ 63-92. Effect of General Assembly review.

(a) If the General Assembly or the Joint Legislative Commission on Governmental Operations determines that the proposed change is in the best interests of the citizens of this State, then the Division of Aviation of the Department of Transportation shall notify the Federal Aviation Administration of the General Assembly's official position on the pending application or rule change when it submits the State's official position on the pending application or rule change.

(b) If the General Assembly or the Joint Legislative Commission on Governmental Operations determines that the proposed change is not in the best interests of the citizens of this State, then the Division of Aviation of the Department of Transportation shall notify the Federal Aviation Administration of the General Assembly's official position opposing the pending application or rule change when it submits the State's official position on the pending application or rule change. (1987, c. 494, s. 1.)

connection with the creation of the special airport district and to provide for the preliminary expenses of such district. Any such advances may be repaid to such participating units of local government from the proceeds of the bonds issued by such district or from other available funds of the district. (1979, c. 668, s. 11.)

§ 63-89. Inconsistent laws declared inapplicable.

All general, special or local laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable, unless otherwise specified in the provisions of this Article. (1979, c. 668, s. 12.)

ARTICLE 10.

Changes in Special Use Airspaces.

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Chapter 63A.

North Carolina Global TransPark Authority.

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§ 63A-1. Short title and intent.

This Chapter is the "North Carolina Global TransPark Authority Act." It is enacted in part pursuant to Article V, Section 13, of the North Carolina Constitution with the intent that the body politic and corporate created by this Chapter shall have all power and authority as may be provided to it under that section of the Constitution. (1991, c. 749, s. 1; 1993 (Reg. Sess., 1994), c. 777, s. 4(b).)

Editor's Note. — Session Laws 1991, c. 749, s. 2, provides: "Interpretation of act.

"(a) This act shall not be deemed to exclude additional or alternative methods for executing the provisions of this act, shall be regarded as supplemental to power conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

"(b) This act, being necessary for the health and welfare of the people of this State, shall be liberally construed to effect its purposes.

"(c) Insofar as the provisions of this act are inconsistent with the provisions of any general laws, the provisions of this act shall be controlling.

"(d) Insofar as the provisions of this act are inconsistent with the provisions of any local, special, or private laws, the provisions of those laws are repealed to the extent of the conflict.

"(e) If any provisions of this act or its application are held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable.

"(f) References in this act to specific acts, sections, or Chapters of the General Statutes are intended to be references to such acts, sections, or chapters as they may be amended from time to time by the General Assembly."

Session Laws 1993 (Reg. Sess., 1994), c. 777, s. 4(a), effective July 17, 1994, renamed this Chapter, which had been entitled the North Carolina Air Cargo Airport Authority. In making this change the act misquoted the former name of the chapter. The act was in the coded bill drafting format provided by G.S. 120-20.1. The chapter name has been set out as above at the direction of the Revisor of Statutes.

Session Laws 1993 (Reg. Sess., 1994), c. 777, which amended this section, in s. (4)(*l*) provides: "Any reference to the North Carolina Air Cargo Airport Authority in any other act of the General Assembly is deemed to refer to the North Carolina Global TransPark Authority."

Legal Periodicals. — For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

§ 63A-2. Definitions.

The following definitions apply in this Chapter:

(1) Aircraft. — A contrivance that is used or designed for flight.

(2) Airport project. — Any of the following that is part of or is used in connection with a cargo airport or a facility at a cargo airport complex site and is not a special user project:
  a. Land, equipment, or buildings or other structures, whether located on one or more sites.
  b. The addition to or the rehabilitation, improvement, renovation, or enlargement of any property described in subpart a.

The term includes infrastructure improvements, such as improvements to railroad facilities, roads, bridges, and water, sewer, or electric utilities even if not located on a cargo airport complex site. An airport project may include a facility leased to one or more entities under a true lease.

(3) Authority. — The North Carolina Global TransPark Authority.

(4) Board. — The Board of Directors of the Authority.

(5) Bonds. — The revenue bonds or other interest bearing obligations authorized to be issued by the Authority under this Chapter.

(6) Cargo airport. — Any area of land or water that is designed for the landing and takeoff of aircraft, any appurtenant area used or suitable for airport buildings or other airport facilities, and any appurtenant right-of-way. In addition to facilities for the transportation of cargo by aircraft, a cargo airport may contain facilities to shelter, service, or repair aircraft and facilities to discharge and receive passengers.

(7) Cargo airport complex. — A cargo airport and all other facilities, including private facilities, related to the cargo airport that are located within the cargo airport complex site.

(8) Cargo airport complex site. — The area designated by the Authority as the location of a cargo airport complex. An area may not be so designated by the Authority unless all or a substantial portion of the land on which the cargo airport is located or is to be located is or shall be owned by the Authority or is or shall be controlled by the Authority pursuant to lease, joint operating agreement, or other contractual arrangements.

(9) Costs. — The capital cost of a project, including:
  a. The costs of doing any or all of the following:
    1. Acquiring, constructing, erecting, providing, developing, installing, furnishing, and equipping.
    2. Reconstructing, remodeling, altering, renovating, replacing, refurnishing, and reequipping.
    3. Enlarging, expanding, and extending.
    4. Demolishing, relocating, improving, grading, draining, landscaping, paving, widening, and resurfacing.
  b. The costs of all property, both real and personal and both improved and unimproved, and of plants, works, appurtenances, structures, facilities, furnishings, machinery, equipment, vehicles, easements, water rights, air rights, franchises, and licenses used or useful in connection with the project.
  c. The costs of demolishing or moving structures from land acquired and acquiring land to which the structures are to be moved.
  d. Financing charges, including estimated interest during the acquisition or construction of a project and for one year thereafter.
  e. The costs of services to provide plans, specifications, studies, reports, surveys, and estimates of costs and revenues.
  f. The costs of paying any interim financing, including principal, interest and premium, related to the acquisition or construction of the project.
  g. Administrative and legal expenses and administrative charges.

h. The costs of obtaining bond and reserve fund insurance and investment contracts, of credit-enhancement facilities, liquidity facilities, and interest-rate agreements, and of establishing and maintaining debt service and other reserves.
i. Any other services, costs, and expenses necessary or incidental to the project.

(10) Credit facility. — An agreement with a banking institution, an insurance institution, an investment institution, or other financial institution located inside or outside the United States of America that provides for prompt payment, whether at maturity, presentment, or tender for purchase, redemption, or acceleration, of part or all of the principal or purchase price, redemption premium, if any, and interest on a bond or note issued by the Authority and for repayment of the institution.

(11) Financing agreement. — A written instrument establishing the rights and responsibilities of the Authority and the operator concerning a special user project financed by the issuance of bonds. A financing agreement may be a lease, a lease and lease-back, a sale and lease-back, a lease purchase, an installment sale and purchase agreement, a conditional sales agreement, a secured or unsecured loan agreement, or other similar contract, and may involve property in addition to the property financed with the bonds.

(12) Local Government Commission. — The Local Government Commission of the Department of State Treasurer, established by Article 2 of Chapter 159 of the General Statutes.

(13) Notes. — Revenue notes or revenue bond anticipation notes issued by the Authority under this Chapter.

(14) Obligor. — A person, including an operator, who has entered into a financing or other agreement obligating the person to make payments to the Authority or to holders of bonds issued to finance a special user project.

(15) Operator. — The person entitled to the use or occupancy of a special user project.

(16) Par formula. — A provision or formula to make periodic adjustments in the interest rate of a bond or note, including:
a. A provision for an adjustment to keep the purchase price of the bond or note in the open market as close to par as possible.
b. A provision for an adjustment based on one or more percentages of a prime rate or base rate that may vary or apply for specified periods of time.
c. Any other provision that does not materially and adversely affect the financial position of the Authority and the marketing of the bonds or notes at a reasonable interest cost to the Authority.

(17) Person. — Any person, corporation, partnership, association, trust, or other legal entity.

(18) Project. — An airport project or a special user project.

(19) Revenues. — For a special user project, the term means rents, fees, charges, payments, proceeds, or other income or profit derived from the special user project or from the financing agreement or security document for the special user project. For an airport project, the term means rents, fees, charges, payments, proceeds, or other income or profit derived from the airport project or from any pledge of nontax revenues, appropriation, or payment made by the State or a county in which the cargo airport is located.

(20) Security document. — One or more written instruments establishing the rights and responsibilities of the Authority and the holders of

bonds issued to finance a special user project. A security document may provide for, or be in the form of an agreement with, a trustee for the benefit of the bondholders. A security document may contain an assignment, pledge, mortgage, or other encumbrance of part or all of the Authority's interest in, or right to receive revenues from, a special user project or any other property provided by the operator or other obligor under a financing agreement. A financing agreement and a security document may be combined as one instrument.

(21) Special user project. — Any land, equipment, or buildings or other structures located on one or more sites within a cargo airport complex site and the addition to or the rehabilitation, improvement, renovation, or enlargement of a structure located within a cargo airport complex site when the property is to be used as or in connection with any of the following:

a. An undertaking for industry, including an industrial or a manufacturing factory, mill, assembly plant, or fabricating plant, a freight terminal, an industrial research, development, or laboratory facility, or an industrial processing or distribution facility for industrial or manufactured products.

b. A commercial, processing, mining, transportation, distribution, storage, marine, aviation, or environmental facility or improvement.

c. Any combination of items mentioned in subparts a. and b.

A special user project, during its economic life, is to be principally used by one or more for-profit entities other than as lessee under a true lease. A special user project may include all appurtenances and incidental facilities such as land, a headquarters or office facility, warehouses, distribution centers, access roads, sidewalks, utilities, railway sidings, trucking and similar facilities, parking facilities, waterways, docks, wharves, and other improvements necessary or convenient for the construction, maintenance, and operation of any structure.

(22) True lease. — A lease that has a fair market value rental and is not treated as a financing lease or installment sale for federal tax law purposes. (1991, c. 749, s. 1; 1991 (Reg. Sess., 1992), c. 900, s. 108(a); 1993 (Reg. Sess., 1994), c. 777, s. 4(c).)

§ 63A-3. Creation of Authority and Board.

(a) Creation. — The North Carolina Global TransPark Authority is created as a body corporate and politic having the powers and jurisdiction as provided under this Chapter or any other law. The Authority is a State agency created to perform essential governmental and public functions. The Authority shall be located within the Department of Transportation, but shall exercise all of its powers, including the power to employ, direct, and supervise all personnel, independently of the Secretary of Transportation and, notwithstanding any other provision of law, shall be subject to the direction and supervision of the Secretary only with respect to the management functions of coordinating and reporting.

(b) Board of Directors. — The Authority shall be governed by a Board of Directors. The Board shall consist of at least the following 20 members:

(1) Seven members appointed by the Governor.

(2) Three members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.

(3) Three members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.

(4) The State Treasurer, who shall serve as an ex officio nonvoting member.
(5) The President of the North Carolina System of Community Colleges, provided that the President of the North Carolina Community Colleges may instead appoint to the Board of Directors one member of the board of trustees of a community college or one president of a community college. If such an appointment is made, the appointee shall serve at the pleasure of the President.
(6) The President of The University of North Carolina, provided that the President of the University of North Carolina may instead appoint to the Board of Directors one member of the board of trustees of a constituent institution of The University of North Carolina, or one chancellor of a constituent institution of The University of North Carolina. If such an appointment is made, the appointee shall serve at the pleasure of the President.
(7) The Chairman of the State Ports Authority.
(8) One member appointed by the board of county commissioners of any county in which the cargo airport complex site is located.
(9) One member appointed by the city council of the city which is a county seat of any county in which the cargo airport complex site is located.
(10) The Commissioner of Agriculture.

Within 90 days after the Authority acquires land, either by purchase or condemnation, for development as part of a cargo airport complex site, the board of county commissioners in any county in which a portion of the land is located and the city council of the city which is the county seat of the county shall, by resolution, each appoint a person to serve as a member of the Board. If the board of commissioners or the city council appoints one of its own members to the Board, the county commissioner or the member of the city council who is appointed is considered to be serving on the Board as an ex officio voting member as part of the duties of the office of county commissioner or the office of city council member, in accordance with G.S. 128-1.2, and is not considered to be serving in a separate office. Notwithstanding G.S. 116-31(h), a member of the board of trustees of a constituent institution of The University of North Carolina appointed to the Board of Directors under subdivision (6) of this subsection may concurrently serve on the board of trustees and the Board of Directors. Notwithstanding any other provision of law, the Governor may serve on the Board of Directors by his own appointment on or after July 16, 1991, under subdivision (1) of this subsection.

As the holder of an office, each member of the Board shall take the oath required by Article VI, § 7 of the North Carolina Constitution before assuming the duties of a Board member.

(c) Selection Criteria. — In making appointments to the Board, the Governor and the General Assembly shall give consideration to the geographical representation of the Western region, the Piedmont region, and the Eastern region of the State. In addition, at least one member appointed by the Governor shall be representative of business, at least one shall be representative of agribusiness, at least one shall be representative of environmental interests, and at least one shall be representative of industrial interests.

(d) Terms. — The terms of the initial members appointed by the Governor or the General Assembly end June 30, 1993. The initial term of a member appointed by a board of county commissioners or by a city council ends on the second June 30 after the appointment. Subsequent appointments by a board of county commissioners or by a city council shall be for terms of four years. The seven members appointed by the Governor for subsequent terms shall be appointed for terms of two years ending on June 30 of each odd-numbered year. The six members appointed by the General Assembly for subsequent terms shall be divided into two classes. The first class shall consist of three persons, two of whom shall be appointed upon recommendation of the Speaker of the House of Representatives and one of whom shall be appointed upon recommendation of the President Pro Tempore of the Senate, to serve an initial term expiring June 30, 1995, with subsequent terms expiring each fourth June 30th thereafter. The second class shall consist of three persons, two of whom shall be appointed upon recommendation of the President Pro Tempore of the Senate and one of whom shall be appointed upon recommendation of the Speaker of the House of Representatives, to serve an initial term expiring June 30, 1997, with subsequent terms expiring each fourth June 30th thereafter.

(e) Chair and Vice-chair of the Board. — The Governor shall designate one of the members appointed by the Governor as the Chair of the Board. The Governor shall convene the first meeting of the Board, at which time the members of the Board shall elect from their membership a Vice-chair of the Board.

(f) Vacancies. — All members of the Board shall remain in office until their successors are appointed and qualify. A vacancy in an appointment made by the Governor or a board of county commissioners shall be filled by the Governor or the board of county commissioners for the remainder of the unexpired term. A vacancy in an appointment made by the General Assembly shall be filled in accordance with G.S. 120-122. A person appointed to fill a vacancy shall qualify in the same manner as a person appointed for a full term.

(g) Removal of Board Members. — The Governor may remove any member of the Board for misfeasance, malfeasance, or nonfeasance in accordance with G.S. 143B-13(d). The person who appointed a member of the Board may remove the member for using improper influence in accordance with G.S. 143B-13(c).

(h) Organization of the Board. — The Board shall adopt bylaws with respect to the calling of meetings, quorums, voting procedures, the keeping of records, and other organizational and administrative matters as the Board may determine. A quorum shall consist of a majority of the members of the Board. No vacancy in the membership of the Board shall impair the right of a quorum to exercise all rights and to perform all the duties of the Board and the Authority.

(i) Compensation of the Board. — No part of the revenues or assets of the Authority shall inure to the benefit of or be distributable to the members of the Board or officers or other private persons. The members of the Board shall receive no salary for their services but shall be entitled to receive per diem and allowances in accordance with the provisions of G.S. 138-5.

(j) Treasurer. — The Board shall select the Authority's treasurer. The Board shall require a surety bond of the appointee in the amount as the Board may fix, and the premium shall be paid by the Authority as a necessary expense of the Authority.

(k) Executive Director and other Employees. — The Board shall appoint an executive director, whose salary shall be fixed by the Board, to serve at its pleasure. The executive director or a person designated by the executive director shall appoint, employ, dismiss, and, within the limits of available funding, fix the compensation of other employees as considered necessary.

(*l*) Office. — The Board shall establish an office for the transaction of the Authority's business at the place the Board finds advisable or necessary to implement the provisions of this Chapter. (1991, c. 749, s. 1; 1991 (Reg. Sess., 1992), c. 900, s. 108(b)-(e); 1993 (Reg. Sess., 1994), c. 777, s. 4(d), (d1).)

§ 63A-4. Powers of the Authority.

(a) The Authority shall have all of the powers necessary to execute the provisions of this Chapter, which shall include at least the following powers:

(1) The powers of a corporate body, including the power to sue and be sued, to make contracts, to adopt and use a common seal, and to alter the adopted seal as needed.
(2) To establish, finance, purchase, construct, operate, and regulate cargo airport complexes and to own, finance, lease, sell, or manage real or personal property.
(3) To charge and collect fees and rents for the use of the cargo airport complexes or for services rendered in the operation of the complexes.
(4) To contract and enter into agreements with the State, local governments, other authorities of North Carolina, and other states for the interchange of business and to facilitate the business of cargo airport complexes.
(5) To rent, lease, purchase, acquire, own, encumber, dispose of, or mortgage real or personal property, including the power to acquire property by eminent domain pursuant to G.S. 63A-6.
(6) To establish, construct, purchase, maintain, equip, and operate any structure or facilities to aid commerce associated with a cargo airport complex, including the construction of highways, bridges, shipping facilities, electronic cargo transfer systems, mass transit systems, and other transportation facilities. Before constructing a highway or a bridge, the Authority shall consult with the Department of Transportation.
(7) To create and operate agencies and departments needed to implement this Chapter.
(8) To pay all necessary costs and expenses in the formation, organization, administration, and operation of the Authority.
(9) To apply for, accept, and administer loans and grants of money from any federal agency, from the State or its political subdivisions, or from any other public or private sources available, to expend the money in accordance with the requirements imposed by the lender or donor, and to give any evidences of indebtedness that are required. No indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State or its political subdivisions, and no indebtedness of the Authority shall involve or be secured by the faith, credit, or taxing power of the State or its political subdivisions.
(10) To adopt, alter, or repeal its own bylaws or rules implementing the provisions of this Chapter.
(11) To execute financing agreements, security documents, and other instruments necessary in exercising its power under this Chapter.
(12) To fix, charge, collect, pledge, or assign revenues of the Authority.
(13) To employ consulting engineers, architects, attorneys, real estate counselors, appraisers, and other consultants and employees as may be required in the judgment of the Board and to fix and pay their compensation from funds available to the Authority, and, when approved by the Local Government Commission under G.S. 159-123(e) and (f) as if the Authority were an issuing unit, to select and retain financial consultants, underwriters, and bond attorneys in connection with the issuance of any bonds and to pay for their services out of the proceeds of any bond issue for which their services were performed.
(14) To issue bonds or notes of the Authority as provided under this Chapter to pay the costs of a project.
(15) To issue revenue refunding bonds of the Authority as provided under this Chapter.
(16) To procure and maintain adequate insurance or otherwise provide for adequate protection to indemnify the Authority and its officers,

directors, agents, employees, adjoining property owners, or the general public against loss or liability resulting from any act or omission by or on behalf of the Authority.

(17) To purchase or finance real or personal property in the manner provided for cities and counties under G.S. 160A-20.

(18) To enter into agreements with counties pursuant to G.S. 63A-15.

(19) To exercise the powers granted political subdivisions under Article 4, Chapter 63 of the General Statutes, and to exercise the powers granted to municipalities and counties under Article 6, Chapter 63 of the General Statutes, governing public airports and related facilities.

(20) To act as agent for the United States of America or any agency of the United States in any matter within the purpose of this Chapter. When acting as agent for the United States or one of its agencies, the Authority shall keep the interest of the State paramount.

(21) With the approval of any unit of local government, to use officers, employees, agents, and facilities of the unit of local government for the purposes and upon the terms as may be mutually agreeable.

(22) To issue obligations, without Local Government Commission approval, to finance the purchase or acquisition of land or options on land, or the construction of buildings or facilities. An obligation may be secured by the land purchased or acquired, or by the buildings or facilities constructed, may be unsecured, or may be made payable from revenues, the proceeds of notes, bonds, or the sale of any lands, the proceeds of any bonds of the State or moneys appropriated by the State, or any other available moneys of the Authority. An obligation to finance the purchase or acquisition of land or options on land, or the construction of buildings or facilities, may be sold only to the Escheat Fund as an investment of the Fund pursuant to G.S. 147-69.2(b)(11).

(23) To receive and use appropriations from the State, including an appropriation from the proceeds of State general obligation bonds or notes.

(b) To execute the powers provided in subsection (a) of this section, the Board shall determine the policies of the Authority by majority vote of the members of the Board present and voting, a quorum having been established. Once a policy is determined, the Board shall communicate it to the executive director, who shall have the sole and exclusive authority to execute the policy of the Authority. No member of the Board shall have the responsibility or authority to give operational directives to any employee of the Authority other than the executive director. (1991, c. 749, s. 1; 2000-67, s. 25.3.)

Editor's Note. — Session Laws 2004-124, s. 30.22(a), provides: "From funds borrowed from the Escheat Fund pursuant to G.S. 63A-4(a)(22) and G.S. 147-69.2(b)(11), the North Carolina Global TransPark Authority shall make a payment of two million five hundred thousand dollars ($2,500,000) to the Escheat Fund as soon as feasible after the effective date of this section and shall not expend or obligate any other funds that were borrowed from the Escheat Fund except after consultation with the Joint Legislative Commission on Governmental Operations on its intent to expend or obligate the funds."

Session Laws 2004-124, s. 30.22(c), provides: "All interest on funds borrowed from the Escheat Fund pursuant to G.S. 63A-4(a)(22) and G.S. 147-69.2(b)(11) and on account with the State Treasurer for the benefit of the North Carolina Global Trans Park Authority may only be used to repay the loan."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5 contains a severability clause.

Session Laws 2004-138, s. 1.1, provides: "Except after consultation with the Joint Legislative Commission on Governmental Operations on its intent to expend or obligate funds, the North Carolina Global TransPark Authority shall not expend or obligate any funds that were borrowed from the Escheat Fund pursuant to G.S. 63A-4(a)(22) and G.S. 147-69.2(b)(11), or any interest earned on those funds."

§ 63A-5. Taxation of property of Authority.

Property owned by the Authority is exempt from taxation in accordance with Article V, § 2 of the North Carolina Constitution. Property that is part of or is located on a cargo airport complex site and is not owned by the Authority, including property that is part of a special user project, is not exempt from tax due to its location. (1991, c. 749, s. 1.)

§ 63A-6. Acquisition, disposition, or exchange of real property.

(a) General. — The Authority may acquire real property by purchase, negotiation, gift, devise, or eminent domain. Any acquisition by eminent domain by the Authority of real property or an estate or interest in real property must be reviewed and approved by the Council of State before it can become effective. When the Authority acquires real property owned by the State, the Secretary of the Department of Administration shall execute and deliver to the Authority a deed transferring fee simple title to the property to the Authority.

(b) Eminent Domain. — To exercise the power of eminent domain, the Authority shall commence a proceeding in its name and may follow any procedure set by law by which a State agency or a political subdivision of the State may exercise the power of eminent domain. The Authority's exercise of the power of eminent domain is subject to review and approval by the Council of State.

The Authority's power of eminent domain applies to all property, including property that is owned by a State agency or a political subdivision of the State and is already devoted to a specific use other than as an airport established under Chapter 63 of the General Statutes. The Authority may acquire by eminent domain property that is owned by a political subdivision and is used as an airport established under Chapter 63 of the General Statutes only after obtaining the approval of the governing body of each political subdivision that established the airport. The Authority may not begin an eminent domain proceeding before it obtains the Council of State's approval for the acquisition of the property to be condemned.

(c) Exchange. — The Authority may exchange any property it acquires for other property usable in carrying out the powers conferred on the Authority and also, upon the payment of just compensation, may remove a building, a terminal, or another structure from land needed for its purposes and reconstruct the structure on another location. The Authority may not use the power of eminent domain to acquire property for exchange.

(d) Site Selection. — In selecting a site for a cargo airport complex, the Authority shall consider comprehensive plans and land-use regulations adopted by local governments and the capability of local governments to provide services as specified in subdivisions (1) through (3) of this subsection. This subsection shall not be construed to require the Authority to comply with any local ordinance, regulation, or plan except as may be otherwise specifically provided by federal or State law, regulation, or rule. Plans, regulations, and capabilities to be considered are:

(1) Local comprehensive plans, including education, emergency response, law enforcement, water supply, stormwater management, solid waste management, and wastewater treatment.

(2) Local land use regulations, including appearance, floodplain zoning, subdivision zoning, and watershed protection elements.

(3) The capability of local governments to provide services and manage growth and development related to establishment of a cargo airport complex. (1991, c. 749, s. 1; 1991 (Reg. Sess., 1992), c. 900, s. 108(f), (g).)

§ 63A-7. Police power.

(a) The Authority has jurisdiction within a cargo airport complex site. The Board may adopt ordinances regulating traffic and parking within the cargo airport complex site and for the safety and welfare of those using the cargo airport complex. An ordinance adopted under this subsection shall be recorded in the minutes of the Board. A copy of the ordinance shall be filed in the office of the Attorney General of North Carolina and shall be posted at appropriate places in the cargo airport complex site. Any person who violates an ordinance of the Authority is guilty of a Class 3 misdemeanor.

(b) The executive director of the Authority may designate employees of the Authority as special police officers. A person designated as a special police officer has jurisdiction within the cargo airport complex site to arrest a person who violates any federal or State law or any ordinance of the Authority and has other powers to the same extent as police officers of incorporated municipalities. An employee designated as a special police officer shall take the oath of a law enforcement officer set out in G.S. 11-11. (1991, c. 749, s. 1; 1993, c. 539, s. 499; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 63A-8. Authority funds.

All Authority funds shall be deposited in one or more banks to be designated by the Board. Funds of the Authority shall be paid out only upon warrants signed by the treasurer or assistant treasurer of the Authority and countersigned by the chair, the acting chair, or the executive director. No warrants shall be drawn or issued disbursing any of the funds of the Authority except for a purpose authorized by this Chapter and only when the account or expenditure has been audited and approved by the Authority or its executive director. (1991, c. 749, s. 1.)

§ 63A-9. Bonds and notes.

(a) The Authority may provide for the issuance, at one time or from time to time, of bonds and notes, including bond anticipation notes and renewal notes, of the Authority to carry out its corporate purposes including financing the costs of projects. The principal of and interest on the bonds or notes shall be payable from funds provided under this Chapter for their payment. A bond anticipation note may be made payable from the proceeds of bonds or renewal notes or, in the event bond or renewal note proceeds are not available, from any available Authority revenues or other funds provided for this purpose. Bonds and notes may also be paid from the proceeds of any credit facility.

All bonds, notes, or refunding bonds or notes of the Authority are subject to this section and G.S. 63A-10. All bonds, notes, or refunding bonds or notes to finance or refinance a special user project are also subject to G.S. 63A-11.

The bonds and notes of each issue shall be dated and may be made redeemable prior to maturity at the option of the Authority or otherwise, at one or more prices, on one or more dates, and upon the terms and conditions set by the Authority. The bonds or notes may also be made payable from time to time on demand or tender for purchase by the owner upon terms and conditions set by the Authority.

A bond or note shall bear interest at a rate or rates, including variable rates, as determined by the Local Government Commission with the approval of the Authority. A bond or note may be secured by a reserve fund created for that purpose and funded from proceeds of the bond or note, revenues, or any other source of funds available to the Authority.

(b) In fixing the details of bonds or notes, the Authority may provide that the bonds or notes may:

(1) Be payable from time to time on demand or tender for purchase by the owner of the bond or note if a credit facility supports the bond or note, unless the Local Government Commission specifically determines that a credit facility is not required because the absence of a credit facility will not materially and adversely affect the financial position of the Authority and the marketing of the bonds or notes at a reasonable interest cost to the Authority.

(2) Be additionally supported by a credit facility.

(3) Be made subject to redemption or a mandatory tender for purchase prior to maturity.

(4) Be capital appreciation bonds.

(5) Bear interest at a rate or rates that may vary, including variations permitted pursuant to a par formula.

(6) Be made the subject of a remarketing agreement whereby an attempt is made to remarket the bonds or notes to new purchasers prior to their presentment for payment to the provider of the credit facility or to the Authority.

(c) Notes and bonds shall mature at the times determined by the Authority, not to exceed 40 years from the date of issue. The Authority shall determine the form and manner of execution of a bond or note, including any interest coupons to be attached to the bond or note. The Authority shall fix the denominations and places of payment of principal and interest of the bond or note. The principal of and interest on a bond or note may be paid at any bank or trust company, whether located inside or outside the United States of America.

(d) The validity of a bond, note, or coupon that has the signature or facsimile signature of a person who was an officer when the bond, note, or coupon was signed or the facsimile signature attached but who is not that officer when the bond, note, or coupon is delivered is not affected by the change in officers. A bond, note, or coupon may bear the signature or facsimile signature of a person who will be the proper officer to sign the bond, note, or coupon when it is executed but who is not the officer on the date of the bond, note, or coupon.

(e) The Authority may provide for any of the following:

(1) Authentication of a bond or note by a trustee or other authenticating agent.

(2) Issuance of a bond or note as a certificated obligation, an uncertificated obligation, or both.

(3) Issuance of a bond or note in coupon form, in registered form, or both.

(4) Registration of a coupon bond or note as to principal alone or as to both principal and interest.

(5) The reconversion of a bond or note registered as to both principal and interest into a coupon bond or note.

(6) The interchange of registered and coupon bonds or notes.

(7) A system for registration in accordance with Chapter 159E of the General Statutes.

(8) Replacement of a bond or note that has been mutilated, lost, or destroyed.

(f) The Authority may not issue a bond or note under this Chapter, other than an obligation permitted under G.S. 63A-4(a)(22), unless its issuance is approved by the Local Government Commission, and it is sold by the Local

Government Commission. To obtain approval of a bond or note, the Authority shall file an application for approval with the Local Government Commission. The application shall contain the information required by the Local Government Commission.

In determining whether to approve a proposed bond or note issue of the Authority, the Local Government Commission shall consider the following:

(1) For bonds or notes to finance airport projects, the criteria for its approval of revenue bonds under G.S. 159-86.

(2) For bonds or notes to finance special user projects, the criteria used for its approval of industrial bonds under G.S. 159C-8.

(3) The effect of the proposed financing upon any proposed or scheduled sale of obligations by the State, another State agency, or a unit of local government.

The Local Government Commission shall approve the proposed bond or note issue if it determines that the proposed financing for the issue meets the criteria and will effect the purposes of this Chapter.

When the Local Government Commission approves a bond or note issue of the Authority, the Authority may submit a written request to the Local Government Commission to sell the approved bonds or notes. Upon receiving a written request, the Local Government Commission shall consult with the Authority on the manner in which the bonds or notes will be sold and the price or prices at which the bonds or notes will be sold. With the approval of the Authority, the Local Government Commission shall sell the bonds or notes either at public or private sale in the manner and at the prices determined to be in the best interest of the Authority and to effect the purposes of this Chapter.

Bonds or notes may be issued under this Chapter without obtaining, except as otherwise expressly provided in this Chapter, the consent of any department, division, commission, board, body, bureau, or other agency of the State or without any other proceedings or conditions except as specifically authorized by this Chapter or by the provisions of the resolution authorizing the issuance of, or any trust agreement securing, the bonds or notes.

(g) Each bond or note that is represented by an instrument shall contain a statement signed by the Secretary of the Local Government Commission, or an assistant designated by the Secretary, certifying that the issuance of the bond or note has been approved under this Chapter. The signature may be a manual signature or a facsimile signature, as determined by the Local Government Commission. Each bond or note that is not represented by an instrument shall be evidenced by a writing relating to the obligation that identifies the obligation or the issue of which it is a part, contains the signed statement certifying approval of the Local Government Commission that is required on an instrument, and is filed with the Local Government Commission. A certification of approval by the Local Government Commission is conclusive evidence that a bond or note complies with this Chapter.

(h) The proceeds of a bond or note shall be used solely for the purposes for which the bond or note was issued and shall be disbursed in accordance with the resolution authorizing the issuance of the bond or note and with any trust agreement securing the bond or note.

(i) Prior to the preparation of definitive bonds, the Authority may issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when the bonds have been executed and are available for delivery.

(j) The Authority may secure a bond or note issued under this Chapter by a trust agreement between the Authority and a corporate trustee. The corporate trustee may be any trust company or bank having the powers of a trust company inside or outside the State. The Authority may secure a bond or note issued under this Chapter by a deed of trust. The trustee of the deed of trust may be an individual who is a resident of the State. A bank or trust company that is incorporated in this State and is a depository of the proceeds of obligations, revenues, or other money of an Authority may furnish indemnifying bonds or pledge securities required by the Authority.

The pledge of any assets, income, or revenues of the Authority to the payment of the principal of or the interest on any obligations of the Authority is binding from the time the pledge is made, and any assets, income, or revenues of the Authority are immediately subject to the lien of the pledge without any physical delivery or other act. The lien created by a pledge is binding against all persons who have claims of any kind against the Authority, regardless of whether they have notice of the lien.

(k) A resolution authorizing the issuance of a bond or note and a trust agreement securing a bond or note may provide that any moneys held under the resolution or trust agreement may be temporarily invested pending disbursement. Any officer with whom, or any bank or trust company with which, the moneys are deposited is considered a trustee of the moneys and must hold and apply the moneys for their stated purpose in accordance with this Chapter and the resolution or trust agreement. The Authority may invest any moneys, other than the proceeds of bonds issued to finance special user projects, as allowed in G.S. 147-69.1 for investments of the State Treasurer or in this subsection. The proceeds of bonds issued to finance special user projects may be invested as provided in the security document for the bonds.

In connection with or incidental to the acquisition or carrying of any investment relating to bonds, program of investment relating to bonds, or carrying of bonds, the Authority may, with the approval of the Local Government Commission, enter into a contract to place the investment or obligation of the Authority, as represented by the bonds, investment, or program of investment and the contract or contracts, in whole or in part, on an interest rate, currency, cash-flow, or other basis, including the following:

(1) Interest rate swap agreements, currency swap agreements, insurance agreements, forward payment conversion agreements, and futures.
(2) Contracts providing for payments based on levels of, or changes in, interest rates, currency exchange rates, or stock or other indices.
(3) Contracts to exchange cash flows or a series of payments.
(4) Contracts to hedge payment, currency, rate, spread, or similar exposure, including interest rate floors or caps, options, puts, and calls.

The Authority may enter a contract of this type in connection with, or incidental to, entering into or maintaining any agreement that secures bonds. A contract shall contain the payment, security, term, default, remedy, and other terms and conditions the Board considers appropriate. The Authority may enter a contract of this type with any person after giving due consideration, where applicable, of the person's credit-worthiness as determined by a rating by a nationally recognized rating agency or any other criteria the Board considers appropriate. In connection with, or incidental to, the issuance or carrying of bonds, or the entering of any contract described in this subsection, the Authority may enter into credit enhancement or liquidity agreements, with payment, interest rate, termination date, currency, security, default, remedy, and other terms and conditions as the Authority determines. Proceeds of bonds and any moneys set aside and pledged to secure payment of bonds or any of the contracts entered into under this subsection may be pledged to and used to service any of the contracts entered into under this section.

(*l*) Bonds and notes are exempt from all State, county, and municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, excluding inheritance and gift taxes, income taxes on the gain from the transfer of bonds and notes, and franchise taxes. The interest on bonds and notes is not subject to taxation as income.

(m) Bonds or notes issued under this Chapter shall not constitute a debt secured by a pledge of the faith and credit of the State or a political subdivision of the State and shall be payable solely from the revenues, income, or assets of the Authority that are pledged for their payment. The face of each bond or note issued shall contain a statement that the Authority is obligated to pay the bond or note or the interest on the bond or note only from the revenues, income, or assets pledged in payment of the bond or note and that neither the faith and credit nor the taxing power of the State or any political subdivision of the State is pledged in payment of the principal of or the interest on the bond or note.

(n) The State pledges to the holder of a bond or note issued under this Chapter that, as long as the bond or note is outstanding and unpaid, the State will not limit or alter the power the Authority had when the bond or note was issued in a way that impairs the ability of the Authority to produce revenues sufficient with other available funds to do all of the following:

(1) Maintain and operate the project for which the bond or note was issued.
(2) Pay the principal of, interest on, and redemption premium, if any, of the bond or note.
(3) Fulfill the terms of an agreement with the holder.

The State further pledges to the holder of a bond or note issued under this Chapter that the State will not impair the rights and remedies of the holder concerning the bond or note.

(o) Obligations issued under this Chapter are made securities in which all public officers and public bodies of the State and its political subdivisions, and all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees, and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. The obligations are made securities that may properly and legally be deposited with and received by any State or municipal officer or any agency or political subdivision of the State for any purpose for which the deposit of bonds, notes, or obligations of the State is now or may be authorized by law. (1991, c. 749, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 16; 1995, c. 46, s. 2.)

§ 63A-10. Refunding bonds or notes.

(a) Issuance. — The Authority may issue refunding bonds or notes for the purpose of refunding any outstanding bonds or notes issued under this Chapter, including any redemption premium on the bonds or notes and any interest accrued or to accrue to the date of redemption. Refunding bonds or notes shall be issued in accordance with the same procedures and requirements as bonds or notes. Refunding bonds or notes may be sold or exchanged for outstanding bonds and notes issued under this Chapter.

Refunding bonds or notes may have different interest rates and maturities than the bonds or notes being refunded. The proceeds of refunding bonds or notes may be applied to any of the following:

(1) The payment, purchase, and retirement of the bonds or notes being refunded by direct application to the payment, purchase, and retirement.
(2) The payment, purchase, and retirement of the bonds or notes being refunded by the deposit in trust of the proceeds.
(3) The payment of any expenses incurred in connection with the refunding.
(4) For any other uses not inconsistent with the refunding.

(b) Proceeds. — The proceedings providing for the issuance of refunding bonds or notes may limit the investments in which the proceeds of a particular refunding issue may be invested. Unless prohibited by the proceedings, the proceeds of refunding bonds or notes that are deposited in trust for the payment, purchase, and retirement of outstanding bonds or notes may be invested in any of the following:

(1) Direct obligations of the United States of America.

(2) Obligations whose principal and interest are guaranteed by the United States of America.

(3) Evidences of ownership of a proportionate interest in an obligation that is described in subdivisions (1) or (2) of this subsection and is held in a custodial capacity by a bank or trust company organized under the laws of the United States of America or a state.

(4) Obligations of the State or a unit of local government of the State when payment of the principal of and interest on the obligations has been provided for by depositing with a trustee or other escrow agent obligations that meet all of the following:

a. Are described in subdivisions (1), (2), or (3) of this subsection.

b. When due and payable, will provide enough money when added to any other money held in trust for this purpose to pay the principal of, premium, if any, and interest on the State or local obligations.

c. Are rated in the highest category by Standard & Poor's Corporation and Moody's Investors Service, Inc.

(5) Obligations of the State or a unit of local government when payment of the principal and interest on the obligations is insured by a bond insurance company rated in the highest category by Standard & Poor's Corporation and Moody's Investors Service, Inc.

(6) Full faith and credit obligations of the State or a unit of local government of the State that are rated in the highest category by Standard & Poor's Corporation and Moody's Investors Service, Inc.

(7) Any obligations or investments in which the State Treasurer is then authorized to invest funds of the State.

(c) Scope. — This section does not limit any of the following:

(1) The period for which the proceeds of refunding bonds or notes may be held in trust to retire the bonds or notes that are being refunded and have not matured, are not redeemable or, if redeemable, have not been called for redemption.

(2) The power to issue bonds or notes for the combined purpose of refunding outstanding bonds or notes and of providing funds for any other corporate purpose. (1991, c. 749, s. 1.)

§ 63A-11. Special user project bonds or notes.

(a) The Authority may, subject to the provisions of this section, G.S. 63A-9, and, if applicable, G.S. 63A-10, issue, at one time or from time to time, bonds and notes to finance or refinance special user projects. Bonds and notes to finance or refinance special user projects may be sold irrespective of the interest limitations in G.S. 24-1.1.

(b) Bonds or notes issued by the Authority under this section are special, limited obligations of the Authority payable solely from the following:

(1) The Authority's revenues, income, or assets that it specifically assigns or pledges for payment.

(2) The funds, collateral, and undertakings of a private party that are assigned or pledged by that party.

(c) Bonds and notes issued under this section may be secured by one or more agreements, including foreclosable deeds of trust and other trust instruments. An agreement may pledge and assign to the trustee or the holders of its obligations the assets, revenues, and income provided for the security of the bonds or notes, including proceeds from the sale of any special user project or part thereof, insurance proceeds, condemnation awards, and third-party agreements, and may convey or mortgage the project and other property and collateral to secure a bond issue.

The Authority may subordinate the bonds or notes or its rights, assets, revenues, and income derived from any special user project to any prior, contemporaneous, or future securities or obligations or lien, mortgage, or other security interest.

(d) Notwithstanding any other provision of law, the Authority may agree that all contracts relating to the acquisition, construction, installation, and equipping of the special user project shall be solicited, negotiated, awarded, and executed by the private parties for which the Authority is financing the special user project or any agents of the private parties subject only to approval by the Authority as the Authority may require. The Authority may, out of the proceeds of bonds or notes, make advances to or reimburse the private parties or their agents for all or a portion of the costs incurred in connection with the contracts.

(e) Repealed by Session Laws 2001-218, s. 5, effective July 1, 2001. (1991, c. 749, s. 1; 1993, c. 553, s. 23; 2000-169, s. 37; 2001-218, s. 5.)

§ 63A-12. Public hearing requirements.

To the extent federal tax law requires public hearings to be held with respect to the issuance of bonds to finance projects, the hearings may be called for by the executive director and held before one or more members of the Board of the Authority. The hearings may be held at any place within the State pursuant to public notice given in accordance with current federal tax regulations. To the extent federal tax law requires approval following the hearing of the issuance of bonds to finance a project, the approval shall be sought from the Governor following a report to the Governor of the results of the public hearing accompanied by information relating to the purposes for the proposed bond issue. (1991, c. 749, s. 1.)

§ 63A-13. Financing agreements.

(a) Every financing agreement shall contain provisions ensuring all of the following:

(1) That the amounts payable under the financing agreement are sufficient to pay, when due, the principal of, redemption premium, if any, and interest on the bonds issued to pay the costs of the special user project.

(2) That the operator pays all costs incurred by the Authority in connection with the financing and administration of the special user project, except costs paid out of the proceeds of bonds or otherwise, including, but without limitation, insurance costs, the cost of administering the financing agreement and the security document, and the fees and expenses of the fiscal agent or trustee, paying agents, attorneys, consultants, and others.

(3) That the operator pays all the costs and expenses of operation, maintenance, and upkeep of the special user project.

(4) That the operator's obligation to provide for the payment of the bonds in full is not subject to cancellation, termination, or abatement until the payment of the bonds or provision for their payment is made.

(b) The financing agreement, if in the nature of a lease agreement, shall either provide that the obligor shall have an option to purchase, or require that the obligor purchase, the special user project upon the expiration or termination of the financing agreement subject to the condition that payment in full of the principal of, and the interest and any redemption premium on, the bonds, or provision therefor, shall have been made.

(c) The financing agreement may provide the Authority with rights and remedies in the event of a default by the obligor including, without limitation, any one or more of the following:

(1) Acceleration of all amounts payable under the financing agreement.
(2) Reentry and repossession of the special user project.
(3) Termination of the financing agreement.
(4) Leasing or sale of foreclosure of the special user project to others.
(5) Taking whatever actions at law or in equity may appear necessary or desirable to collect the amounts payable under, and to enforce covenants made in, the financing agreement.

(d) The Authority's interest in a special user project under a financing agreement may be that of owner, lessor, lessee, conditional or installment vendor, mortgagor, mortgagee, secured party, or otherwise, but the Authority need not have any ownership or possessory interest in the special user project.

(e) The Authority may assign all or any of its rights and remedies under the financing agreement to the trustee or the bondholders under a security document.

(f) The financing agreement may contain additional provisions as in the determination of the Board are necessary or convenient to effectuate the purposes of this Chapter. When, as provided in G.S. 63A-9 and G.S. 63A-11, the Local Government Commission approves the issuance of bonds by the Authority, the Commission shall also approve all financing agreements and security documents. (1991, c. 749, s. 1; 1997-456, s. 27.)

§ 63A-14. Security documents.

Bonds issued under the provisions of this Chapter may be secured by a security document which may be a trust instrument between the Authority and a bank or trust company or individual within the State, or a bank or a trust company outside the State, as trustee. The security document may pledge and assign the revenues provided for the security of the bonds, including proceeds from the sale of any project, or part thereof, insurance proceeds and condemnation awards, and may convey or mortgage the project and other property to secure a bond issue.

The revenues and other funds derived from the project, except for any part as may be necessary to provide reserves therefor, if any, may be set aside at regular intervals as may be provided in the security document in a sinking fund which may be pledged to, and charged with, the payment of the principal of and the interest on the bonds as the same shall become due and the redemption price or the purchase price of bonds retired by call or purchase as provided. The pledge shall be valid and binding from the time when the pledge is made. The revenues pledged and received by the Authority shall immediately be subject to the lien of the pledge without any physical delivery or further act, and the lien of any pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the Authority, irrespective of whether the parties have notice. The use and disposition of money to the credit of the sinking fund shall be subject to the provisions of the security document. The security document may contain provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including, without limitation, any one or more of the following:

(1) Acceleration of all amounts payable under the security document.
(2) Appointment of a receiver to manage the project and any other property mortgaged or assigned as security for the bonds.

(3) Foreclosure and sale of the project and any other property mortgaged or assigned as security for the bonds.
(4) Rights to bring and maintain such other actions at law or in equity as may appear necessary or desirable to collect the amounts payable under, or to enforce the covenants made in, the security document.

It shall be lawful for any bank or trust company incorporated under the laws of this State which may act as depository of the proceeds of bonds, revenues, or other funds provided under this Chapter to furnish indemnifying bonds or to pledge securities as may be required by the Authority. All expenses incurred in carrying out the provisions of the security document may be treated as a part of the cost of the project in connection with which bonds are issued or as an expense of administration of the project.

The Authority may subordinate the bonds or its rights under the security document or otherwise to any prior, contemporaneous, or future securities or obligations or lien, mortgage, or other security interest. (1991, c. 749, s. 1.)

§ 63A-15. County agreements.

Any county in which all or part of a cargo airport complex site is located may enter into an agreement with the Authority providing for payments to be made by the county to the Authority. A county may not enter into an agreement to make payments to the Authority until after the Authority designates the cargo airport complex site. The county's obligations under the agreement shall not constitute a pledge of its faith and credit. (1991, c. 749, s. 1.)

§ 63A-16. Remedies.

Any owner of bonds or notes issued under the provisions of this Chapter or any coupons appertaining thereto, and the trustee under any trust agreement securing or resolution authorizing the issuance of such bonds or notes, except to the extent the rights given may be restricted by the trust agreement or resolution, may either at law or in equity, by suit, action, mandamus, or other proceeding, protect and enforce any and all rights under the laws of the State or granted hereunder or under the trust agreement or resolution, or under any other contract executed by the Authority pursuant to this Chapter; and may enforce and compel the performance of all duties required by this Chapter or by the trust agreement or resolution by the Authority or by any officer of the Authority. (1991, c. 749, s. 1.)

§ 63A-17. Status of bonds and notes under Uniform Commercial Code.

All bonds and notes and interest coupons, if any, issued under this Chapter are made investment securities within the meaning of and for all the purposes of Article 8 of the Uniform Commercial Code, as enacted in Chapter 25 of the General Statutes. (1991, c. 749, s. 1.)

§ 63A-18. Zoning power of Authority.

(a) The Authority has exclusive zoning jurisdiction within a cargo airport complex site. The Authority has zoning jurisdiction within six miles of the boundaries of a cargo airport complex site.

(b) No State agency and, in accordance with G.S. 63-31, no political subdivision may adopt, without obtaining the approval of the Authority, an airport zoning provision or other land use regulation that affects real property

within six miles of any cargo airport complex site if it conflicts with a zoning provision or land use restriction adopted by the Authority.
A zoning provision or land use restriction adopted in violation of this subsection is not effective. (1991, c. 749, s. 1; 1991 (Reg. Sess., 1992), c. 900, s. 108(h).)

§ 63A-19. Goals for participation by minorities, women, and the disabled.

(a) The Authority shall verify its efforts to achieve the goals established in this section for participation by minority business enterprises, women's business enterprises, and disabled business enterprises in the total value of contracts awarded by the Authority in each of the following categories:

(1) Contracts for capital construction or repair projects.
(2) Contracts for goods.
(3) Contracts for professional and other services.

(b) The goals for the Authority are as follows:

(1) Ten percent (10%) participation by minority business enterprises.
(2) Five percent (5%) participation by women's business enterprises.
(3) Two percent (2%) participation by disabled business enterprises.

In determining participation in contract awards, a contract shall be counted as participation by a minority business enterprise without regard to the gender of the owner, but only if the business does not qualify as a disabled business enterprise. A contract shall be counted as participation by a women's business enterprise only if the business does not also qualify as a disabled business enterprise. A contract shall be counted as participation by a disabled business enterprise without regard to the race or gender of the owner. The goals in this section, instead of any goals in Article 8 of Chapter 143 of the General Statutes, apply to the Authority. With respect to projects for which the Authority would not receive federal funds if it adhered to the goals in this section because the goals are contrary to or are inconsistent with 14 C.F.R. Part 152, Subpart E, Nondiscrimination in Airport Aid Program, the federal law and regulations supersede this section to the extent it is contrary to or inconsistent with the federal law and regulations.

(c) The following definitions apply in this section:

(1) Disabled business enterprise. — A legal entity, other than a joint venture, that is organized to engage in commercial transactions and is at least fifty-one percent (51%) owned and controlled by one or more disabled persons.
(2) Disabled person. — A handicapped person as defined in G.S. 168A-3.
(3) Minority business enterprise. — A legal entity, other than a joint venture, that is organized to engage in commercial transactions and is at least fifty-one percent (51%) owned and controlled by one or more minority persons.
(4) Minority person. — A member of one of the following groups: African-Americans, Hispanic-Americans, American Indians, or Asian-Americans.
(5) Women's business enterprise means a legal entity, other than a joint venture, that is organized to engage in commercial transactions and is at least fifty-one percent owned and controlled by one or more women. (1991, c. 749, s. 1.)

§ 63A-20. Officers not liable.

No member or officer of the Authority shall be subject to any personal liability or accountability by reason of his execution of any bonds or notes or the issuance of any bonds or notes. (1991, c. 749, s. 1.)

§ 63A-21. Conflicts of interest.

If any member, officer, or employee of the Authority shall be interested either directly or indirectly, or shall be an officer or employee of or have an ownership interest in any firm or corporation, not including units of local government, interested directly or indirectly, in any contract with the Authority, the interest shall be disclosed to the Board and shall be set forth in the minutes of the Board. The member, officer, or employee having an interest shall not participate on behalf of the Authority in the authorization of any contract. Other provisions of law notwithstanding, failure to take any or all actions necessary to carry out the purposes of this section may not affect the validity of any bonds or notes issued under this Chapter. (1991, c. 749, s. 1.)

§ 63A-22. Cooperation by other State agencies.

All State officers and agencies shall render the services to the Authority within their respective functions as may be requested by the Authority. (1991, c. 749, s. 1.)

§ 63A-23. Annual and quarterly reports.

The Authority shall, promptly following the close of each fiscal year, submit an annual report of its activities for the preceding year to the Governor, the General Assembly, and the Local Government Commission. Each report shall be accompanied by an audit of its books and accounts. The audit shall be conducted by the State Auditor. The costs of all audits shall be paid from funds of the Authority.

The Authority shall submit quarterly reports to the Joint Legislative Commission on Governmental Operations. The reports shall summarize the Authority's activities during the quarter and contain any information about the Authority's activities that is requested by the Commission. (1991, c. 749, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 26.)

§ 63A-24. General laws apply to Authority; exceptions.

Except as provided in this section, the general laws that apply to State agencies apply to the Authority. The following general laws, to the extent provided below, do not apply to the Authority:

(1) Article 3 of Chapter 143 of the General Statutes does not apply to contracts for services listed in 49 U.S.C. § 2210(a)(16) or contracts for special user projects. That Article also does not apply to other contracts for projects, but, with respect to these other contracts, the powers and duties established in that Article shall be exercised by the Authority and the Secretary of Administration, and other State officers, employees, or agencies shall have no duties or responsibilities concerning the contracts.

(2) Article 8 of Chapter 143 of the General Statutes does not apply to public building contracts of the Authority, but, with respect to these contracts, the powers and duties established in that Article shall be exercised by the Authority and the Secretary of Administration, and other State officers, employees, or agencies shall have no duties or responsibilities concerning the contracts.

(3) Except for G.S. 146-29.1, 146-79, and 146-80, Chapter 146 of the General Statutes does not apply to the Authority. (1991, c. 749, s. 1.)

§ 63A-25. Dissolution.

Whenever the Board shall by resolution determine that the purposes for which the Authority was formed have been substantially fulfilled and that all bonds issued and all other obligations incurred by the Authority have been fully paid or satisfied, the Board may declare the Authority to be dissolved. On the effective date of the resolution, the title to all funds and other property owned by the Authority at the time of the dissolution shall vest in the State and possession of the funds and other property shall be delivered to the State. (1991, c. 749, s. 1.)

Chapter 64.

Aliens.

Sec.
64-1. Rights as to real property.
64-1.1. Secretary of State to collect information as to foreign ownership of real property.
64-2. Contracts validated.
64-3. Nonresident aliens' rights of inheritance.
64-4. Escheats.
64-5. Burden of proof.

§ 64-1. Rights as to real property.

It is lawful for aliens to take both by purchase and descent, or other operation of law, any lands, tenements or hereditaments, and to hold and convey the same as fully as citizens of this State can or may do, any law or usage to the contrary notwithstanding. (1870-1, c. 255; Code, s. 7; Rev., s. 182; C.S., s. 192; 1935, c. 243; 1939, c. 19.)

Cross References. — As to the Intestate Succession Act, see G.S. 29-1 et seq.

CASE NOTES

Right to Inherit by Intestate Succession. — Except for the reciprocity provisions contained in G.S. 64-3, 64-4, and 64-5, a nonresident alien is entitled to inherit by intestate succession as fully as a resident alien or a citizen of this country. In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972).

§ 64-1.1. Secretary of State to collect information as to foreign ownership of real property.

The Secretary of State is authorized and directed to collect all information obtainable from reports by aliens made to agencies of the federal government on ownership of real property interests in North Carolina, to be updated every three months, and to maintain a file on such information which shall be available to the members of the General Assembly and the public. (1979, c. 610.)

§ 64-2. Contracts validated.

All contracts to purchase or sell real estate by or with aliens, heretofore made, shall be deemed and taken as valid to all intents and purposes. (1870-1, c. 255, s. 2; Code, s. 8; Rev., s. 183; C.S., s. 193.)

§ 64-3. Nonresident aliens' rights of inheritance.

No alien residing outside the United States or its territories shall be entitled to take personal property located in this State by succession or testamentary disposition if the laws of the nation of which such alien is a resident prohibit residents of the United States from inheriting personal property located within that nation. Except as hereinabove provided, no alien shall, by reason of his citizenship or place of residence, be disqualified from inheriting property in this State. (1959, c. 1208; 1985 (Reg. Sess., 1986), c. 797, s. 1.)

CASE NOTES

This section is constitutional on its face. In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972).

Right to Inherit by Intestate Succession. — Except for the reciprocity provisions contained in this section and G.S. 64-4 and 64-5, a nonresident alien is entitled to inherit by intestate succession as fully as a resident alien or a citizen of this country. In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972).

§ 64-4. Escheats.

If a decedent owning personal property located within North Carolina shall leave no heirs, heirs at law or legatees other than persons disqualified from inheritance under G.S. 64-3, then such personal property shall escheat. (1959, c. 1208; 1985 (Reg. Sess., 1986), c. 797, s. 2.)

CASE NOTES

Right to Inherit by Intestate Succession. — Except for the reciprocity provisions contained in this section and G.S. 64-3 and 64-5, a nonresident alien is entitled to inherit by intestate succession as fully as a resident alien or a citizen of this country. In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972).

§ 64-5. Burden of proof.

The burden of proof in any action or proceeding to disqualify a nonresident alien from taking personal property located within this State by succession or testamentary disposition by reason of the provisions of G.S. 64-3, shall be upon the person asserting the disqualification. (1959, c. 1208; 1985 (Reg. Sess., 1986), c. 797, s. 3.)

CASE NOTES

Right to Inherit by Intestate Succession. — Except for the reciprocity provisions contained in this section and G.S. 64-3 and 64-4, a nonresident alien is entitled to inherit by intestate succession as fully as a resident alien or a citizen of this country. In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972).

Chapter 65.

Cemeteries.

Article 1.

Care of Rural Cemeteries.

Sec.

65-1 through 65-3. [Repealed.]

Article 2.

Care of Confederate Cemetery.

65-4. State Department of Correction to furnish labor.

Article 3.

Cemeteries for Inmates of County Homes.

65-5. County commissioners may establish new cemeteries.
65-6. Removal and reinterment of bodies.

Article 4.

Trust Funds for the Care of Cemeteries.

65-7 through 65-12. [Repealed.]

Article 5.

Removal of Graves.

65-13 through 65-15. [Repealed.]

Article 6.

Cemetery Associations.

65-16. Land holdings.
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Article 7.

Cemeteries Operated for Private Gain.

65-18 through 65-36. [Recodified.]

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65-36.1 through 65-36.8. [Recodified.]

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65-38. [Repealed.]
65-39, 65-40. [Repealed.]

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ARTICLE 1.

Care of Rural Cemeteries.

§§ 65-1 through 65-3: Repealed by Session Laws 2007-118, s. 2, effective July 1, 2007.

Cross References. — For similar present provisions, see G.S. 65-111 through 65-113.

Editor's Note. — Session Laws 2007-118, s. 7, provides, in part, that the repeal of this article applies to all trusts entered on or after July 1, 2007.

ARTICLE 2.

Care of Confederate Cemetery.

§ 65-4. State Department of Correction to furnish labor.

The State Department of Correction is hereby authorized and directed to furnish at such time, or times, as may be convenient, such prisoner's labor as may be available, to properly care for the Confederate Cemetery situated in the City of Raleigh, such services to be rendered by the State's prisoners without compensation. (1927, c. 224, s. 1; 1933, c. 172; 1957, c. 349, s. 10; 1967, c. 996, s. 13.)

ARTICLE 3.

Cemeteries for Inmates of County Homes.

§ 65-5. County commissioners may establish new cemeteries.

The boards of county commissioners of the various counties in the State are authorized and empowered to locate and establish new graveyards or cemeteries upon the lands of their respective counties for the burial of the inmates of the county homes. (1917, c. 151, s. 1; C.S., s. 5022.)

§ 65-6. Removal and reinterment of bodies.

Whenever the county commissioners have established new graveyards or cemeteries, they are authorized and empowered to remove to such graveyards or cemeteries all bodies of deceased inmates of the county homes. (1917, c. 151, s. 2; C.S., s. 5023.)

ARTICLE 4.

Trust Funds for the Care of Cemeteries.

§§ 65-7 through 65-12: Repealed by Session Laws 2007-118, s. 3, effective July 1, 2007.

Cross References. — For similar present provisions, see G.S. 65-91 through 65-96.

Editor's Note. — Session Laws 2007-118, s. 7, provides, in part, that the repeal of this article applies to all trusts entered on or after July 1, 2007.

ARTICLE 5.

Removal of Graves.

§ 65-13: Repealed by Session Laws 2007-118, s. 4, effective July 1, 2007, and applicable to all trusts created on or after that date.

Cross References. — For similar current provisions, see G.S. 65-106.

§§ 65-14, 65-15: Repealed by Session Laws 1971, c. 797, s. 2.

ARTICLE 6.

Cemetery Associations.

§ 65-16. Land holdings.

All cemetery associations or corporations created by any local, private or special act or resolution before January 10, 1917, are authorized and fully empowered to hold amounts of land in excess of the limitation provided in the local, private or special act or resolution incorporating or chartering such cemetery association or corporation. (1923, c. 76, s. 1; C.S., s. 5030(b).)

§ 65-17. Change of name of association or corporation.

Any corporation or association chartered or incorporated by any special act of the legislature, as set forth in G.S. 65-16, is authorized and fully empowered to change the name of such association or corporation by a majority vote of its directors, and upon such change in name it shall be the duty of the officers of the board of directors of such corporation or association to file with the clerk of the superior court a copy of resolution changing the name, which resolution must show the act of the legislature creating or incorporating the same and the reasons for the change thereof. (1923, c. 76, s. 2; C.S., s. 5030(c).)

§ 65-17.1. Quorum at stockholders' meeting of certain nonprofit cemetery corporations; calling meeting; amendment of charter.

Notwithstanding any conflicting provision of law or of the charter or bylaws of any corporation affected by this section, in the case of any nonprofit cemetery corporation chartered prior to the year 1900 whose charter has expired prior to May 18, 1955, a quorum at any meeting of stockholders called for the purpose of electing directors, or of amending the charter of such corporation, or both, shall consist of the holders of ten percent (10%) or more of the outstanding shares of the capital stock of such corporation having voting powers, present in person or represented by proxy; and a meeting of the stockholders of such corporation for such purpose or purposes may be called by any two stockholders after 10 days' notice by registered mail to all stockholders of record at their last known addresses as shown by the stock book of such corporation. The concurrence of a majority of the shares represented at such meeting shall be sufficient to authorize an amendment or amendments to the charter of such corporation in accordance with the provisions of G.S. 55-31. (1955, c. 1084.)

Editor's Note. — This section refers to former G.S. 55-31 as it stood prior to the 1955 revision of former Chapter 55. As to amendments of bylaws of nonprofit corporations, see now G.S. 55A-10-01 et seq.

ARTICLE 7.

Cemeteries Operated for Private Gain.

§§ 65-18 through 65-36: Recodified as G.S. 65-46 through 65-72.

Editor's Note. — This Article was rewritten by Session Laws 1975, c. 768, s. 1, effective Sept. 1, 1975, and has been recodified as Article 9, G.S. 65-46 et seq., of this Chapter.

ARTICLE 7A.

Funeral and Burial Trust Funds.

§§ 65-36.1 through 65-36.8: Recodified as G.S. 90-210.30 through 90-210.37, by Session Laws 1985, c. 12, s. 1.

ARTICLE 8.

Municipal Cemeteries.

§ 65-37: Repealed by Session Laws 2007-118, s. 5, effective July 1, 2007, and applicable to all trusts created on or after that date.

§ 65-38: Repealed by Session Laws 1969, c. 1279.

§§ 65-39, 65-40: Repealed by Session Laws 2007-118, s. 5, effective July 1, 2007, and applicable to all trusts created on or after that date.

ARTICLE 8A.

Veterans Cemeteries.

§ 65-41. Land acquisition.

The State may accept land for the establishment of not more than three veterans cemeteries. (1987, c. 183, s. 1.)

§ 65-42. Location of cemeteries.

These veterans cemeteries may be located in those regions of the State with a high concentration of veterans including the 3rd, 7th and 11th United States Congressional Districts. (1987, c. 183, s. 1.)

§ 65-43. Definitions.

For purposes of this Article, the following definitions shall apply, unless the context requires otherwise:

(1) "Honorable military service" means:
  a. Service on active duty, other than for training, as a member of the Armed Forces of the United States, when the service was terminated under honorable conditions;
  b. Service on active duty as a member of the Armed Forces of the United States at the time of death under honorable conditions;
  c. Service on active duty for training or full-time service as a member of the Reserve component of the Armed Forces, the Army National Guard, the Air National Guard, or the Reserve Officer Training Corps of the Army, Navy, or Air Force, at the time of death under honorable conditions.

(2) A "legal resident" of a state means a person whose principal residence or abode is in that state, who uses that state to establish his right to vote and other rights in a state, and who intends to live in that state, to the exclusion of maintaining a legal residence in any other state.

(3) A "qualified veteran" means a veteran who meets the requirements of sub-subdivisions a. and b. of this subdivision:
  a. A veteran who served an honorable military service or who served a period of honorable nonregular service and is any of the following:
    1. A veteran who is entitled to retired pay for nonregular service under 10 U.S.C. §§ 12731-12741, as amended.

2. A veteran who would have been entitled to retired pay for nonregular service under 10 U.S.C. §§ 12731-12741, as amended, but for the fact that the person was under 60 years of age.
3. A veteran who is eligible for interment in a national cemetery under 38 U.S.C. § 2402, as amended.

b. Who is a legal resident of North Carolina:
  1. At the time of death, or
  2. For a period of at least 10 years, or
  3. At the time he entered the Armed Forces of the United States. (1987 (Reg. Sess., 1988), c. 1051, s. 1; 1993, c. 553, s. 24; 2001-143, s. 1.)

§ 65-43.1. Eligibility for interment in a State veterans cemetery.

(a) The following persons are eligible for interment at a State veterans cemetery:

(1) A qualified veteran.

(2) The spouse, widow, or widower of a qualified veteran, or a minor child who is unmarried and dependent on the qualified veteran at the time of death. For purposes of this subdivision, “minor child includes a child under 21 years of age or under 23 years of age if pursuing a course of instruction at an educational institution approved by the United States Department of Veterans Affairs.

(3) An unmarried adult child of a qualified veteran when the child became permanently incapable of self-support because of a physical or mental disability before attaining the age of 18 years.

(b) Only one grave site is authorized for a qualified veteran and his eligible family members. A grave site may not be reserved until the death of a person who is eligible for interment. When a death occurs and the deceased is determined to be eligible for interment in a State veteran cemetery pursuant to subsection (b) of this section, a grave site shall be assigned in the name of the veteran.

(c) When an eligible family member dies before the qualified veteran dies, the veteran shall sign an agreement to be interred in the same plot with the family member before the deceased family member is interred in the veterans cemetery. (1987 (Reg. Sess, 1988), c. 1051, s. 1; 2001-143, s. 2.)

§ 65-43.2. Proof of eligibility.

(a) The veteran, his survivors, or his legal representative shall furnish any evidence necessary to establish the eligibility of the veteran or the family member before the veteran or eligible family member may be interred in a State veterans cemetery.

(b) The survivors or legal representative of the deceased shall notify the funeral director that the deceased is to be interred in a veterans cemetery. The survivor or legal representative shall furnish the funeral director with documentary evidence of the veteran’s honorable military service and evidence to establish that the veteran is a legal resident of North Carolina. The funeral director shall notify the superintendent of the nearest State veterans cemetery to arrange for the interment and convey to the superintendent all evidence to establish the veteran’s eligibility. (1987 (Reg. Sess., 1988), c. 1051, s. 1.)

§ 65-43.3. Bars to eligibility.

A veteran may not be interred in a State veterans cemetery under any of the following circumstances:

(1) He was discharged or dismissed on the grounds that:
  a. He was a conscientious objector who refused to perform military duty;
  b. He was a deserter; or
  c. He was an officer who accepted his resignation for the good of the service;
(2) He was convicted of subversive activities against the United States after separation from active military service; or
(3) He was separated from the Armed Forces of the United States for the good of the service due to a willful and persistent unauthorized absence and issued a Clemency Discharge (DD Form 1953) pursuant to Presidential Proclamation No. 4313. (1987 (Reg. Sess., 1988), c. 1051, s. 1.)

§ 65-43.4. Disinterment.

(a) When a veteran fails to abide by his agreement to be interred in the same grave site as his previously interred eligible family member, the veteran, his legal representative, or his heirs shall have the remains of the family member removed from the cemetery at no cost to the State.

(b) A disinterment may be permitted, at no cost to the State, when the following conditions are satisfied:
(1) The disinterment is requested in writing and filed with the Program Director of the veterans cemeteries, the Assistant Secretary for Veterans Affairs, or the Division of Veterans Affairs;
(2) The request for disinterment contains the notarized signature of the nearest of kin, such as surviving spouse. If the spouse is deceased, the signatures of a majority of the surviving children of legal age will be required;
(3) The funeral director has obtained all necessary permits for disinterment. (1987 (Reg. Sess., 1988), c. 1051, s. 1.)

§ 65-43.5. Reinterment.

(a) The remains of a qualified veteran or the remains of an eligible family member may be moved to a State veterans cemetery for reinterment, at no cost to the State, when the following conditions are satisfied:
(1) The superintendent of the State veterans cemetery has been presented with proof of eligibility in accordance with G.S. 65-43.2;
(2) The reinterment is requested in writing and filed with the Program Manager of veterans cemeteries, the Assistant Secretary for Veterans Affairs, or the Division of Veterans Affairs; and
(3) The request for reinterment contains the notarized signatures of the veteran or his legal representative, all living immediate family members, and any other interested living family member;
(4) The request for reinterment contains a statement of the circumstances and reasons for reinterment; and
(5) The funeral director has obtained all necessary permits for reinterment.

(b) If permission for reinterment is granted, an agreement shall be entered into between the veteran or his living representative, all living immediate family members, and any interested living family members, and the Assistant Secretary of Veterans Affairs. (1987 (Reg. Sess., 1988), c. 1051, s. 1.)

§ 65-43.6. State veterans cemeteries cost.

(a) There may be no charge for the grave site or the interment service of a qualified veteran. There may be a minimal charge, to be set by the Division of

Veteran Affairs, for only the opening and closing of the grave of an eligible family member.

(b) All other costs, including funeral expenses and costs of the headstone, transportation of the remains, or grave liner or burial vault shall be paid out of allowances by the Veterans Administration or private funds.

(c) All costs resulting from damage to, or destruction or theft of a grave site, headstone, or any other grave monument may not be borne by the State. (1987 (Reg. Sess., 1988), c. 1051, s. 1.)

§ 65-44. Days for burial.

Notwithstanding any other provision of law, burial services shall be conducted at the Coastal Carolina State Veterans Cemetery and the Sandhills State Veterans Cemetery from Monday through Sunday, except when the day for services falls on a State holiday. (2004-124, s. 19.2(a).)

§ 65-45: Reserved for future codification purposes.

ARTICLE 9.

North Carolina Cemetery Act.

§ 65-46. Short title.

This Article 9 may be cited as "North Carolina Cemetery Act." (1975, c. 768, s. 1.)

Editor's Note. — This Article is former Article 7 of this Chapter as rewritten by Session Laws 1975, c. 768, s. 1, effective Sept. 1, 1975, and recodified. Where appropriate, the historical citations to the sections of the former Article have been added to corresponding sections of the new Article.

CASE NOTES

Cited in Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325 (1979).

§ 65-47. Scope.

(a) The provisions of this Article shall apply to all persons engaged in the business of operating a cemetery as defined herein, except cemeteries owned and operated by governmental agencies or churches.

(b) Any cemetery beneficially owned and operated by a fraternal organization or its corporate agent for at least 50 years prior to September 1, 1975, shall be exempt from the provisions of Article 9 of this Chapter.

(c) The provisions of this Article shall not apply to persons licensed under Article 13D of Chapter 90 of the General Statutes when engaging in activities for which a license is required under the Article. (1975, c. 768, s. 1; 1977, c. 686, s. 1; 1995, c. 509, s. 135.1(i).)

Editor's Note. — Former G.S. 65-36.1 through 65-36.8 were recodified as G.S. 90-210.30 [Repealed] through 90-210.37, effective October 1, 1985, by Session Laws 1985, c. 12, s. 1. References to these sections in the text above were changed to reflect their current placement in light of the 1985 recodification.

§ 65-48. Definitions.

As used in this Article, unless otherwise stated or unless the context or subject matter clearly indicates otherwise:

(1) "Bank of belowground crypts" means any construction unit of belowground crypts acceptable to the Commission which a cemetery uses to initiate its belowground crypt program or to add to existing belowground crypt structures.

(2) "Belowground crypts" consists of an interment space in preplaced chambers, either side by side or multiple depth, covered by earth and sod and are also known as lawn crypts, westminsters or turf top crypts.

(3) "Cemetery" means any one or a combination of more than one of the following in a place used or to be used and dedicated or designated for cemetery purposes:
   a. A burial park, for earth interment.
   b. A mausoleum.
   c. A columbarium.

(4) "Cemetery broker" means a legal entity engaged in the business of arranging sales of cemetery products between legal entities and which sale does not involve a cemetery company, but does not mean funeral establishments or funeral directors operating under G.S. 90-210.25, when dealing between legal entities wherein one such entity shall be members of the family of a deceased person or other persons authorized by law to arrange for the burial and funeral of such deceased human being. The North Carolina Cemetery Act shall not apply to any cemetery broker selling less than five grave spaces per year.

(5) "Cemetery company" means any legal entity that owns or controls cemetery lands or property and conducts the business of a cemetery, including all cemeteries owned and operated by governmental agencies, churches and fraternal organizations or their corporate agents for the duration of any sales and management contracts entered into with cemetery sales organizations or cemetery management organizations for cemetery purposes, or with any other legal entity other than direct employees of said governmental agency, church or fraternal organization.

(6) "Cemetery management organization" means any legal entity contracting as an independent contractor with a cemetery company to manage a cemetery but does not mean individual managers employed by and contracting directly with cemetery companies operating under this Article.

(7) "Cemetery sales organization" means any legal entity contracting with a cemetery which is exempt or not exempt under this Article to conduct sales of cemetery products, but does not mean individual salesmen or sales managers employed by and contracting directly with cemetery companies operating under this Article, nor does it mean funeral establishments or funeral directors operating under licenses authorized by G.S. 90-210.25 when dealing directly with a cemetery company and with members of the family of a deceased person or other persons authorized by law to arrange for the burial and funeral of such deceased human being.

(8) "Columbarium" means a structure or building substantially exposed aboveground intended to be used for the interment of the cremated remains of a deceased person.

(9) "Commission" means the North Carolina Cemetery Commission.

(10) "Grave space" means a space of ground in a cemetery intended to be used for the interment in the ground of the remains of a deceased person.

(11) "Human remains" or "remains" means the bodies of deceased persons, and includes the bodies in any stage of decomposition, and cremated remains.

(12) "Mausoleum" means a structure or building substantially exposed aboveground intended to be used for the entombment of remains of a deceased person.

(13) "Mausoleum section" means any construction unit of a mausoleum acceptable to the Commission which a cemetery uses to initiate its mausoleum program or to add to its existing mausoleum structures.

(14) "Person" means an individual, corporation, partnership, joint venture, or association.

(15) "Vault" means a crypt or underground receptacle which is used for interment in the ground and which is designed to encase and protect caskets or similar burial devices. For the purposes of this Article, a vault is a preneed item until delivery to the purchaser. (1943, c. 644, s. 2; 1967, c. 1009, s. 2; 1971, c. 1149, s. 1; 1975, c. 768, s. 1; 1977, c. 686, ss. 2, 3.)

CASE NOTES

Above-Ground Burial Facilities Did Not Change the Nature of Cemetery Property Use. — Where the zoning ordinance provided for the continuation of pre-existing nonconforming uses of property, a cemetery construction of above-ground burial facilities related to the process by which the nonconforming activity was conducted and did not amount to a change in the nature and kind of use to which the property was devoted. Stegall v. Zoning Bd. of Adjustment, 87 N.C. App. 359, 361 S.E.2d 309 (1987).

Cemetery was not estopped from asserting that no special use permit was required for the construction and installation of facilities for above-ground burial since such facilities were not an unlawful extension of its nonconforming use of its cemetery property. Stegall v. Zoning Bd. of Adjustment, 87 N.C. App. 359, 361 S.E.2d 309 (1987).

§ 65-49. The North Carolina Cemetery Commission.

There is hereby established in the Department of Commerce a North Carolina Cemetery Commission with the power and duty to adopt rules and regulations to be followed in the enforcement of this Article. (1975, c. 768, s. 1; 1989, c. 751, s. 7(5); 1991 (Reg. Sess., 1992), c. 959, s. 19.)

CASE NOTES

Quasi-Judicial and Quasi-Legislative Duties. — The duties of the Commission are neither political nor executive. They are predominantly quasi-judicial and quasi-legislative. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979), cert. denied, 299 N.C. 121, 262 S.E.2d 6 (1980).

Commission Must Act with Impartiality. — Since it is charged "with the power and duty to adopt rules and regulations to be followed in the enforcement" of the North Carolina Cemeteries Act, including the licensing of cemeteries operating in this State, it must act with entire impartiality. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979), cert. denied, 299 N.C. 121, 262 S.E.2d 6 (1980).

Members are required to exercise the judgment of experts in the field appointed by law and informed by experience. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979), cert. denied, 299 N.C. 121, 262 S.E.2d 6 (1980).

§ 65-50. Cemetery Commission; members, selection, quorum.

(a) Membership. — The Cemetery Commission shall consist of nine members. The General Assembly shall appoint two members, one of whom shall be recommended by the President Pro Tempore of the Senate and one of whom shall be recommended by the Speaker of the House of Representatives. The Governor shall appoint seven members as follows:

(1) Two members who own or manage cemeteries in North Carolina.
(2) Three members who are selected from six nominees submitted by the North Carolina Cemetery Association.
(3) Two public members who have no financial interest in, and are not involved in management of, any cemetery or funeral related business.

(b) Terms. — Four members of the initial Commission shall be appointed for a term to expire June 30, 1977, and three members shall be appointed for a term to expire June 30, 1976. At the end of the respective terms of office of the initial members of the Commission, their successors shall be nominated in the same manner, selected from the same categories and appointed for terms of four years and until their successors are appointed and qualified. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

(c) Removal. — The appointing authority shall have the power to remove any member of the Commission appointed by that authority from office for misfeasance, malfeasance and nonfeasance according to applicable provisions of law.

(d) Quorum. — A majority of the Commission shall constitute a quorum for the transaction of business.

(e) Chair. — At the first meeting of the Commission held after September 1, 1975, the Commission shall elect one of its members as its chairman and another as its vice-chairman, both to serve through June 30 of the next following year. Thereafter, at its first meeting held on or after July 1 of each year, the Commission shall elect from its members a chairman and vice-chairman to serve through June 30 of the next following year. (1975, c. 768, s. 1; 2001-486, s. 2.1.)

CASE NOTES

Administrative Procedure Act Not Applicable to Removal. — This section gives the Governor the power to remove a member of the Cemetery Commission for cause "according to the provisions of G.S. 143B-13 of the Executive Organization Act of 1973." There is no reference to the Administrative Procedure Act. Nor does G.S. 143B-13(d), which gives the Governor power to remove for cause any member of a commission, refer to the Administrative Procedure Act. Had the General Assembly intended for the Governor to be bound by the provisions of the Administrative Procedure Act, it could have referred to that act rather than the Executive Organization Act. Absent a specific legislative enactment requiring removals by the Governor to be subject to the Administrative Procedure Act, the act is not applicable to removals by the Governor. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979), cert. denied, 299 N.C. 121, 262 S.E.2d 6 (1980).

§ 65-51. Principal office.

The principal office of the Commission shall be in the City of Raleigh, North Carolina. Notice of all regular and special meetings of the Commission shall be advertised 10 or more days in advance in at least three newspapers in North Carolina having inter-county circulation in the State. Each member of the Commission shall receive per diem and allowances in accordance with G.S. 138-5. The administrator of the Commission, other employees required to attend and legal counsel to the Commission shall be entitled to actual expenses while attending regular or special meetings of the Commission held other than in Raleigh, North Carolina. All expenses of the Commission shall be paid from funds coming to the Commission pursuant to this Article. (1975, c. 768, s. 1.)

§ 65-52. Regular and special meetings.

The Cemetery Commission shall meet at least once in each quarter and may hold special meetings at any time and place within the State at the call of the chairman or upon the written request of at least four members. (1975, c. 768, s. 1.)

§ 65-53. Powers.

In addition to other powers conferred by this Article, the Cemetery Commission shall have the following powers and duties:

(1) The administrator shall be appointed by the Governor upon recommendation of the Cemetery Commission. The compensation of the administrator and such other personnel as is necessary to operate the Commission is subject to the provisions of Chapter 126 of the General Statutes of North Carolina. The Commission is authorized and empowered to employ such staff, including legal counsel, as may be necessary.

(2) To examine a cemetery company's records when a person applies for a change of control of the company.

(3) Investigate, upon its own initiative or upon a verified complaint in writing, the actions of any person engaged in the business or acting in the capacity of a licensee under this Article. The license of a licensee may be revoked or suspended for a period not exceeding two years, or until compliance with a lawful order imposed in the final order of suspension, or both, where the licensee in performing or attempting to perform any of the acts specified in this Article has been guilty of:

a. Failing to pay the fees required herein;
b. Failing to make any reports required by this Article;
c. Failing to remit to the care and maintenance trust fund, merchandise trust fund, or preconstruction trust fund the required amounts;
d. Making any substantial misrepresentation;
e. Making any false statement of a character likely to influence or persuade;
f. A continued and flagrant course of misrepresentation or making of false promises through cemetery agents or salesmen;
g. Violating any provision of this Article or rule promulgated by the Commission; or
h. Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(4) In all proceedings under this Article for the revocation or suspension of licenses, the provisions of Chapter 150B of the General Statutes shall be applicable.

(5) At such time as the Commission finds it necessary it may bring an action in the name of the State in the court of the county in which the place of business is located against such person to enjoin such person from engaging in or continuing such violation or doing any act or acts in furtherance thereof. In any such action, an order or judgment may be entered awarding such temporary or permanent injunction as may be deemed proper; provided, that before any such action is brought the Commission shall give the cemetery at least 20 days' notice in writing, stating the alleged violation and giving the cemetery an opportunity within the 20-day period to cure the violation. In addition to all other means provided by law for the enforcement of a temporary restraining

order, temporary injunction, or permanent injunction, the court shall have the power and jurisdiction to impound and to appoint a receiver for the property and business of the defendant, including books, papers, documents, and records appertaining thereto or so much thereof as the court may deem reasonably necessary to prevent further violation of this Article through or by means of the use of said property and business. The Commission may institute proceedings against the cemetery or its officers, whereafter an examination, pursuant to this Article, a shortage in the care and maintenance trust fund, merchandise trust fund or mausoleum and belowground crypts preconstruction trust fund is discovered, to recover said shortage.

(6) Whenever any special additional audit or examination of a licensee's premises, facilities, books or records is necessary because of the failure of the licensee to comply with the requirements imposed in this Article or by the rules and regulations of the Commission, to charge a fee based on the cost of the special examination or audit, taking into consideration the salary of any employees involved in the special audit or examination and any expenses incurred.

(7) Promulgate rules and regulations requiring licensees to file with the Commission plans and specifications for the minimum quality of any product sold. The sale of any product for which plans and specifications required by the rules and regulations have not been filed or sale of any product of a lesser quality than the plans and specifications filed with the Commission is a violation of this Article.

(8) When the Commission finds that failure by a licensee to maintain a cemetery properly has caused that cemetery to be a public nuisance or a health or safety hazard, the Commission may bring an action for injunctive relief, against the responsible licensee, in the superior court of the county in which the cemetery or any part thereof is located. (1943, c. 644, s. 17; 1971, c. 1149, s. 8; 1973, c. 732, s. 2; 1975, c. 768, s. 1; 1977, c. 686, ss. 4-6; 1979, c. 888, ss. 1-3; 1981 (Reg. Sess., 1982), c. 1153; 1987, c. 488, s. 8; c. 827, s. 1; 1991, c. 653, s. 3.)

§ 65-54. Annual budget of Commission; collection of funds.

The Commission shall prepare an annual budget and shall collect the sums of money required for this budget from yearly fees and from any other sources provided in this Article. On or before July 1 of each year, each licensed cemetery shall pay a license fee to be set by the Commission in an amount not to exceed six hundred dollars ($600.00). In addition, each licensed cemetery shall pay to the Commission an inspection fee for each grave space, niche, or mausoleum crypt when the certificate of interment right is issued and shall pay a fee for each vault, belowground crypt, memorial, or opening and closing of a grave space that is included in a preneed cemetery contract. The inspection fee for each grave space, niche, or mausoleum crypt is payable when the certificate of interment right is issued and may not exceed four dollars ($4.00). The fee for each of the listed items that are included in a preneed cemetery contract is payable when the contract is made and may not exceed ten dollars ($10.00). (1975, c. 768, s. 1; 1977, c. 686, s. 7; 1987, c. 488, s. 1; 1991, c. 653, s. 1; 2004-202, s. 1.)

§ 65-55. License; cemetery company.

(a) No legal entity shall engage in the business of operating a cemetery company except as authorized by this Article and without first obtaining a license from the Commission.

(b) Any legal entity wishing to establish a cemetery shall file a written application for authority with the Commission on forms provided by the Commission.

(c) Upon receipt of the application and filing fee to be set by the Commission in an amount not to exceed one thousand six hundred dollars ($1,600), the Commission shall cause an investigation to be made to establish the following criteria for approval of the application:

(1) The creation of a legal entity to conduct cemetery business, and its proposed financial structure.

(2) A perpetual care trust fund agreement, with an initial deposit of not less than fifty thousand dollars ($50,000) and with a bank cashier's check or certified check attached for the amount made payable to the trustee. The trust fund agreement must be executed by the applicant, accepted by the trustee, and conditional only upon approval of the application.

(3) A plat of the land to be used for the cemetery, showing the location of the cemetery and the access roads to the cemetery.

(4) Designation by the legal entity wishing to establish a cemetery of a general manager. The general manager must be a person of good moral character and have at least one year's experience in cemeteries.

(5) Development plans sufficient to ensure the community that the cemetery will provide adequate cemetery services and that the property is suitable for use as a cemetery.

(d) The Commission, after receipt of the investigating report, shall grant or refuse to grant the authority to organize a cemetery based upon the criteria set forth in G.S. 65-55(c).

(e) If the Commission intends to deny an application, it shall give written notice to the applicant of its intention to deny. The notice shall state a time and a place for a hearing before the Commission and a summary statement of the reasons for the proposed denial. The notice of intent shall be mailed by certified mail to the applicant at the address stated in the application at least 15 days prior to the scheduled hearing date. The applicant shall pay the costs of this hearing as assessed by the Commission unless the applicant notifies the Commission by certified mail at least five days prior to the scheduled hearing date that a hearing is waived. Any appeals from the Commission's decision shall be to the court having jurisdiction of the applicant or the Commission.

(f) If the Commission intends to grant the authority, it shall give written notice that the authority to organize a cemetery has been granted and that a license to operate will be issued upon the completion of the following:

(1) Establishment of the care and maintenance trust fund and receipt by the Commission of a certificate from the trust company, certifying receipt of the initial deposit required under this Article.

(2) Full development, ready for burial, of not less than two acres including a completed paved road from a public roadway to said developed section, certified by inspection of the Commission or its representative.

(3) A description, by metes and bounds, of the acreage tract of such proposed cemetery, together with evidence, by title insurance policy or by certificate of an attorney-at-law, certifying that the applicant is the owner in fee simple of such tract of land, which must contain not less than 30 acres, and that the title to not less than 30 acres is free and clear of all encumbrances. In counties with a population of less than 35,000 population according to the latest federal decennial census the tract need be only 15 acres.

(4) A plat of the cemetery showing the number and location of all lots surveyed and permanently staked for sale. (1943, c. 644, s. 9; 1957, c.

529, s. 3; 1967, c. 1009, s. 9; 1975, c. 768, s. 1; 1977, c. 686, s. 8; 1987, c. 488, s. 2; 1991, c. 653, s. 2; 2004-202, s. 2.)

§ 65-56. Existing companies; effect of Article.

Existing cemetery companies at the time of the adoption of this Chapter shall continue in full force and effect and be granted a license but shall hereafter be operated in accordance with the provisions of Article 9 of this Chapter. (1975, c. 768, s. 1.)

§ 65-57. Licenses for sales organizations, management organizations and brokers.

(a) No legal entity shall engage in the business of a cemetery sales organization, a cemetery management organization or a cemetery broker except as authorized by this Article, and without first obtaining a license from the Commission.

(b) Any legal entity wishing to establish and operate the business of a cemetery sales organization, a cemetery management organization or a cemetery broker shall file a written application for authority with the Commission on forms provided by the Commission which must contain such of the following documents and information as may be required by the Commission:

(1) The appointment of a North Carolina resident to receive service of any lawful process in any noncriminal proceedings arising under this Chapter against the applicant, its principal owners, principal stockholders, directors and general manager or their personal representatives.

(2) The states or other jurisdictions in which the applicant presently is conducting the business activity applied for or other similar businesses and any adverse order, judgment or decree entered against the applicant in each jurisdiction or by any court.

(3) The applicant's name, address and the form, date and jurisdiction of the organization and the address of each of its offices within or without this State.

(4) The name, address, principal occupation for the past five years of every director and officer of the applicant or person occupying a similar status or performing similar functions.

(5) Copies of the articles of incorporation or articles of partnership or joint venture agreement or other instrument establishing the legal entity of the applicant.

(c) The application shall be accompanied by an initial filing fee to be set by the Commission in an amount not to exceed one thousand dollars ($1,000) for cemetery sales organization and cemetery management organization and an initial filing fee to be set by the Commission in an amount not to exceed five hundred dollars ($500.00) for a cemetery broker. If ninety percent (90%) or more of the applicant is owned by an existing cemetery company operating under the North Carolina Cemetery Act, then the initial filing fee shall be one half of the sums set out herein. On or before July 1 of each year, each licensed cemetery sales organization, cemetery management organization, or cemetery broker shall pay a license renewal fee to be set by the Commission in an amount not to exceed six hundred dollars ($600.00) per year.

(d) Upon receipt of the application and filing fee, the Commission shall cause an investigation to be made of the legal entity to conduct the business applied for and the qualification of said legal entity to do business in North Carolina.

(e) The Commission, after receipt of the investigation report, shall grant or refuse to grant the authority to organize the organization applied for after it determines that the applicant possesses good character and general fitness or, in the case of a business association, employs and is directed by personnel of good character and general fitness.

(f) If the Commission intends to deny an application, it shall give written notice to the applicant of its intention to deny. The notice shall state a time and a place for hearing before the Commission and a summary statement of the reasons for the proposed denial. The notice of intent shall be mailed by certified mail to the applicant at the address stated in the application at least 15 days prior to the scheduled hearing date. Any appeals from the Commission's decision shall be to the court having jurisdiction of the applicant, or in the event of an out-of-state applicant, then to the court having jurisdiction of the Commission.

(g) If the Commission intends to grant the authority, it shall give written notice that the authority to organize the business applied for has been granted and that a license to operate will be issued upon presentment to the Commission of a statement of employment between the applicant and the cemetery or cemeteries to be serviced thereby.

(h) Any person or any cemetery sales organization or any cemetery management organization or any cemetery broker violating the provisions of this section is guilty of a Class 1 misdemeanor, and shall be subject to revocation of the license to operate. (1975, c. 768, s. 1; 1977, c. 686, ss. 9, 10; 1993, c. 539, s. 500; 1994, Ex. Sess., c. 24, s. 14(c); 2004-202, s. 3.)

§ 65-58. Licenses for persons selling preneed grave space.

(a) No person shall offer to sell preneed grave spaces, mausoleum crypts, niches, memorials, vaults or any other preneed cemetery merchandise or services under any plan authorized for any cemetery, cemetery sales group, or cemetery management group, before obtaining a license from the Commission.

(b) Persons wishing to obtain a license shall file a written application with the Commission on forms provided by the Commission. The Commission may require such information and documents as it deems necessary to protect the public interest.

(c) The application shall be accompanied by a filing fee to be set by the Commission in an amount not to exceed one hundred dollars ($100.00) to cover the expenses of processing and investigation. After processing and investigation, the Commission shall grant, or refuse to grant, the license applied for. The license fee for a two-year term shall be set by the Commission but shall not exceed one hundred dollars ($100.00).

(d) If the Commission refuses to grant the license applied for, it shall give written notice to the applicant. The notice shall state a time and a place for hearing before the Commission, and a summary statement of the reasons for the refusal to grant the license. The notice shall be mailed by registered mail or certified mail to the applicant at the address stated in the application at least 30 days prior to the scheduled hearing date.

(e) If the Commission intends to grant the license, it shall give written notice that the license will be issued upon presentment to the Commission of a duly executed statement of employment between the applicant and the cemetery or cemeteries to be serviced thereby.

(f) The provisions of Article 4 of Chapter 150B of the General Statutes of North Carolina relating to "Judicial Review" shall apply to appeals or petitions for judicial review by any person or persons aggrieved by an order or decision of the Commission.

(g) Repealed by Session Laws 1977, c. 686, s. 12. (1943, c. 644, s. 15; 1967, c. 1009, s. 14; 1975, c. 768, s. 1; 1977, c. 686, ss. 11, 12; 1987, c. 827, s. 1; 2004-202, s. 4.)

§ 65-59. Application for a change of control; filing fee.

A person who proposes to acquire control of an existing cemetery company, whether by purchasing the capital stock of the company, purchasing an owner's interest in the company, or otherwise acting to effectively change the control of the company, shall first make application on a form supplied by the Commission for a certificate of approval of the proposed change of control. The application shall contain the name and address of each proposed new owner. The Commission shall issue a certificate of approval only after it determines that the proposed new owners are qualified by character, experience, and financial responsibility to control and operate the cemetery company in a legal and proper manner, and that the interest of the public generally will not be jeopardized by the proposed change in control. An application for approval of a change of control must be completed and accompanied by a filing fee to be set by the Commission in an amount not to exceed one thousand six hundred dollars ($1,600). (1975, c. 768, s. 1; 1987, c. 488, s. 4; 1991, c. 653, s. 4; 2004-202, s. 5.)

§ 65-60. Records.

A record shall be kept of every burial in the cemetery of a cemetery company, showing the date of burial, name of the person buried, together with lot, plot, and space in which such burial was made therein. All sales, trust funds, accounting records, and all other records of the licensee shall be available at the licensee's principal place of business in this State and shall be readily available at all reasonable times for examination by an authorized representative of the Commission. (1975, c. 768, s. 1.)

CASE NOTES

Cited in Stegall v. Zoning Bd. of Adjustment, 87 N.C. App. 359, 361 S.E.2d 309 (1987).

§ 65-60.1. Trustees; qualifications; examination of records; enforcement.

(a) The term "corporate trustee" as used in this Article shall mean either a bank or trust company authorized to do business in North Carolina under the supervision of the Commissioner of Banks or any other corporate entity; provided that any corporate entity other than a bank or trust company which acts as trustee under this Article shall first be approved by the Cemetery Commission and shall be subject to supervision by the Cemetery Commission as provided herein.

(b) Any corporate entity, other than a bank or trust company, which desires to act as trustee for cemetery funds under this Article shall make application to the Commission for approval. The Commission shall approve the trustee when it has become satisfied that:

(1) The applicant employs and is directed by persons who are qualified by character, experience, and financial responsibility to care for and invest the funds of others.

(2) The applicant will perform its duties in a proper and legal manner and the trust funds and interest of the public generally will not be jeopardized.

(3) The applicant will act as trustee for cemetery funds which will exceed five hundred thousand dollars ($500,000) in the aggregate.

(4) The applicant is authorized to do business in North Carolina and has adequate facilities to perform its duties as trustee.

(c) Any trustee under this Article, other than a bank or trust company under the supervision of the Commissioner of Banks, shall maintain records relative to cemetery trust funds as the Commission may by regulation prescribe. The records shall be available at the trustee's place of business in North Carolina and shall be available at all reasonable times for examination by a representative of the Commission. The records shall be audited annually, within 90 days from the end of the trust fund's fiscal year, by an independent certified public accountant, and a copy of the audit report shall be promptly forwarded to the Commission.

(d) Whenever it appears that an officer, director, or employee of a trustee, other than a bank or trust company, is dishonest, incompetent, or reckless in the management of a cemetery trust fund, the Commission may bring an action in the courts to remove the trustee and to impound the property and business of the trustee as may be reasonably necessary to protect the trust funds.

(e) Any trustee shall invest and reinvest cemetery trust funds in the same manner as provided by law for the investment of trust funds by the clerk of the superior court; provided, however, that cemetery trust funds held in a fund designated as Trust Fund "A" pursuant to G.S. 65-64(e) may be invested and reinvested in accordance with G.S. 36A-2. (1977, c. 686, s. 15; 1979, c. 888, s. 9; 1995, c. 509, s. 135.3(a).)

§ 65-61. Required trust fund for care and maintenance; remedy of Commission for noncompliance.

No cemetery company shall be permitted to establish, or operate if already established, a cemetery unless provision is made for the future care and maintenance of such cemetery by establishing a trust fund and designating a corporate trustee to administer said fund in accordance with a written trust agreement. If any cemetery company refuses or otherwise fails to provide or maintain an adequate care and maintenance trust fund in accordance with the provisions of this Article, the Commission, after reasonable notice, shall proceed to enforce compliance under the powers vested in it under this Article; provided any nonprofit cemetery corporation, incorporated and engaged in the cemetery business continuously since and prior to 1915 and whose current trust assets exceed seven hundred fifty thousand dollars ($750,000) shall not be required to designate a corporate trustee. The trust fund agreement shall contain and include the following: name, location, and address of both the licensee and the trustee showing the date of agreement together with the amounts required deposited as stated in this Article. No person shall withdraw or transfer any portion of the corpus of the care and maintenance trust fund without first obtaining written consent from the Commission. (1943, c. 644, s. 9; 1957, c. 529, s. 3; 1967, c. 1009, s. 9; 1975, c. 768, s. 1; 1977, c. 686, s. 13.)

§ 65-62. Individual contracts for care and maintenance.

At the time of making a sale or receiving the initial deposit hereunder, the cemetery company shall deliver to the person to whom such sale is made, or who makes such deposit, an instrument in writing which shall specifically state that the net income of the care and maintenance trust fund shall be used solely for the care and maintenance of the cemetery, for reasonable costs of administering such care and maintenance and for reasonable costs of administering the trust fund. (1975, c. 768, s. 1.)

§ 65-63. Requirements for perpetual care fund.

A cemetery company may not cause or permit advertising of a perpetual care fund in connection with the sale or offer for sale of its property unless the amount deposited in the fund is at least one hundred dollars ($100.00) or ten percent (10%) of the retail sale price, whichever is greater, per grave space, niche, or mausoleum crypt sold. Nothing may prohibit an individual cemetery from requiring a perpetual care deposit for grave memorial markers to be deposited in the perpetual care fund so long as the same assessment is uniformly applied to all grave memorial markers installed in the cemetery. (1943, c. 644, s. 5; 1957, c. 529, s. 1; 1967, c. 1009, s. 3; 1971, c. 1149, s. 3; 1975, c. 768, s. 1; 1979, c. 888, s. 4; 1987, c. 488, s. 5; 1991, c. 653, s. 5; 2004-202, s. 6.)

§ 65-64. Deposits to perpetual care fund.

(a) Deposits to the care and maintenance trust fund must be made by the cemetery company holding title to the subject cemetery lands on or before the last day of the calendar month following the calendar month in which final payment is received as provided herein; however the entire amount required to be deposited into the fund shall be paid within four years from the date of any contract requiring such payment regardless of whether all amounts have been received by the cemetery company. If the cemetery company fails to make timely deposit, the Commission may levy and collect a late filing fee of one dollar ($1.00) per day for each day the deposit is delinquent on each grave space, niche or mausoleum crypt sold. The care and maintenance trust fund shall be invested and reinvested by the trustee in the same manner as provided by law for the investment of other trust funds by the clerk of the superior court except that such investments may be made through means of a common trust fund as described in G.S. 36A-90; provided, further, that cemetery trust funds held in a fund designated as Trust Fund "A" pursuant to G.S. 65-64(e) may be invested and reinvested in accordance with G.S. 36A-2. The fees and other expenses of the trust fund shall be paid by the trustee from the net income thereof and may not be paid from the corpus. To the extent that the said net income is not sufficient to pay such fees and other expenses, the same shall be paid by the cemetery company.

(b) When a municipal, church-owned or fraternal cemetery converts to a private cemetery as defined in G.S. 65-48, then said cemetery shall establish and maintain a care and maintenance trust fund pursuant to this section; provided, however, the initial deposit for establishment of this trust fund shall be an amount equal to fifty dollars ($50.00) per space for all spaces either previously sold or contracted for sale in said cemetery at the time of conversion or fifty thousand dollars ($50,000), whichever sum is greater.

(c) Repealed by 1991 (Regular Session, 1992), c. 1007, s. 35.

(d) In each sales contract, reservation or agreement wherein burial rights are priced separately, the purchase price of said burial rights shall be the only item subject to care and maintenance trust fund deposits; but if the burial rights are not priced separately therein, the full amount of the contract, reservations or agreement shall be subject to care and maintenance trust fund deposits as provided herein, unless the purchase price of said burial rights can be determined from the accounting records of the cemetery company.

(e) When the amount deposited in the perpetual care fund required by this Article of any cemetery company shall amount to one hundred fifty thousand dollars ($150,000), anything in this Article to the contrary notwithstanding, the cemetery company may make all deposits thereafter either into the original perpetual care trust fund or into a separate fund established as an irrevocable trust, designated as Perpetual Care Trust Fund "A," and invested by the trustee, in accordance with G.S. 36A-2, as directed by the cemetery company. Funds in a trust fund designated as Trust Fund "A" may not be invested in another cemetery company.

(f) For special endowments for a specific lot, grave, or a family mausoleum, memorial, marker, or monument, the cemetery may set aside the full amounts received for this individual special care in a separate trust or by a deposit to a savings account in a bank or savings and loan association located within and authorized to do business in the State; provided, however, if the licensee does not set up a separate trust or savings account for the special endowment the full amount thereof shall be deposited in Perpetual Care Trust Fund "A." (1943, c. 644, s. 10; 1957, c. 529, s. 4; 1967, c. 1009, s. 10; 1971, c. 1149, s. 5; 1975, c. 768, s. 1; 1977, c. 686, s. 14; 1979, c. 888, ss. 5, 6; 1987, c. 488, ss. 3, 6; 1991, c. 653, s. 6; 1991 (Reg. Sess., 1992), c. 1007, s. 35; 1995, c. 509, s. 135.3(b), (c); 2004-202, ss. 7, 8.)

§ 65-65. Trust fund; financial reports.

Within 60 days after the end of the calendar or fiscal year of the cemetery company, the trustee shall furnish adequate financial reports with respect to the care fund on forms provided by the Commission. However, the Commission may require the trustee to make such additional financial reports as it may deem advisable. (1975, c. 768, s. 1.)

§ 65-66. Receipts from sale of personal property or services; trust account; penalties.

(a) It shall be deemed contrary to public policy if any person or legal entity receives, holds, controls or manages funds or proceeds received from the sale of, or from a contract to sell, personal property or services which may be used in a cemetery in connection with the burial of or the commemoration of the memory of a deceased human being, where payments for the same are made either outright or on an installment basis prior to the demise of the person or persons so purchasing them or for whom they are so purchased, unless such person or legal entity holds, controls or manages said funds, subject to the limitations and regulations prescribed in this section. This section shall apply to all cemetery companies or other legal entities that offer for sale or sell personal property or services which may be used in a cemetery in connection with the burial of, or the commemoration of the memory of, a deceased human being, but shall exclude persons holding a license under Article 13D of Chapter 90 of the General Statutes.

(b) Any cemetery company or other entity entering into a contract for the sale of personal property or services, to be used in a cemetery in connection with disposing of, or commemorating the memory of a deceased human being wherein the use of the personal property or the furnishing of services is not immediately requested or required, shall comply with the following requirements and conditions:

(1) The cemetery company or other entity shall deposit an amount equal to sixty percent (60%) of all proceeds received on such contracts into a trust account, either in the form of an account governed by a trust agreement and handled by a corporate trustee or in the form of a passbook savings account, certificates of deposit for time certificates, and/or money-market certificates with a licensed and insured bank or savings institution located in the State of North Carolina until the amount deposited equals sixty percent (60%) of the actual sale price of the property or services sold. Such accounts and/or deposits shall be in the name of the cemetery company or other entity in a form which will permit withdrawals only with the participation and consent of the Cemetery Commission as required by subdivision (4) of this subsection.

(2) All funds received on account of a contract for the sale of such personal property or services, whether the funds be received directly from the purchaser or from the sale or assignment of notes entered into by the purchase or otherwise, shall be deposited into the trust account as required by subdivision (1) of this section.

(3) All deposits required herein shall be made into the trust account so established on or before the last day of the month following receipt of the funds by the cemetery company or other entity.

(4) Withdrawals from a trust account may be made by the depositor, but only with the written approval of the Commission or officer or employee of the Commission authorized to act for the Commission. Withdrawals may be made only upon delivery of the merchandise or services for which the funds were deposited, cancellation of a contract, the presence of excess funds in the trust account, or under other circumstances deemed appropriate by the Commission. The Commission shall promulgate rules and regulations governing withdrawals from trust accounts, including time and frequency of withdrawals, notice to the Commission prior to withdrawals, the number and identity of persons other than the owner who are authorized by the owner to make withdrawals, the officers and employees of the Commission authorized to approve withdrawals, and any other matters necessary to implement the provisions of this subdivision. Withdrawals will not be allowed if the amount remaining in the trust account would fall below sixty percent (60%) of all proceeds received on account of contracts for the sale of such personal property or services.

(5) If for any reason a cemetery company or other entity who has entered into a contract for the sale of personal property or services cannot or does not provide the personal property or perform the services called for by the contract after request in writing to do so, the purchaser or his heirs or assigns or duly authorized representative shall be entitled to receive the entire amount paid on the contract and any income if any, earned thereon by the trust account.

(6) Every year after September 1, 1975, the cemetery company, the trustee or other entity shall within 75 days after the end of the calendar year, file a financial report of the trust funds with the Commission, setting forth the principal thereof, the investments and payments made, the income earned and disbursed; provided, however, that the Commission may require the cemetery, trustee, or other entity to make such additional financial reports as it may deem advisable.

(c) Whenever a contract for the sale of personal property and/or services allocates payments to apply to one item at a time under a specific schedule, the contract shall be considered divisible. Title to each item of personal property or the right to each item of services shall pass to the purchaser upon full payment for that item regardless of the remaining balance on other items under the same contract.

(d) Any contract for the sale of personal property and/or services shall state separate costs for each item of personal property, for each act of installation required by the contract, and for each other item of services included in the contract.

(e) All contracts for the sale of personal property and/or services must be printed in type size as required by the Truth in Lending Act, 15 U.S.C. § 1601 et seq., and regulations adopted pursuant to that act.

(f) In the event of prepayment, interest charged shall be no more than the interest earned on the unpaid balance computed on a percent per month basis for each month or part of a month up to the date of final payment. Any excess interest which has been paid by the purchaser must be refunded to him, his assigns, or his representative within 30 days after the final payment. No penalty or additional charge for prepayment may be required.

(g) In lieu of the deposits required under subsection (b) of this section, the cemetery company or other entity may post with the Commission a good and sufficient performance bond by surety company licensed to do business in North Carolina and in an amount sufficient to cover all payments made directly or indirectly by or on account of purchasers who have not received the purchased property and services. Money received from the sale or assignment of notes entered into by the purchasers, or otherwise, shall be treated as payments made by the purchasers.

(h) The Commission shall have the power and is required from time to time as it may deem necessary to examine the business of any cemetery company or other entity writing contracts for the sale of the property or services as herein contemplated. The written report of such examination shall be filed in the office of the Commission. Any person or entity being examined shall produce the records of the company needed for such examination.

(i) Any provision of any contract for the sale of the personal property or the performance of services herein contemplated under which the purchaser or beneficiary waives any of the provisions of this section shall be void.

(j) Repealed by Session Laws 1991, c. 653, s. 7.

(k) Nothing in this section shall apply to persons or legal entities holding licenses under Article 13D of Chapter 90 of the General Statutes when engaging in activities for which a license is required under that Article.

(*l*) If any report is not received within the time stipulated by the Commission or herein, the Commission may levy and collect a late filing fee of twenty-five dollars ($25.00) per month for each month of delinquency.

(m) Within 30 days following the execution of a contract for the sale of personal property or performance of services, a purchaser may cancel his contract by giving written notice to the seller. The seller may cancel the contract, upon default by purchaser, by giving written notice to the purchaser. Within 30 days of notice of cancellation, the cemetery company or other entity shall refund to purchaser the principal amount on deposit in the trust account for his benefit on any undelivered merchandise or services. This amount (no other obligations owed the purchaser by the seller) shall constitute the purchaser's entire entitlements under the contract. The seller may not terminate the contract without complying with this subsection. (1975, c. 768, s. 1; 1979, c. 888, s. 7; 1987, c. 488, s. 7; 1991, c. 653, s. 7; 1995, c. 509, s. 135.1(j), (k); 2004-202, s. 9.)

Editor's Note. — Former G.S. 65-36.1 through 65-36.8 were recodified as G.S. 90-210.30 [Repealed] through 90-210.37, effective October 1, 1985, by Session Laws 1985, c. 12, s. 1. References to these sections in the text above were changed to reflect their current placement, in light of the 1985 recodification.

§ 65-67. Applications for license.

Applications for renewal license must be submitted on or before July 1 each and every year in the case of an existing cemetery company. Before any sale of cemetery property in the case of a new cemetery company or a change of ownership or control as indicated in G.S. 65-59, an application for license must be submitted and license issued. (1975, c. 768, s. 1.)

§ 65-68. License not assignable or transferable.

No license issued under G.S. 65-67 shall be transferable or assignable and no licensee shall develop or operate any cemetery authorized by this Article under any name or at any location other than that contained in the application for such license. (1975, c. 768, s. 1.)

§ 65-69. Minimum acreage; sale or disposition of cemetery lands.

(a) Each licensee shall set aside a minimum of 30 acres of land for use by said licensee as a cemetery, and shall not sell, mortgage, lease or encumber the same.

(b) The fee simple title, or lesser estate, in any lands owned by licensee and dedicated for use by it as a cemetery, which are contiguous, adjoining, or adjacent to the minimum of 30 acres described in subsection (a), may be sold, conveyed, or disposed of, or any part thereof, by the licensee, for use by the new owner for other purposes than as a cemetery; provided that no bodies have been previously interred therein; and provided further, that any and all titles, interests, or burial rights which may have been sold or contracted to be sold in such lands which are the subject of such sale shall be conveyed to and revested in the licensee prior to consummation of any such sale, conveyance or disposition.

(c) Any licensee may convey and transfer to a municipality or county its real and personal property together with moneys deposited with the trustee; provided said municipality or county will accept responsibility for maintenance thereof and prior written approval of the Commission is first obtained.

(d) The provisions of subsections (a) and (b) relating to a requirement for minimum acreage shall not apply to those cemeteries licensed by the Commission on or before July 1, 1967, which own or control a total of less than 30 acres of land; provided that such cemeteries shall not dispose of any of such lands. A nongovernment lien or other interest in land acquired in violation of this section is void. (1975, c. 768, s. 1; 1991, c. 653, s. 8.)

§ 65-70. Construction of mausoleums and belowground crypts; trust fund for receipts from sale of preconstruction crypts; compliance requirements.

(a) A cemetery company shall be required to start construction of that section of a mausoleum or bank of belowground crypts in which sales, contracts for sale, reservations for sales or agreements for sales are being made, within 48 months after the date of the first such sale. The construction of such mausoleum section or bank of belowground crypts shall be completed within five years after the date of the first sale made; provided, however, extensions for completion, not to exceed one year, may be granted by the Commission for good reasons shown.

(b) A cemetery company which plans to offer for sale space in a section of a mausoleum or bank of underground crypts prior to its construction shall establish a preconstruction trust account. The trust account shall be administered and operated in the same manner as the merchandise trust account provided for in G.S. 65-66 and shall be exclusive of the merchandise trust account or such other trust accounts or funds that may be required by law. The personal representative of any purchaser of such space who dies before completion of construction shall be entitled to a refund of all moneys paid for such space including any income earned thereon.

(c) Before a sale, contract for sale, reservation for sale or agreement for sale in the first mausoleum section or bank of underground crypts in each cemetery may be made the funds (one hundred twenty percent (120%) of construction cost) to be deposited to the preconstruction trust account shall be computed as to said section or bank of crypts and such trust account payments must be made on or before the last day of the calendar month following receipt by the cemetery company or its agent of each payment. The trust account portion of each such payment shall be computed by dividing the cost of the project plus twenty percent (20%) of said cost, as computed by a licensed contractor, engineer or architect by the number of crypts in the section or bank of crypts to ascertain the cost per unit. The unit cost shall be divided by the contract sales price of each unit to obtain a percentage which shall be multiplied by the amount of each payment. The formula shall be computed as follows:

Cost plus twenty percent (20%) divided by number of crypts = cost per unit
Cost per unit divided by contract sales price = percentage
Percentage x payment received = deposit required to preconstruction trust account.

(d) The cemetery company shall be entitled to withdraw the funds from said preconstruction trust account only after the Commission has become satisfied that construction has been completed; provided, however, that during construction of the mausoleum or bank of belowground crypts the Commission may, in its discretion, authorize a specific percentage of the funds to be withdrawn when it appears that at least an equivalent percentage of construction has been completed.

(e) If a mausoleum section or bank of underground crypts is not completed within the time limits set out in this section the corporate trustee, if any, shall contract for and cause said project to be completed and paid therefor from the trust account funds deposited to the project's account paying any balance, less cost and expenses, to the cemetery company. In the event there is no corporate trustee, the Commission shall appoint a committee to serve as trustees to contract for and cause said project to be completed and paid therefor from the trust account funds deposited to the project's account paying any balance, less cost and expenses, to the cemetery company.

(f) In lieu of the payments outlined hereunder to the preconstruction trust account the cemetery company may deliver to the Commission a good and sufficient completion or performance bond in an amount and by surety companies acceptable to the Commission. (1975, c. 768, s. 1; 1977, c. 686, ss. 16, 17; 1979, c. 888, s. 8.)

§ 65-71. Penalties.

(a) Except as provided in this subsection, a person violating any provisions of this Article, of any order or rule promulgated under this Article, or of any license issued by the Commission is guilty of a Class 1 misdemeanor. Each failure to deposit funds in a trust fund in accordance with this Article is a separate offense. A person who has failed to deposit funds in a trust fund in accordance with this Article and whose delinquent deposits equal or exceed twenty thousand dollars ($20,000) is guilty of a Class I felony.

(b) The officers and directors or persons occupying similar status or performing similar functions of any cemetery company, cemetery sales organization, cemetery management organization or cemetery broker, as defined in this Chapter, failing to make required contributions to the care and maintenance trust fund and any other trust fund or escrow account shall be liable for any offense based on the failure and upon conviction for the offense shall be punished in the manner prescribed by law. (1943, c. 644, s. 14; 1967, c. 1009, s. 13; 1975, c. 768, s. 1; 1991, c. 653, s. 9; 1993, c. 539, ss. 501, 1281; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 65-72. Burial without regard to race or color.

(a) It shall be the public policy of the State that all cemetery companies or other legal entities conducting or maintaining public or private cemeteries shall sell to all applicants and bury all deceased human beings on equal terms without regard to race or color. Anything contrary hereto is void and of no legal effect. Bylaws, rules and regulations, contracts, deeds, etc., may permit designation of parts of cemeteries or burial grounds for the specific use of persons whose religious code required isolation. Any program offering free burial rights to veterans or any other person or group of persons shall not be conditioned by any requirement to purchase additional burial rights or merchandise.

(b) Any cemetery company or other legal entity violating the provisions of this section shall be guilty of a Class 1 misdemeanor, and each violation of this section shall constitute a separate offense. (1975, c. 768, s. 1; 1993, c. 539, s. 502; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 65-73. Validation of certain deeds for cemetery lots executed by suspended corporations.

Any deed for a cemetery lot or lots which was executed prior to January 1, 1979, and which would have been valid if the charter of the grantor corporation had not been suspended at the time the deed was executed, is hereby validated. (1979, c. 225, s. 1.)

ARTICLE 10.

Access to and Maintenance of Private Graves and Abandoned Public Cemeteries.

§§ 65-74, 65-75: Repealed by Session Laws 2007-118, s. 6, effective July 1, 2007, and applicable to all trusts created on or after that date.

Cross References. — For similar present provisions, see G.S. 65-101, 65-102.

§ 65-76: Reserved for future codification purposes.

ARTICLE 11.

Minimum Burial Depth.

§ 65-77. Minimum burial depth.

When final disposition of a human body entails interment, the top of the uppermost part of the burial vault or other encasement shall be a minimum of 18 inches below the ground surface. This section does not apply to:

(1) Burials where no part of the burial vault or other encasement containing the body is touching the ground.

(2) Burials where the land is located in a family owned cemetery that was established by deed recorded prior to January 1, 1989, and the individual to be buried is to be buried in a surface burial vault in a manner similar to that of the individual's deceased spouse who was

buried prior to January 1, 1981. (1995, c. 123, s. 16; 1999-425, s. 4; 2003-420, s. 8(b).)

Editor's Note. — This section is former G.S. 90-210.25A as recodified by Session Laws 2003-420, s. 8(b). The historical citation of the former section has been added to this section as recodified.

§§ 65-78 through 65-84: Reserved for future codification purposes.

Article 12.

Abandoned and Neglected Cemeteries.

Part 1. General.

§ 65-85. Definitions.

As used in this Article, the following terms mean:

(1) Abandoned. — Ceased from maintenance or use by the person with legal right to the real property with the intent of not again maintaining the real property in the foreseeable future.
(2) Cemetery. — A tract of land used for burial of multiple graves.
(3) Department. — The Department of Cultural Resources.
(4) Grave. — A place of burial for a single decedent.
(5) Neglected. — Left unattended or uncared for through carelessness or intention and lacking a caretaker.
(6) Public cemetery. — A cemetery for which there is no qualification to purchase, own, or come into possession of a grave in that cemetery. (2007-118, s. 1.)

Editor's Note. — Session Laws 2007-118, s. 7, made this article effective July 1, 2007, and applicable to all trusts created on or after that date.

Session Laws 2007-118, which added this Article, repealed former Articles 1, 4, 5, 8 and 10 of the Chapter. Where appropriate, the historical citations and case annotations for the former sections in those Articles have been added to the similar present sections in new Article 12.

§§ 65-86 through 65-90: Reserved for future codification purposes.

Part 2. Trust Funds for Care of Cemeteries.

§ 65-91. Money deposited with the clerk of superior court.

For the maintenance and preservation of abandoned or neglected graves or abandoned or neglected cemeteries, any person, firm, or corporation may, by will or otherwise, place in the hands of the clerk of the superior court of any county in the State where such grave or lot is located any sum of money not less than five thousand dollars ($5,000), the income from which is to be used for keeping in good condition the abandoned or neglected grave or the abandoned or neglected cemetery with specific instructions as to the use of the fund. (1917, c. 155, s. 1; C.S., s. 5024; 1979, c. 38; 2007-118, s. 1.)

Editor's Note. — Former G.S. 65-7, repealed by Session Laws 2007-118, s. 3, and similar to present G.S. 65-91, carried the following local modification: "Washington: 1957, ch. 1126."

§ 65-92. Separate record of accounts to be kept.

It shall be the duty of the clerk of the superior court to keep a separate record for keeping account of the money deposited as provided in G.S. 65-91, to keep a perpetual account of the same therein, and to record therein the specific instructions about the use of the income on such money. The clerk shall see that the income is spent according to such specific instructions and shall place a copy of the accounting in the estate file. (1917, c. 155, s. 1; C.S., s. 5025; 2007-118, s. 1.)

§ 65-93. Funds to be kept perpetually.

All money placed in the office of the superior court clerk in accordance with this Part shall be held perpetually, or until such time as the balance of the trust corpus falls below one hundred dollars ($100.00), at which time the trust shall terminate, and the clerk shall disburse the remaining balance as provided in G.S. 36A-147(c). Except as otherwise provided herein, no one shall have authority to withdraw or change the direction of the income on same. (1917, c. 155, s. 2; C.S., s. 5026; 1995, c. 225, s. 2; 2007-118, s. 1.)

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 65-94. Investment of funds.

Money placed in the office of the superior court clerk in accordance with this Part shall be invested in the same manner as is provided by law for the investment of other trust funds by the clerk of the superior court. (1917, c. 155, s. 3; C.S., s. 5027; 1943, c. 97, s. 1; 2007-118, s. 1.)

§ 65-95. Clerk's bond; substitution of bank or trust company as trustee.

The official bond of the clerk of the superior court shall be liable for all such sums as shall be paid over to the clerk in accordance with the provisions of this Part. In lieu of the provisions of this section, the clerk may appoint any bank or trust company authorized to do business in this State as trustee for the funds authorized to be paid into his office by virtue of this Part; provided, that no bank or trust company shall be appointed as such trustee unless such bank or trust company is authorized and licensed to act as fiduciary under the laws of this State.

Before any clerk shall turn over such funds to the trustee so appointed, the clerk shall require that the trustee so named qualify before the clerk as such trustee in the same way and manner and to the same extent as guardians are by law required to so qualify. After such trustee has qualified as herein provided, all such funds coming into the clerk's hands may be invested by the trustee only in the securities set out in G.S. 7A-112 and the income therefrom invested for the purposes and in the manner heretofore set out in this Part. All trustees appointed under the provisions of this Part shall render and file in the office of the clerk of the superior court all reports that are now required by law of guardians. (1917, c. 155, ss. 3, 4; C.S., s. 5028; 1939, c. 18; 1943, c. 97, s. 2; 2007-118, s. 1.)

§ 65-96. Funds exempt from taxation.

All money referred to in the preceding sections of this Part shall be exempt from all State, county, township, town, and city taxes. (1917, c. 155, s. 4; C.S., s. 5029; 2007-118, s. 1.)

§§ 65-97 through 65-100: Reserved for future codification purposes.

Part 3. Access to and Maintenance of Abandoned or Neglected Cemeteries.

§ 65-101. Entering public or private property to maintain or visit with consent.

Any of the following persons, with the consent of the public or private landowner, may enter the property of another to discover, restore, maintain, or visit a grave or abandoned public cemetery:

(1) A descendant of the person whose remains are reasonably believed to be interred in the grave or abandoned public cemetery.
(2) A descendant's designee.
(3) Any other person who has a special personal interest in the grave or abandoned public cemetery. (1987, c. 686, s. 1; 1991, c. 36, s. 1; 2007-118, s. 1.)

§ 65-102. Entering public or private property to maintain or visit without consent.

(a) If the consent of the landowner cannot be obtained, any person listed in G.S. 65-101(1), (2), or (3) may commence a special proceeding by petitioning the clerk of superior court of the county in which the petitioner has reasonable grounds to believe the grave or abandoned public cemetery is located for an order allowing the petitioner to enter the property to discover, restore, maintain, or visit the grave or abandoned public cemetery. The petition shall be verified. The special proceeding shall be in accordance with the provisions of Articles 27A and 33 of Chapter 1 of the General Statutes. The clerk shall issue an order allowing the petitioner to enter the property if the clerk finds all of the following:

(1) There are reasonable grounds to believe that the grave or abandoned public cemetery is located on the property or it is reasonably necessary to enter or cross the landowner's property to reach the grave or abandoned public cemetery.
(2) The petitioner, or the petitioner's designee, is a descendant of the deceased, or the petitioner has a legitimate historical, genealogical, or governmental interest in the grave or abandoned public cemetery.
(3) The entry on the property would not unreasonably interfere with the enjoyment of the property by the landowner.

(b) The clerk's order may state one or more of the following:

(1) Specify the dates and the daylight hours that the petitioner may enter and remain on the property.
(2) Grant the petitioner the right to enter the landowner's property periodically, as specified in the order, after the time needed for initial restoration of the grave or abandoned public cemetery.
(3) Specify a reasonable route from which the petitioner may not deviate in all entries and exits from the property. (1987, c. 686, s. 1; 1991, c. 36, s. 1; 1999-216, s. 12; 2007-118, s. 1.)

CASE NOTES

Constitutionality. — Former G.S. 65-75 [repealed] was a proper exercise of a police power and therefore not subject to the constitutional and fundamental provision that private property was not to be taken for a public use without just compensation. Massey v. Hoffman, 184 N.C. App. 731, 647 S.E.2d 457, 2007 N.C. App. LEXIS 1595 (2007), appeal dismissed, review denied, 362 N.C. 360, 662 S.E.2d 907 (2008).

§§ 65-103 through 65-105: Reserved for future codification purposes.

Part 4. Removal of Graves.

§ 65-106. Removal of graves; who may disinter, move, and reinter; notice; certificate filed; reinterment expenses; due care required.

(a) The State of North Carolina and any of its agencies, public institutions, or political subdivisions, the United States of America or any agency thereof, any church, electric power or lighting company, or any person, firm, or corporation may effect the disinterment, removal, and reinterment of graves as follows:

(1) By the State of North Carolina or any of its agencies, public institutions, or political subdivisions, the United States of America or any agency thereof, when it shall determine and certify to the board of county commissioners in the county from which the bodies are to be disinterred that such removal is reasonably necessary to perform its governmental functions and the duties delegated to it by law.

(2) By any church authority in order to erect a new church, parish house, parsonage, or any other facility owned and operated exclusively by such church; in order to expand or enlarge an existing church facility; or better to care for and maintain graves not located in a regular cemetery for which such church has assumed responsibility of care and custody.

(3) By an electric power or lighting company when it owns land on which graves are located, and the land is to be used as a reservoir.

(4) By any person, firm, or corporation who owns land on which an abandoned cemetery is located after first securing the consent of the governing body of the municipality or county in which the abandoned cemetery is located.

(b) The party effecting the disinterment, removal, and reinterment of a grave containing a decedent's remains under the provisions of this Part shall, before disinterment, give 30 days' written notice of such intention to the next of kin of the decedent, if known or subject to being ascertained by reasonable search and inquiry, and shall cause notice of such disinterment, removal, and reinterment to be published at least once per week for four successive weeks in a newspaper of general circulation in the county where such grave is located, and the first publication shall be not less than 30 days before disinterment. Any remains disinterred and removed hereunder shall be reinterred in a suitable cemetery.

(c) The party removing or causing the removal of all such graves shall, within 30 days after completion of the removal and reinterment, file with the register of deeds of the county from which the graves were removed and with the register of deeds of the county in which reinterment is made, a written certificate of the removal facts. Such certificate shall contain the full name, if known or reasonably ascertainable, of each decedent whose grave is moved, a precise description of the site from which such grave was removed, a precise description of the site and specific location where the decedent's remains have been reinterred, the full and correct name of the party effecting the removal, and a brief description of the statutory basis or bases upon which such removal or reinterment was effected. If the full name of any decedent cannot reasonably be ascertained, the removing party shall set forth all additional reasonably ascertainable facts about the decedent including birth date, death date, and family name.

The fee for recording instruments in general, as provided in G.S. 161-10(a)(1), for registering a certificate of removal facts shall be paid to the register of deeds of each county in which such certificate is filed for registration.

(d) All expenses of disinterment, removal, and acquisition of the new burial site and reinterment shall be borne by the party effecting such disinterment, removal, and reinterment, including the actual reasonable expense of one of the next of kin incurred in attending the same, not to exceed the sum of two hundred dollars ($200.00).

(e) The Office of Vital Records of North Carolina shall promulgate regulations affecting the registration and indexing of the written certificate of the removal facts, including the form of that certificate.

(f) The party effecting the disinterment, removal, and reinterment of a decedent's remains under the provisions of this Part shall ensure that the site in which reinterment is accomplished shall be of such suitable dimensions to accommodate the remains of that decedent only and that such site shall be reasonably accessible to all relatives of that decedent, provided that the remains may be reinterred in a common grave where written consent is obtained from the next of kin. If under the authority of this Part, disinterment, removal, and reinterment are effected by the State of North Carolina or any of its agencies, public institutions, or political subdivisions, the United States of America or any agency thereof, any electric power or lighting company, then such disinterment, removal, and reinterment shall be performed by a funeral director duly licensed as a "funeral director" or a "funeral service licensee" under the provisions of Article 13A of Chapter 90 of the General Statutes.

(g) All disinterment, removal, and reinterment under the provisions of this Part shall be made under the supervision and direction of the county board of commissioners or other appropriate official, including the local health director, appointed by such board for the county where the disinterment, removal, and reinterment take place. If reinterment is effected in a county different from the county of disinterment with the consent of the next of kin of the deceased whose remains are disinterred, then the disinterment and removal shall be made under the supervision and direction of the county board of commissioners or other appropriate official, including the local health director, appointed by such board for the county of the disinterment, and the reinterment shall be made under the supervision and direction of the county board of commissioners or other appropriate official, including the local health director, appointed by such board for the county of reinterment.

Due care shall be taken to do said work in a proper and decent manner, and, if necessary, to furnish suitable coffins or boxes for reinterring such remains. Due care shall also be taken to remove, protect, and replace all tombstones or other markers, so as to leave such tombstones or other markers in as good condition as that prior to disinterment. Provided that in cases where the remains are to be moved to a perpetual care cemetery or other cemetery where upright tombstones are not permitted, a suitable replacement marker shall be provided.

(h) Nothing contained in this Part shall be construed to grant or confer the power or authority of eminent domain, or to impair the right of the next of kin of a decedent to remove or cause the removal, at his or their expense, of the remains or grave of such decedent. (1919, c. 245; C.S., ss. 5030, 5030(a); Ex. Sess. 1920, c. 46; 1927, c. 23, s. 1; c. 175, s. 1; 1937, c. 3; 1947, cc. 168, 576; 1961, c. 457; 1963, c. 915, s. 1; 1965, c. 71; 1971, c. 797, s. 1; 1977, c. 311, s. 1; 2001-390, s. 3; 2007-118, s. 1.)

Cross References. — As to defacing, desecrating, or plowing over grave sites and desecrating human remains, see G.S. 14-148 and 14-149.

Editor's Note. — Former G.S. 65-13, repealed by Session Laws. 2007-118, s. 5, and similar to present G.S. 65-106, carried the following local modification: "Orange: 1963, c. 915, s. 11/2."

CASE NOTES

***Editor's Note.** — Some of the decisions cited below were decided under former G.S. 65-13.*

This section is much broader than the older C.S. 5030, and reflects a recognition of the need for broad authority by church authority to meet the needs of a growing membership in relocating graves which would restrict that growth. Singletary v. McCormick, 36 N.C. App. 597, 244 S.E.2d 731 (1978).

The phrase "in order to" in subdivision (a)(2) of this section is synonymous with the phrase "as the means to." Singletary v. McCormick, 36 N.C. App. 597, 244 S.E.2d 731 (1978).

Relocation of Street to Enlarge Church Facility. — Though graves proposed to be relocated were within the area of a relocated street, the street was to be relocated "as the means to" expand or enlarge an existing church facility, and therefore relocation of the graves was permissible. Singletary v. McCormick, 36 N.C. App. 597, 244 S.E.2d 731 (1978).

Section Not Exclusive Grounds for Disinterment. — This statute does not provide the exclusive grounds for the disinterment of a body. The statute speaks to the situation where a body had been properly interred, but for some reason justified by the public interest or by some compelling private interests it is necessary to effect a disinterment, removal, and reinterment. This statute nowhere provides for the situation where there has been an improper interment. Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325, cert. denied, 298 N.C. 304, 259 S.E.2d 917 (1979).

Action for Removal of Grave in Violation of Former Provision. — See King v. Smith, 236 N.C. 170, 72 S.E.2d 425 (1952).

The building of a new vestry room of a church to be used with the one as presently located in relation to the use of the choir, etc., comes within the purview of the statute permitting the removal of the bodies buried in the churchyard by the proper authorities of the church, when necessary or expedient to do so, in carrying out the arrangement. Mayo v. Bragaw, 191 N.C. 427, 132 S.E. 1 (1926).

§§ 65-107 through 65-110: Reserved for future codification purposes.

Part 5. County Care of Rural Cemeteries.

§ 65-111. County commissioners to provide list of public and abandoned cemeteries.

Each board of county commissioners shall have the following duties and responsibilities:

(1) To prepare and keep on record in the office of the register of deeds a list of all public cemeteries in the county outside the limits of incorporated municipalities, and not established and maintained for the use of an incorporated municipality, including the names and addresses of the persons in possession and control of those public cemeteries.

(2) To prepare and keep on record in the office of the register of deeds a list of all abandoned public cemeteries.

(3) To furnish to the Department and the Publications Division in the Department of the Secretary of State copies of the lists of such public and abandoned cemeteries, to the end that it may furnish to the

boards of county commissioners, for the use of the persons in control of such cemeteries, suitable literature, suggesting methods of taking care of such places. (1917, c. 101, s. 1; C.S., s. 5019; 1939, c. 316; 2007-118, s. 1.)

§ 65-112. Appropriations by county commissioners.

To encourage the persons in possession and control of the public cemeteries referred to in G.S. 65-111 to take proper care of and to beautify such cemeteries, to mark distinctly their boundary lines with evergreen hedges or rows of suitable trees, and otherwise to lay out the grounds in an orderly manner, the board of county commissioners of any county, upon being notified that two-thirds of the expense necessary for so marking and beautifying any cemetery has been raised by the local governing body of the institution which owns the cemetery, and is actually in hand, is hereby authorized to appropriate from the general fund of the county one-third of the expense necessary to pay for such work, the amount appropriated by the board of commissioners in no case to exceed fifty dollars ($50.00) for each cemetery. (1917, c. 101, s. 2; C.S., s. 5020; 1979, c. 735; 2007-118, s. 1.)

§ 65-113. County commissioners to have control of abandoned public cemeteries; trustees.

The county commissioners of the various counties are authorized to oversee all abandoned public cemeteries in their respective counties, to see that the boundaries and lines are clearly laid out, defined, and marked, and to take proper steps to preserve them from encroachment, and they are hereby authorized to appropriate from the general fund of the county whatever sums may be necessary from time to time for the above purposes.

The boards of county commissioners of the various counties may appoint a board of trustees not to exceed five in number and to serve at the will of the board, and may impose upon such trustees the duties required of the board of commissioners by this Article; and such trustees may accept gifts and donations for the purpose of upkeep and beautification of such cemeteries. (1917, c. 101, s. 3; C.S., s. 5021; 1947, c. 236; 2007-118, s. 1.)

§§ 65-114 through 65-125: Reserved for future codification purposes.

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ARTICLE 1.

Regulation and Inspection.

§ 66-1. County commissioners to appoint inspectors.

The board of county commissioners may appoint for their county or any township thereof inspectors for any article of commerce the inspection of which is not otherwise provided for by law, who shall hold office for the term of five years after their employment. (Rev., ss. 4637, 4669; C.S., s. 5068.)

§ 66-2: Repealed by Session Laws 1973, c. 108, s. 22.

§ 66-3. Bond of inspector; fees.

The said inspector shall enter into bond in the sum of five hundred dollars ($500.00), payable to the State of North Carolina, conditioned for the faithful performance of the duties of his office, which bond the board shall take; and he shall be entitled to such fees as may be prescribed by the board. (1848, c. 43, s. 3; R.C., c. 60, s. 76; Code, s. 3053; Rev., s. 4671; C.S., s. 5071.)

§ 66-4. Falsely acting as inspector.

If any person, who is not a legal or sworn inspector of lumber or other articles, presume to act as such, he shall forfeit and pay one hundred dollars ($100.00), and be guilty of a Class 1 misdemeanor. (1824, c. 1254, s. 3; R.C., c. 60, s. 69; Code, s. 3046; Rev., s. 3580; C.S., s. 5072; 1993, c. 539, s. 503; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-5. Penalty for sale without inspection.

If any person shall sell any article of forage or provision, of which inspection is required in accordance with this Article, without the same having been inspected as required, he shall, for every offense, forfeit and pay one hundred dollars ($100.00).

The clear proceeds of penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1850, c. 74, s. 2; R.C., c. 60, s. 77; Code, s. 3054; Rev., s. 4672; C.S., s. 5073; 1998-215, s. 40.)

§ 66-6. Penalty on master receiving without inspection.

No master or commander of any vessel shall take on board any cask or barrel or other commodity, liable to inspection as aforesaid, without its being inspected and branded as required, under the penalty of two hundred dollars ($200.00) for each offense.

The clear proceeds of penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1784, c. 206, s. 6; R.C., c. 60, s. 59; Code, ss. 3036, 3037; Rev., ss. 4657, 4658; C.S., s. 5074; 1998-215, s. 41.)

Local Modification. — Town of New Bern: C.S., G.S. 5074.

§ 66-7. Who to pay inspectors' fees; penalty for extortion.

The fees of inspectors shall be paid by the purchaser or exporter of the articles inspected, and if any inspector shall receive any greater fees than are by law allowed, he shall forfeit and pay ten dollars ($10.00) for every offense to any person suing for the same. (1824, c. 1254, ss. 1, 2; R.C., c. 60, s. 79; Code, s. 3055; Rev., s. 4673; C.S., s. 5075.)

§ 66-8: Repealed by Session Laws 1995, c. 379, s. 18.3.

§ 66-9. Gas and electric light bills to show reading of meter.

It shall be the duty of all gas companies and electric light companies selling gas and electricity to the public to show, among other things, on all statements or bills rendered to consumers, the reading of the meter at the end of the preceding month, and the reading of the meter at the end of the current month, and the amount of electricity, in kilowatt hours, and of gas, in feet, consumed for the current month; provided, however, that nothing herein contained shall be construed to prohibit any gas or electric company from adopting any method of and times of reading meters and rendering bills that may be approved by the North Carolina Utilities Commission.

Any gas or electric light company failing to render bills or statements, as provided for in this section, shall be subject to a penalty of ten dollars ($10.00) for each violation of this section or failure to render such statements, recoverable in the district court by any person suing for the same; but this section shall not apply to bills and accounts rendered customers on flat rate contracts. (1915, c. 259; C.S., s. 5082; 1959, c. 987; 1973, c. 108, s. 23.)

§ 66-10. Failure of dealers of scrap, salvage, or surplus to keep record of purchases of certain items misdemeanor.

(a) Every person, firm, or corporation buying rubber or leather, rubber belts, and belting, as scrap, salvage, or surplus shall keep a register containing a true and accurate record of each purchase, including the description of the article purchased, the name from whom purchased, the amount paid for the article purchased, the date of the purchase, and any and all marks or brands upon the rubber or leather, rubber belts, and belting. This register and the rubber, leather, rubber belts, and belting purchased shall be at all times open to the inspection of the public. A failure to comply with these requirements or the making of a false entry concerning the rubber or leather, rubber belts, or belting shall constitute a Class 1 misdemeanor.

(b) Every person, firm, or corporation engaged in the business of buying or dealing in scrap, salvage, or surplus, including glass, waste paper, burlap, cloth, cordage, rubber, leather, or belting of every kind, in addition to the above requirements under subsection (a) of this section, shall make and keep a record of the name and address of the person from whom this scrap, salvage, or surplus is purchased and the license number, if any, and if there is no license, a description of the vehicle in which this scrap, salvage, or surplus is delivered. Any person, firm, or corporation which fails to comply with the requirements of this subsection shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined not in excess of fifty dollars ($50.00) in the discretion of the court. (1917, c. 46; C.S., s. 5090; 1957, c. 791; 1993, c. 295, s. 1; 1993, c. 539, s. 504; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Anson: C.S., G.S. 5090; Beaufort, Bertie: 1953, c. 1154; Caldwell, Davidson: C.S., G.S. 5090; Harnett, Martin, Perquimans: 1953, c. 1154; Randolph, Robeson: C.S., G.S. 5090; Stanly: 1939, c. 154; Washington: 1953, c. 1154.

§ 66-11. Dealing in regulated metals property; penalties.

(a) Definitions. — As used in this section:

(1) "Law enforcement officer" means any duly constituted law enforcement officer of the State or of any municipality or county.

(2) "Regulated metals property" means all ferrous and nonferrous metals.

(3) "Secondary metals recycler" means any person, firm, or corporation in the State:

a. That, from a fixed location or otherwise, is engaged in the business of gathering or obtaining ferrous or nonferrous metals that have served their original economic purpose or is in the business of performing the manufacturing process by which ferrous metals or nonferrous metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value; or

b. That has facilities for performing the manufacturing process by which ferrous metals or nonferrous metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value, by methods including, but not limited to, the processing, sorting, cutting, classifying, cleaning, baling, wrapping, shredding, shearing, or changing the physical form or chemical content of the metals, but not including the exclusive use of hand tools.

(4) "Fixed location" means any site occupied by a secondary metals recycler as the owner of the site or as a lessee of the site under a lease or other rental agreement providing for occupation of the site by the secondary metals recycler for a total duration of not less than 364 days.

(a1) Receipt Required. — A secondary metals recycler shall issue a receipt to the person delivering the regulated metals property for all purchase transactions in which the secondary metals recycler purchases regulated metals property. This receipt shall be signed by the person delivering the materials, and the secondary metals recycler shall be able to provide documentation regarding the employee who completed the transaction.

(b) Records Required. —

(1) A secondary metals recycler shall maintain a record of all purchase transactions in which the secondary metals recycler purchases regulated metals property.

(2) The following information shall be maintained for transactions in which a secondary metals recycler purchases regulated metals property:

a. The name and address of the secondary metals recycler.
b. The name, initials, or other identification of the individual entering the information.
c. The date of the transaction.
d. The weight of the regulated metals property purchased.
e. The description made in accordance with the custom of the trade of the type of regulated metals property purchased and the physical address where the regulated metals were obtained by the seller, and a statement signed by the seller or the seller's agent certifying that the seller or the seller's agent has the lawful right to sell and dispose of the property.
f. The amount of consideration given for the regulated metals property.
g. The name and address of the vendor of the regulated metals property and the license plate number of the vehicle used to deliver the regulated metals.
h. A photocopy or electronic scan of the drivers license or state or federally issued photo identification card of the person delivering the regulated metals property to the secondary metals recycler. If the secondary metals recycler has a copy of the valid photo identification of the person delivering the regulated metals property on file, the secondary metals recycler must examine the photo identification, but may reference the photo identification that is on file without making a separate photocopy or electronic scan for each subsequent transaction. If the person delivering the regulated metals property does not have a drivers license or a state or federally issued photo identification card, the secondary metals recycler shall not complete the transaction.
i. A copy of the receipt required under subsection (a1) of this section when all the information required under subsection (a1) of this section is clear and legible or, in the event the copy of the receipt is not clear or not legible, the original receipt.
j. In transactions involving catalytic converters that are not attached to a vehicle, and central air conditioner evaporator coils or condensers, the person delivering the materials shall place next to that person's signature on the receipt required under subsection (a1) of this section, a clear impression of that person's index finger that is in ink and free of any smearing. A secondary metals recycler may elect to obtain the fingerprint electronically. If the secondary metals recycler has a copy of the fingerprint of the person delivering the nonferrous metal on file, the secondary metals recycler must examine the photo identification but may reference the fingerprint that is on file without making a separate fingerprint for each subsequent transaction.

(3) A secondary metals recycler shall keep and maintain the information required under this subsection for not less than two years from the date of the purchase of the regulated metals property. Records shall be securely maintained at all times and shall be destroyed in a manner that protects the identity of the owner of the property, the seller of the property, and the purchaser of the property.

(c) Inspection of Regulated Metals Property and Records. — During the usual and customary business hours of a secondary metals recycler, a law enforcement officer shall have the right to inspect all of the following:

(1) Any and all purchased regulated metals property in the possession of the secondary metals recycler.
(2) Any and all records required to be maintained under subsection (b) of this section.

A secondary metals recycler shall make receipts for the purchase of regulated metals property available for pickup each regular workday if requested by the sheriff or chief of police of the county or the chief of police of the municipality in which the secondary metals recycler is located. The sheriff or the chief of police may request these receipts to be electronically transferred directly to the law enforcement agency. Records retained by a law enforcement agency shall be securely retained as required by law and destroyed in a manner that protects the identity of the owner of the property, the seller of the property, and the purchaser of the property.

(c1) Records submitted to any public law enforcement agency pursuant to this section are records of criminal investigations or records of criminal intelligence information as defined in G.S. 132-1.4 and are not public records as defined by G.S. 132-1.

(d) Purchase Limitations. — No secondary metals recycler shall do any of the following:

(1), (2) Repealed by Session Laws 2009-200, s. 1, effective October 1, 2009, and applicable to purchases and offers of purchase that occur on or after that date.

(3) Purchase any central air conditioner evaporator coils or condensers, or catalytic converters that are not attached to a vehicle, except that a secondary metals recycler may purchase these items from a company, contractor, or individual that is in the business of installing, replacing, maintaining, or removing these items, provided the secondary metals recycler is prohibited from paying cash or making payment of any kind for any central air conditioner evaporator coil or condenser in whole or in part or a catalytic converter that is not attached to a vehicle. The payment for these metals is to be made by check or money order made out to the company, contractor, or individual. Payment for these metals may also be made using a cash card system that captures the photograph of the person selling these metals if the secondary metals recycler maintains the photograph for 90 days.

(4) Purchase other nonferrous metal property not listed in subdivision (5) of this subsection for any cash consideration greater than one hundred dollars ($100.00) per transaction. The secondary metals recycler may purchase other nonferrous metal property for an amount in excess of one hundred dollars ($100.00) if the payment is made by check, money order, or a cash card system that captures the photograph of the person selling the nonferrous metal if the secondary metals recycler maintains the photograph for 90 days.

(5) Except as provided in subsection (g) of this section, purchase:

a. Any regulated metal marked with the initials or other identification of a telephone, cable, electric, water, or other public utility, or any brewer.
b. Any utility access cover.
c. Any street light pole or fixture.
d. Any road or bridge guard rail.
e. Any highway or street sign.
f. Any water meter cover.
g. Any metal beer keg, including any made of stainless steel that is clearly marked as being the property of the beer manufacturer.
h. Any traffic directional or control sign.
i. Any traffic light signal.
j. Any regulated metal marked with the name of a government entity.
k. Any property owned by a railroad and marked and otherwise identified as such.
l. Any historical marker or any grave marker or burial vase.

(d1) Retain Metals for Seven Days Before Selling or Altering. — Any secondary metals recycler owner convicted of a felonious violation of this Chapter, G.S. 14-71, 14-71.1, or 14-72 shall hold and retain any regulated metals product, except for iron and steel products, for seven days from the date of purchase before selling, dismantling, defacing, or in any manner altering or disposing of the regulated metals property.

(e) Right to Restitution. — The court may order a defendant to make restitution to the secondary metals recycler for any damage or loss caused by the defendant arising out of an offense committed by the defendant.

(f) Violations. — Unless the conduct is covered by some other provision of law providing greater punishment, any person knowingly and willfully violating any of the provisions of this section shall be guilty of a Class 1 misdemeanor for a first offense. A second or subsequent violation of this section is a Class I felony.

(g) Exemptions. — This section does not apply to:

(1) Purchases of regulated metals property from a manufacturing, industrial, government, or other commercial vendor that generates or sells regulated metals property in the ordinary course of its business.

(2) Purchases of regulated metals property that involve only beverage containers.

(h) Preemption. — A county or municipality shall not enact any local law, ordinance, or regulation regulating secondary metals recyclers or regulated metals property that conflicts with this section, and this law preempts all existing laws, ordinances, or regulations. (1907, c. 464; 1909, c. 855, s. 1; C.S., s. 5091; 1967, c. 792; 1971, c. 1231, s. 1; 1975, c. 182, s. 2; 1993, c. 295, s. 2; c. 539, s. 505; 1994, Ex. Sess., c. 14, s. 40; c. 24, s. 14(c); 2007-301, s. 1; 2009-200, s. 1.)

Cross References. — As to injuring wires and other fixtures of telephone, telegraph, and electric-power companies, § 14-154.

Effect of Amendments. — Session Laws 2009-200, s. 1, effective October 1, 2009, and applicable to purchases and offers of purchase that occur on or after that date, added subsection (a1); added subdivisions (b)(2)i and (b)(2)j; in subsection (c), in the introductory language, substituted "inspect all" for "inspect either", and added the last two sentences in the concluding paragraph; added subsection (c1); and rewrote subsections (d) and (g).

§ 66-11.1. Transportation of copper.

It shall be unlawful for any person to transport or have in his possession on highways of this State, in any vehicle other than a vehicle used in the ordinary course of business for the purpose of transporting such copper, an amount of such copper of an aggregate weight of more than 25 pounds, unless such person shall have in his possession

(1) A bill of sale pertaining to such copper signed by (i) a holder of a sales and use tax registration number from the North Carolina Department of Revenue; or (ii) an authorized wholesaler engaged in the sale of such copper; or (iii) a registered dealer in scrap metals; or (iv) a seller of antiques or objects of art; or

(2) In the event the person from whom such copper was purchased was other than one of the above enumerated persons or firms, a certificate of origin signed by the sheriff, or his designated representative, of the county in which the purchase was made.

Such bill of sale or certificate of origin shall clearly identify the material to which it applies and show thereon the name and address of the seller, license plate of the vehicle in which such material is delivered to the purchaser, identified by license number, year and state of issue, the name and address of the purchaser, the date of sale, and the type and amount of such copper purchased.

Any person violating the provisions of this section shall be deemed guilty of a Class 2 misdemeanor. (1975, c. 182, s. 1; 1993, c. 539, s. 506; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-11.2. Forfeiture of vehicles used to transport unlawfully obtained regulated metals property.

(a) Vehicles which are used or intended for use to convey or transport, or in any manner to facilitate the conveyance or transportation of unlawfully obtained regulated metals property, as defined by this Article, are subject to forfeiture, except that:

(1) No conveyance shall be forfeited under the provisions of this section by reason of any act or omission, committed or omitted while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state;

(2) No conveyance shall be forfeited unless the violation involved is a felony;

(3) A forfeiture of a vehicle encumbered by a bona fide security interest is subject to the interest of the secured party who had no knowledge of or consented to the act or omission;

(4) No conveyance shall be forfeited under the provisions of this section unless the owner knew or had reason to believe the vehicle was being used in the commission of any violation that may subject the conveyance to forfeiture under this section.

(b) Any vehicle subject to forfeiture under this section may be seized by any law enforcement officer upon process issued by any district or superior court having jurisdiction over the vehicle except that seizure without such process may be made when:

(1) The seizure is incident to an arrest or a search under a search warrant;

(2) The vehicle subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding under this section.

(c) Vehicles taken or detained under this section shall not be repleviable, but shall be deemed to be in custody of the law enforcement agency seizing it, which may:

(1) Place the vehicle under seal; or

(2) Remove the vehicle to a place designated by it; or

(3) Request that the North Carolina Department of Justice take custody of the vehicle and remove it to an appropriate location for disposition in accordance with law.

Any vehicle seized by a State, local, or county law enforcement officer shall be held in safekeeping as provided in this subsection until an order of disposition is properly entered by the judge.

(d) Whenever a vehicle is forfeited under this section, the law enforcement agency having custody of it may:

(1) Retain the vehicle for official use; or

(2) Sell any forfeited vehicle, provided that the proceeds be disposed of for payment of all proper expenses of the proceedings for forfeiture and sale, including expense of seizure, maintenance of custody, advertising, and court costs; or

(3) Transfer any vehicles which are forfeited under the provisions of this section to the North Carolina Department of Justice when, in the discretion of the presiding judge and upon application of the North

Carolina Department of Justice, said vehicle may be of official use to the North Carolina Department of Justice;

(4) Upon determination by the director of any law enforcement agency that a vehicle transferred pursuant to the provisions of this section is of no further use to said agency for use in official investigations, such vehicle may be sold as surplus property in the same manner as other vehicles owned by the law enforcement agency, and the proceeds from such sale after deducting the cost of sale shall be paid to the treasurer or proper officer authorized to receive fines and forfeitures to be used for the school fund of the county in the county in which said vehicle was seized; provided, that any vehicle transferred to any law enforcement agency under the provisions of this section which has been modified to increase speed shall be used in the performance of official duties only and not for resale, transfer, or disposition other than as junk. (2007-301, s. 3.)

Editor's Note. — Session Laws 2007-301, s. 4, made this section effective December 1, 2007, and applicable to offenses committed on or after that date.

ARTICLE 2.

Manufacture and Sale of Matches and Lighters.

Editor's Note. — Session Laws 2009-230, s. 1, effective October 1, 2009, and applicable to infractions committed on or after that date, added "and Lighters" to the Article heading.

§ 66-12. Requirements for matches permitted to be sold.

No person, association, or corporation shall manufacture, store, offer for sale, sell or otherwise dispose of or distribute white phosphorous, single-dipped, strike-anywhere matches of the type popularly known as "parlor matches"; nor manufacture, store, sell, offer for sale, or otherwise dispose of, or distribute, white phosphorous, double-dipped, strike-anywhere matches or any other type of double-dipped matches, unless the bulb or first dip of such match is composed of a so-called safety or inert composition, nonignitible as an abrasive surface; nor manufacture, store, sell, or offer for sale, or otherwise dispose of or distribute matches which when packed in a carton of 500 approximate capacity and placed in an oven maintained at a constant temperature of 200 degrees F., will ignite in eight hours; nor manufacture, store, offer for sale, sell or otherwise dispose of, or distribute, blazer, or so-called wind matches, whether of the so-called safety or strike-anywhere type. (1915, c. 109, s. 12, I; C.S., s. 5113.)

§ 66-13. Packages to be marked.

No person, association, or corporation shall offer for sale, sell or otherwise dispose of, or distribute, any matches, unless the package or container in which such matches are packed bears, plainly marked on the outside thereof, the name of the manufacturer and the brand or trademark under which the matches are sold, disposed of, or distributed. (1915, c. 109, s. 12, II; C.S., s. 5114.)

§ 66-14. Storage and packing regulated.

No more than one case of each brand of matches of any type or manufacture shall be opened at any one time in the retail store where matches are sold or otherwise disposed of; nor shall loose boxes or paper-wrapped packages of matches be kept on shelves or stored in such retail stores at a height exceeding five feet from the floor; all matches when stored in warehouses must be kept only in properly secured cases, and not piled to a height exceeding 10 feet from the floor; nor be stored within a horizontal distance of 10 feet from any boiler, furnace, stove, or other like heating apparatus; nor within a horizontal distance of 25 feet from any explosive material kept or stored on the same floor. All matches shall be packed in boxes or suitable packages, containing not more than 700 matches in any one box or package: Provided, however, that when more than 300 matches are packed in any one box or package the said matches shall be arranged in two nearly equal portions, the heads of the matches in the two portions shall be placed in opposite directions, and all boxes containing 350 or more matches shall have placed over the matches a center-holding or protecting strip, made of chip board, not less than one and one-quarter inches wide; said strip shall be flanged down to hold the matches in position when the box is nested into the shuck or withdrawn from it. (1915, c. 109, s. 12, II; C.S., s. 5115.)

§ 66-15. Shipping containers regulated.

All match boxes or packages shall be packed in strong shipping containers or cases; maximum number of match boxes or packages contained in any one shipping container or case shall not exceed the following number:

Number of Boxes	Nominal Number of Matches per Box
1/2 gross	700
1 gross	500
2 gross	400
3 gross	300
5 gross	200
12 gross	100
20 gross over 50 and under	100
25 gross under	50

No shipping container or case constructed of fiber board, corrugated fiber board, or wood, nailed or wirebound, shall exceed a weight, including its contents, of 75 pounds; and no lock-cornered wooden case containing matches shall have a weight, including its contents, exceeding 85 pounds; nor shall any other article or commodity be packed with matches in any such container or case; and all such containers and cases in which matches are packed shall have plainly marked on the outside of the container or case the words "Strike-Anywhere Matches" or "Strike-on-the-Box Matches." (1915, c. 109, s. 12, III; C.S., s. 5116.)

§ 66-16. Violation of Article a misdemeanor.

Any person, association, or corporation violating any of the provisions of this Article, other than G.S. 66-16.1, shall be guilty of a Class 3 misdemeanor and shall only be fined for the first offense not less than five dollars ($5.00) nor more than twenty-five dollars ($25.00), and for each subsequent violation not less than twenty-five dollars ($25.00). (1915, c. 109, s. 12, IV; C.S., s. 5117; 1993, c. 539, s. 507; 1994, Ex. Sess., c. 24, s. 14(c); 2009-230, s. 2.)

Editor's Note. — Session Laws 2009-230, s. 4, provides: "Notwithstanding the provisions of G.S. 66-16.1, as enacted by Section 3 of this act, during the first year after the effective date of this act, no penalty shall be imposed for a first violation of this act."

Effect of Amendments. — Session Laws 2009-230, s. 2, effective October 1, 2009, and applicable to infractions committed on or after that date, inserted "other than G.S. 66-16.1" near the middle.

§ 66-16.1. Retail sale of novelty lighters prohibited.

(a) Definition. — As used in this section, the term "novelty lighter" means a mechanical or electrical device typically used for lighting cigarettes, cigars, or pipes, that is designed to resemble a cartoon character, toy, gun, watch, musical instrument, vehicle, animal, food or beverage, or similar articles, or that plays musical notes. A novelty lighter may operate on any fuel, including butane, isobutene, or liquid fuel.

(b) Prohibition. — It shall be unlawful to sell at retail, offer to sell at retail, or give, or distribute for retail sale or promotion, a novelty lighter in this State. This prohibition does not apply to the transportation of novelty lighters through this State or to the storage of novelty lighters in a warehouse or distribution center in this State that is closed to the public for purposes of retail sales.

(c) Exceptions. — The prohibition in this section does not apply to any of the following:

(1) A lighter manufactured prior to January 1, 1980.

(2) Any mechanical or electrical device primarily used to ignite fuel for fireplaces or charcoal or gas grills.

(3) Standard disposable or refillable lighters that are printed or decorated with logos, labels, decals or artwork, or heat shrinkable sleeves, but which do not otherwise resemble a novelty lighter.

(d) Penalty. — A violation of this section is an infraction and shall subject a violator to a penalty of five hundred dollars ($500.00) for each violation. The clear proceeds of any penalties imposed under this section shall be remitted in accordance with G.S. 115C-452. (2009-230, s. 3.)

Editor's Note. — Session Laws 2009-230, s. 5, made this section effective October 1, 2009, and applicable to infractions committed on or after that date.

Session Laws 2009-230, s. 4, provides: "Notwithstanding the provisions of G.S. 66-16.1, as enacted by Section 3 of this act, during the first year after the effective date of this act, no penalty shall be imposed for a first violation of this act."

ARTICLE 3.

Candy and Similar Products.

§§ 66-17 through 66-22: Repealed by Session Laws 1998-98, s. 37.

ARTICLE 4.

Electrical Materials, Devices, Appliances and Equipment.

§ 66-23. Sale of electrical goods regulated.

Every person, firm or corporation before selling, offering for sale, assigning, or disposing of by gift as premiums or in any similar manner any electrical material, devices, appliances or equipment shall first determine if such electrical materials, devices, appliances and equipment comply with the provision of this Article. (1933, c. 555, s. 1; 1989, c. 681, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Electrical Equipment Purchasers. — This section does not apply to purchasers of electrical equipment. See opinion of Attorney General to The Honorable Constance K. Wilson Representative 57th District, 1998 N.C.A.G. 57 (12/22/98).

§ 66-24. Identification marks required.

All electrical materials, devices, appliances and equipment shall have the maker's name, trademark, or other identification symbol placed thereon, together with such other markings giving voltage, current, wattage, or other appropriate ratings as may be necessary to determine the character of the material, device, appliance or equipment and the use for which it is intended; and it shall be unlawful for any person, firm or corporation to remove, alter, change or deface the maker's name, trademark or other identification symbol. (1933, c. 555, s. 2; 1989, c. 681, s. 1.)

§ 66-25. Acceptable listings as to safety of goods.

All electrical materials, devices, appliances, and equipment shall be evaluated for safety and suitability for intended use. This evaluation shall be conducted in accordance with nationally recognized standards and shall be conducted by a qualified testing laboratory. The Commissioner of Insurance, through the Engineering Division of the Department of Insurance, shall implement the procedures necessary to approve suitable national standards and to approve suitable qualified testing laboratories. The Commissioner may assign his authority to implement the procedures for specific materials, devices, appliances, or equipment to other agencies or bodies when they would be uniquely qualified to implement those procedures.

In the event that the Commissioner determines that electrical materials, devices, appliances, or equipment in question cannot be adequately evaluated through the use of approved national standards or by approved qualified testing laboratories, the Engineering Division of the Department of Insurance shall specify any alternative evaluations which safety requires.

The Engineering Division of the Department of Insurance shall keep in file, where practical, copies of all approved national standards and resumes of approved qualified testing laboratories. (1933, c. 555, s. 3; 1989, c. 681, s. 1.)

§ 66-26. Legal responsibility of proper installations unaffected.

This Article shall not construed to relieve from or to lessen the responsibility or liability of any party owning, operating, controlling or installing any electrical materials, devices, appliances or equipment for damages to persons or property caused by any defect therein, nor shall the electrical inspector, the Commissioner, or agents of the Commissioner be held as assuming any such liability by reason of the approval of any material, device, appliance or equipment authorized herein. (1933, c. 555, s. 4; 1989, c. 681, s. 1.)

§ 66-27. Violation made misdemeanor.

Any person, firm or corporation who shall violate any of the provisions of this Article shall be guilty of a Class 2 misdemeanor. (1933, c. 555, s. 5; 1989, c. 681, s. 1; 1993, c. 539, s. 509; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-27.01. Enforcement.

The Commissioner or his designee or the electrical inspector of any State or local governing agency may initiate any appropriate action or proceedings to prevent, restrain, or correct any violation of this Article. The Commissioner or his designee, upon showing proper credentials and in discharge of his duties pursuant to this Article may, at reasonable times and without advance notice, enter and inspect any facility within the State in which there is reasonable cause to suspect that electrical materials, devices, appliances, or equipment not in conformance with the requirements of this Article are being sold, offered for sale, assigned, or disposed of by gift, as premiums, or in any other similar manner. (1989, c. 681, s. 1; 1997-456, s. 27.)

Editor's Note. — Former 66-27A was recodified as this section pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

ARTICLE 4A.

Safety Features of Hot Water Heaters.

§ 66-27.1. Certain automatic hot water tanks or heaters to have approved relief valves; installation or sale of unapproved relief valves forbidden.

(a) No individual, firm, corporation or business shall install, sell or offer for sale any automatic hot water tank or heater of 120-gallon capacity or less, except for a tankless water heater, which does not have installed thereon by the manufacturer of the tank or heater an American Society of Mechanical Engineers and National Board of Boiler and Pressure Vessel Inspectors approved type pressure-temperature relief valve set at or below the safe working pressure of the tank as indicated, and so labeled by the manufacturer's identification stamped or cast upon the tank or heater or upon a plate secured to it.

(b) No individual, firm, corporation or business shall install, sell, or offer for sale any relief valve, whether it be pressure type, temperature type or pressure-temperature type, which does not carry the stamp of approval of the American Society of Mechanical Engineers and the National Board of Boiler and Pressure Vessel Inspectors. (1965, c. 860, s. 1; 1967, c. 453; 2004-199, s. 24.)

§ 66-27.1A. Water heater thermostat settings.

(a) The thermostat of any new residential water heater offered for sale or lease for use in a single-family or multifamily dwelling in the State shall be preset by the manufacturer or installer no higher than approximately 120 degrees Fahrenheit (or 49 degrees Celsius). A water heater reservoir temperature may be set higher if it is supplying space heaters that require higher temperatures. For purposes of this section, a water heater shall mean the primary source of hot water for any single-family or multifamily residential dwelling including, but not limited to any solar or other hot water heating systems.

(b) Nothing in this section shall prohibit the occupant of a single-family or multiunit residential dwelling with an individual water heater from resetting or having reset the thermostat on the water heater. Any such resetting shall relieve the manufacturer or installer of the water heater and, in the case of a residential dwelling that is leased or rented, also the unit's owner, from liability for damages attributed to the resetting.

(c) A warning tag or sticker shall be placed on or near the operating thermostat control of any residential water heater. This tag or sticker shall state that the thermostat settings above the preset temperature may cause severe burns. This tag or sticker may carry such other appropriate warnings as may be agreed upon by manufacturers, installers, and other interested parties. (1991, c. 190, s. 1.)

§ 66-27.2. Certain hot water supply storage tank or heater baffles, heat traps, etc., to be tested before installation or sale.

(a) No individual, firm, corporation or business shall install, sell or offer for sale any hot water supply storage tanks or heaters of 120-gallon capacity or less which utilize dip tubes, supply and hot water nipples, supply water baffles or heat traps that have not been tested to withstand a temperature of 400 degrees Fahrenheit without deteriorating in any manner, and such tank or heater so labeled by the manufacturer.

(b) No individual, firm, corporation or business shall install, sell, or offer for sale any water baffles or heat traps, which are not constructed and tested to withstand a temperature of 400 degrees Fahrenheit without deterioration in any manner and such baffles or heat traps to be so labeled by the manufacturer. (1965, c. 860, s. 2.)

§ 66-27.3. Violation of Article made misdemeanor.

Violation of any provision of this Article is hereby made a Class 1 misdemeanor. (1965, c. 860, s. 3; 1993, c. 539, s. 510; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-27.4. Local regulation of hot water heater safety features.

Nothing in this Article shall be interpreted as relieving any individual, firm, corporation or business from complying with additional protective regulations relating to the safety features of hot water heaters as may be prescribed by local law, county or municipal charter or ordinance; provided, however, that no local law, county or municipal charter or ordinance shall fix or govern the temperature or pressure settings of a pressure-temperature relief valve on an automatic hot water tank or heater covered by this Article if there is installed on such tank or heater a pressure-temperature relief valve having settings in compliance with the North Carolina Building Code. (1965, c. 860, s. 4.)

ARTICLE 4B.

Safety Features of Trailers.

§ 66-27.5. House trailers to have two doors.

(a) In order to provide greater protection from the dangers of fire, every new house trailer having a body length exceeding 32 feet and manufactured or assembled after January 1, 1970, and sold in this State shall, if such house trailer is to be used as a residence or dwelling within this State, be equipped with at least two doors. These doors shall be located in the vicinity of the front and rear rooms of the house trailer. Provided, however, this section shall not apply: to any (i) travel trailer which is factory equipped for the road and designed to be used as a dwelling for travel, recreational or vacation use, if such travel trailer does not exceed 32 feet in length; (ii) to any house trailer of any length sold in North Carolina for use in a state other than North Carolina.

(b) It shall be unlawful for any dealer to sell in this State any house trailer manufactured or assembled after January 1, 1970, having a body length exceeding 32 feet which does not conform to the specifications set forth in subsection (a). Any dealer who violates this section shall be guilty of a Class 3 misdemeanor. (1969, c. 463; 1993, c. 539, s. 511; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-27A: Recodified as G.S. 66-27.01 by Session Laws 1997-456, s. 27.

ARTICLE 5.

Sale of Phonograph Records or Electrical Transcriptions.

§ 66-28. Prohibition of rights to further restrict or to collect royalties on commercial use.

When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use within this State, all asserted common-law rights to further restrict or to collect royalties on the commercial use made of such recorded performances by any person is hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated.

Nothing in this section shall be deemed to deny the rights granted any person by the United States copyright laws. The sole intendment of this enactment is to abolish any common-law rights attaching to phonograph records and electrical transcriptions, whose sole value is in their use, and to forbid further restrictions of the collection of subsequent fees and royalties on phonograph records and electrical transcriptions by performers who were paid for the initial performance at the recording thereof. (1939, c. 113.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

The effect of this section was to eliminate any common-law right to restrict the use of a recording sold for use in this State. Liberty/UA, Inc. v. Eastern Tape Corp., 11 N.C. App. 20, 180 S.E.2d 414, cert. denied, 278 N.C. 702, 181 S.E.2d 600 (1971).

"Use," as employed in this section, means the use for which a recording is intended; i.e., the playing of the recording. Thus, under this section, any record sold in commerce for use in this State may be played privately, publicly, and commercially without restriction. It does not follow that the performance contained on the record can be rerecorded onto another record and the rerecording sold in competition with the original producer. Liberty/UA, Inc. v. Eastern Tape Corp., 11 N.C. App. 20, 180 S.E.2d 414, cert. denied, 278 N.C. 702, 181 S.E.2d 600 (1971).

Copying Sound Recordings. — In North Carolina the conduct and techniques employed to copy and appropriate sound recordings are not justified either under this section or by the fact that such recordings are in the public domain. United Artists Records, Inc. v. Eastern Tape Corp., 19 N.C. App. 207, 198 S.E.2d 452 (1973).

ARTICLE 6.

Sale of Nursery Stock.

§ 66-29: Repealed by Session Laws 1973, c. 918.

ARTICLE 7.

Tagging Secondhand Watches.

§§ 66-30 through 66-34: Repealed by Session Laws 1995, c. 379, s. 18.4.

ARTICLE 8.

Public Warehouses.

§ 66-35. Who may become public warehousemen.

Any person or any corporation organized under the laws of this State whose charter authorizes it to engage in the business of a warehouseman may become a public warehouseman and authorized to keep and maintain public warehouses for the storage of cotton, goods, wares, and other merchandise as hereinafter prescribed upon giving the bond hereinafter required. (1901, c. 678; Rev., s. 3029; 1919, c. 212; C.S., s. 5118.)

CASE NOTES

Cited in Champion Shoe Mach. Co. v. Sellers, 197 N.C. 30, 147 S.E. 674 (1929).

§ 66-36. Bond required.

Every person or every corporation organized under G.S. 66-35, to become a public warehouseman, except such as shall have a capital stock of not less than five thousand dollars ($5,000), shall give bond in a reliable bonding or surety company, or an individual bond with sufficient sureties, payable to the State of North Carolina, in an amount not less than ten thousand dollars ($10,000), to be approved, filed with and recorded by the clerk of the superior court of the county in which the warehouse is located, for the faithful performance of the duties of a public warehouseman; but if such person or corporation has a capital stock of not less than five thousand dollars ($5,000), then it shall not be required to give the bond mentioned in this section. (1901, c. 678, s. 2; 1905, c. 540; Rev., s. 3030; 1908, c. 56; 1919, c. 212; C.S., s. 5119.)

§ 66-37. Person injured may sue on bond.

Whenever such warehouseman fails to perform any duty or violates any of the provisions of this Article, any person injured by such failure or violation may bring an action in his name and to his own use in any court of competent jurisdiction on the bond of said warehouseman. (1901, c. 678, s. 3; Rev., s. 3031; C.S., s. 5120.)

CASE NOTES

Warehousemen are liable under the general law for their negligence causing damage to articles stored with them. Motley v. Southern Finishing & Whse. Co., 122 N.C. 347, 30 S.E. 3 (1898); A.H. Motley Co. v. Southern Finishing & Whse. Co., 124 N.C. 232, 32 S.E. 555 (1899).

Care Required of Bailee. — Where it was known to bailor at time of storage that the bailee knew nothing about tobacco, and had no experience in handling it, the bailee will not be held liable for injury resulting from want of skill and experience; but will be bound to use such ordinary care as a prudent man would exercise to guard against moisture in the structure of the warehouse and the location of the tobacco. A.H. Motley Co. v. Southern Finishing & Whse. Co., 126 N.C. 339, 35 S.E. 601 (1900).

Provision Against Liability. — A provision in a charter of a warehouse corporation to the effect that such corporation shall not be liable for loss or damages not provided for in its warehouse receipt or contract attempts to confer exclusive privileges and is therefore unconstitutional and void. Motley v. Southern Finishing & Whse. Co., 122 N.C. 347, 30 S.E. 3 (1898).

The measure of damages for property damaged while in the care of a storage or warehouse company is the difference between the market value of the property in its damaged condition and what it would have sold for, if undamaged, on the day of its return to the owner. Motley v. Southern Finishing & Whse. Co., 122 N.C. 347, 30 S.E. 3 (1898).

Carrier's Liability as Warehouseman. — See Poythress v. Durham & S. Ry., 148 N.C. 391, 62 S.E. 515 (1908); Citizens & Marine Bank v. Southern Ry., 153 N.C. 346, 69 S.E. 261 (1910).

§ 66-38. When insurance required; storage receipts.

Every such warehouseman shall, when requested thereto in writing by a party placing property with it on storage, cause such property to be insured; every such warehouseman shall give to each person depositing property with it for storage a receipt therefor. (1901, c. 678, s. 4; 1905, c. 540, s. 2; Rev., s. 3032; C.S., s. 5121.)

Cross References. — As to warehouse receipts, see Chapter 27.

§ 66-39. Books of account kept; open to inspection.

Every such warehouseman shall keep a book in which shall be entered an account of all its transactions relating to warehousing, storing, and insuring cotton, goods, wares and merchandise, and to the issuing of receipts therefor, which books shall be open to the inspection of any person actually interested in the property to which such entry relates. (1901, c. 678, s. 7; Rev., s. 3035; C.S., s. 5122.)

§ 66-40. Unlawful disposition of property stored.

If any person unlawfully sells, pledges, lends, or in any other way disposes of or permits or is a party to the unlawful selling, pledging, lending, or other disposition of any goods, wares, merchandise, or anything deposited in a public warehouse, without the authority of the party who deposited the same, he shall be punished by a fine not to exceed two thousand dollars ($2,000) and by imprisonment in the State's prison for not more than three years; but no officer, manager, or agent of such public warehouse shall be liable to the penalties provided in this section unless, with the intent to injure or defraud any person, he so sells, pledges, lends, or in any other way disposes of the same, or is a party to the selling, pledging, lending, or other disposition of any goods, wares, merchandise, article, or thing so deposited. (1901, c. 678, s. 11; Rev., s. 3831; C.S., s. 5123.)

Cross References. — As to warehouse receipts, see Chapter 27.

ARTICLE 9.

Collection of Accounts.

§§ 66-41 through 66-49: Recodified as G.S. 66-49.24 through 66-49.50.

Editor's Note. — This Article was rewritten by Session Laws 1979, c. 835, and has been recodified as Article 9C, G.S. 66-49.24 through 66-49.50.

ARTICLE 9A.

Private Detectives.

§§ 66-49.1 through 66-49.8: Repealed by Session Laws 1977, c. 712, s. 2.

ARTICLE 9B.

Motor Clubs and Associations.

§§ 66-49.9 through 66-49.23: Recodified as Article 69 of Chapter 58.

Editor's Note. — This Article was recodified as Article 69 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

G.S. 66-49.19 through 66-49.23 had been reserved for future codification purposes.

ARTICLE 9C.

Collection Agencies.

§§ 66-49.24 through 66-49.50: Recodified as Article 70 of Chapter 58.

Editor's Note. — This Article was recodified as Article 70 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

ARTICLE 10.

Fair Trade.

§§ 66-50 through 66-57: Repealed by Session Laws 1975, c. 172.

ARTICLE 10A.

Inventions Developed by Employee.

§ 66-57.1. Employee's right to certain inventions.

Any provision in an employment agreement which provides that the employees shall assign or offer to assign any of his rights in an invention to his employer shall not apply to an invention that the employee developed entirely on his own time without using the employer's equipment, supplies, facility or trade secret information except for those inventions that (i) relate to the employer's business or actual or demonstrably anticipated research or development, or (ii) result from any work performed by the employee for the employer. To the extent a provision in an employment agreement purports to apply to the type of invention described, it is against the public policy of this State and in unenforceable. The employee shall bear the burden of proof in establishing that his invention qualifies under this section. (1981, c. 488, s. 1.)

Cross References. — As to larceny of secret technical processes, see G.S. 14-75.1.

§ 66-57.2. Employer's rights.

An employer may not require a provision of an employment agreement made unenforceable under G.S. 66-57.1 as a condition of employment or continued employment. An employer, in an employment agreement, may require that the employee report all inventions developed by the employee, solely or jointly, during the term of his employment to the employer, including those asserted by the employee as nonassignable, for the purpose of determining employee or employer rights. If required by a contract between the employer and the United States or its agencies, the employer may require that full title to certain patents and inventions be in the United States. (1981, c. 488, s. 1.)

ARTICLE 11.

Government in Business.

§ 66-58. Sale of merchandise or services by governmental units.

(a) Except as may be provided in this section, it shall be unlawful for any unit, department or agency of the State government, or any division or subdivision of the unit, department or agency, or any individual employee or employees of the unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or to engage in the operation of restaurants, cafeterias or other eating places in any building owned by or leased in the name of the State, or to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises, or to provide transportation services, or to contract with any person, firm or corporation for the operation or rendering of the businesses or services on behalf of the unit, department or agency, or to purchase for or sell to any person, firm or corporation any article of merchandise in competition with private enterprise. The leasing or subleasing of space in any building owned, leased or operated by any unit, department or agency or division or subdivision thereof of the State for the purpose of operating or rendering of any of the businesses or services herein referred to is hereby prohibited.

(b) The provisions of subsection (a) of this section shall not apply to:

(1) Counties and municipalities.
(2) The Department of Health and Human Services or the Department of Agriculture and Consumer Services for the sale of serums, vaccines, and other like products.
(3) The Department of Administration, except that the agency shall not exceed the authority granted in the act creating the agency.
(4) The State hospitals for the mentally ill.
(5) The Department of Health and Human Services.
(6) The North Carolina School for the Blind at Raleigh.
(6a) The Department of Juvenile Justice and Delinquency Prevention.
(7) The North Carolina Schools for the Deaf.
(8) The University of North Carolina with regard to:
  a. The University's utilities and other services operated by it prior to January 1, 2005.
  b. The sale of articles produced incident to the operation of instructional departments, articles incident to educational research, articles of merchandise incident to classroom work, meals, books, or to articles of merchandise when sold to members of the educational staff or staff auxiliary to education or to duly enrolled students or occasionally to immediate members of the families of members of the educational staff or of duly enrolled students.
  c. The sale of meals or merchandise to persons attending meetings or conventions as invited guests.
  d. The operation by the University of North Carolina of an inn or hotel and dining and other facilities usually connected with a hotel or inn.
  e. The hospital and Medical School of the University of North Carolina.
  f. The Coliseum of North Carolina State University at Raleigh, and the other schools and colleges for higher education maintained or supported by the State.
  g. The Centennial Campus of North Carolina State University at Raleigh.
  h. The Horace Williams Campus of the University of North Carolina at Chapel Hill.
  i. A Millennial Campus of a constituent institution of The University of North Carolina.
  j. The comprehensive student health services or the comprehensive student infirmaries maintained by the constituent institutions of the University of North Carolina.
  k. Agreements by the University of North Carolina School of the Arts to the use of that school's facilities, equipment, and services of students, faculty, and staff for the creation of commercial materials and productions that may be unrelated to educational purposes, so long as the proceeds from those agreements are used for the benefit of the educational mission of the University of North Carolina School of the Arts.
  l. Activities that further the mission of the University as stated in G.S. 116-1.
  m. Activities that serve students or employees of the University or members of the immediate families or guests of students or employees.

n. Activities that provide University-related services or market University-related merchandise to alumni of the University and members of their immediate families.

o. Activities that enable the community in which the constituent institution or other University entity is located, or the people of the State to utilize the University's facilities, equipment, or expertise. If the University proposes to engage in a new type of activity under this subdivision, then the University shall provide electronic notice of the proposal to the persons who have requested to be included in the registry created pursuant to subdivision (j)(2) of this section prior to engaging in the new type of activity.

(8a) The University of North Carolina with regard to the operation of gift shops, snack bars, and food service facilities physically connected to any of The University of North Carolina's public exhibition spaces, including the North Carolina Arboretum, provided that the resulting profits are used to support the operation of the public exhibition space.

(9) The Department of Environment and Natural Resources, except that the Department shall not construct, maintain, operate or lease a hotel or tourist inn in any park over which it has jurisdiction. The North Carolina Wildlife Resources Commission may sell wildlife memorabilia as a service to members of the public interested in wildlife conservation.

(10) Child-caring institutions or orphanages receiving State aid.

(11) Highlands School in Macon County.

(12) The North Carolina State Fair.

(13) Rural electric memberships corporations.

(13a) Repealed by Session Laws 2006-264, s. 8, effective August 27, 2006.

(13b) The Department of Agriculture and Consumer Services with regard to its lessees at farmers' markets operated by the Department.

(13c) The Western North Carolina Agricultural Center.

(13d) Agricultural centers or livestock facilities operated by the Department of Agriculture and Consumer Services.

(14) Nothing herein contained shall be construed to prohibit the engagement in any of the activities described in subsection (a) hereof by a firm, corporation or person who or which is a lessee of space only of the State of North Carolina or any of its departments or agencies; provided the leases shall be awarded by the Department of Administration to the highest bidder, as provided by law in the case of State contracts and which lease shall be for a term of not less than one year and not more than five years.

(15) The State Department of Correction is authorized to purchase and install automobile license tag plant equipment for the purpose of manufacturing license tags for the State and local governments and for such other purposes as the Department may direct.

The Commissioner of Motor Vehicles, or such other authority as may exercise the authority to purchase automobile license tags is hereby directed to purchase from, and to contract with, the State Department of Correction for the State automobile license tag requirements from year to year.

The price to be paid to the State Department of Correction for the tags shall be fixed and agreed upon by the Governor, the State Department of Correction, and the Motor Vehicle Commissioner, or such authority as may be authorized to purchase the supplies.

(16) Laundry services performed by the Department of Correction may be provided only for agencies and instrumentalities of the State which

are supported by State funds and for county or municipally controlled and supported hospitals presently being served by the Department of Correction, or for which services have been contracted or applied for in writing, as of May 22, 1973. In addition to the prior sentence, laundry services performed by the Department of Correction may be provided for VA Medical Centers of the United States Department of Veterans Affairs, the Governor Morehead School, and the North Carolina School for the Deaf.

The services shall be limited to wet-washing, drying and ironing of flatwear or flat goods such as towels, sheets and bedding, linens and those uniforms prescribed for wear by the institutions and further limited to only flat goods or apparel owned, distributed or controlled entirely by the institutions and shall not include processing by any dry-cleaning methods; provided, however, those garments and items presently being serviced by wet-washing, drying and ironing may in the future, at the election of the Department of Correction, be processed by a dry-cleaning method.

(17) The North Carolina Global TransPark Authority or a lessee of the Authority.
(18) The activities and products of private enterprise carried on or manufactured within a State prison facility pursuant to G.S. 148-70.
(19) The North Carolina Justice Academy.
(20) The Department of Transportation, or any nonprofit lessee of the Department, for the sale of books, crafts, gifts, and other tourism-related items at visitor centers owned by the Department.
(21) Repealed by Session Laws 2008-134, s. 73(b), effective July 28, 2008.
(22) The North Carolina State Highway Patrol.
(23) The North Carolina State Lottery Commission.
(24) The North Carolina National Guard, for the operation of post exchanges.
(25) The gift or sale of any craft items made by inmates in the custody of the Department of Correction as part of a program or initiative established by the Division of Prisons.
(26) The North Carolina Zoological Park.
(27) The North Carolina Office of Economic Recovery and Investment and State agencies in the implementation of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5) funded projects.

(c) The provisions of subsection (a) shall not prohibit:
(1) The sale of products of experiment stations or test farms.
(1a) The sale of products raised or produced incident to the operation of a community college viticulture/enology program as authorized by G.S. 18B-1114.4.
(1b) The sale by North Carolina State University at University-owned facilities of dairy products, including ice cream, cheeses, milk-based beverages, and the by-products of heavy cream, produced by the Dairy and Process Applications Laboratory, so long as any profits are used to support the Department of Food Science and College of Agriculture and Life Sciences at North Carolina State University.
(2) The sale of learned journals, works of art, books or publications of the Department of Cultural Resources or other agencies, or the Supreme Court Reports or Session Laws of the General Assembly.
(3) The business operation of endowment funds established for the purpose of producing income for educational purposes; for purposes of this section, the phrase "operation of endowment funds" shall include the operation by constituent institutions of The University of North Carolina of campus stores, the profits from which are used exclusively

for awarding scholarships to defray the expenses of students attending the institution; provided, that the operation of the stores must be approved by the board of trustees of the institution, and the merchandise sold shall be limited to educational materials and supplies, gift items and miscellaneous personal-use articles. Provided further that, notwithstanding this subsection, profits from a campus store operated by the endowment of the North Carolina School of Science and Mathematics are used exclusively for student activities, athletics, and other programs to enhance student life. Provided further that sales at campus stores are limited to employees of the institution and members of their immediate families, to duly enrolled students of the campus at which a campus store is located and their immediate families, to duly enrolled students of other campuses of the University of North Carolina other than the campus at which the campus store is located, to other campus stores and to other persons who are on campus other than for the purpose of purchasing merchandise from campus stores. It is the intent of this subdivision that campus stores be established and operated for the purpose of assuring the availability of merchandise described in this Article for sale to persons enumerated herein and not for the purpose of competing with stores operated in the communities surrounding the campuses of the University of North Carolina.

(3a) The use of community college personnel or facilities, with the consent of the trustees of that college, in support of or by a private business enterprise located on a community college campus or in the service area of a community college for one or more of the following specific services in support of economic development:

a. Small business incubators. — As used in this sub-subdivision, the term "small business incubators" means sites for new business ventures in the service area of the community college that are in need of the support and assistance provided by the college; and, without which, the likelihood of success of the business would be greatly diminished. The services of the small business incubator shall not extend to any such new business venture for a period of more than 24 months.

b. Product testing services.

c. Videoconferencing services provided to the public for occasional use.

(3b) The operation of a military business center by a community college. For the purposes of this subdivision, the term "military business center" means a facility that serves to coordinate and facilitate interactions between the United States Armed Forces; military personnel, veterans, and their families; and private businesses.

(3c) The use of the personnel and facilities of Western Piedmont Community College, with the consent of the trustees of the college, in support of economic development through the operation of the East Campus and its companion facilities as an event venue.

(3d) The use of community college facilities by a private business enterprise that has loaned or donated instructional equipment to the college to demonstrate that equipment to customers. This use of college facilities shall be in accordance with policies adopted by the board of trustees of the college.

(3e) The use of personnel, equipment, and facilities relating to Interactive Three Dimensional (Advanced Visualization) technology and Telepresence technology at Fayetteville Technical Community College. Proceeds generated must be used either to continue the function of this program or to support the educational mission of the school.

(4) The operation of lunch counters by the Department of Health and Human Services as blind enterprises of the type operated on January 1, 1951, in State buildings in the City of Raleigh.
(5) The operation of a snack bar and cafeteria in the State Legislative Building, and a snack bar in the Legislative Office Building.
(6) The maintenance by the prison system authorities of eating and sleeping facilities at units of the State prison system for prisoners and for members of the prison staff while on duty, or the maintenance by the highway system authorities of eating and sleeping facilities for working crews on highway construction or maintenance when actually engaged in such work on parts of the highway system.
(7) The operation by penal, correctional or facilities operated by the Department of Health and Human Services, the Department of Juvenile Justice and Delinquency Prevention, or by the Department of Agriculture and Consumer Services, of dining rooms for the inmates or clients or members of the staff while on duty and for the accommodation of persons visiting the inmates or clients, and other bona fide visitors.
(8) The sale by the Department of Agriculture and Consumer Services of livestock, poultry and publications in keeping with its present livestock and farm program.
(9) The operation by the public schools of school cafeterias.
(9a) The use of a public school bus or public school activity bus for a purpose allowed under G.S. 115C-242 or the use of a public school activity bus for a purpose authorized by G.S. 115C-247.
(9b) The use of a public school activity bus by a nonprofit corporation or a unit of local government to provide transportation services for school-aged and preschool-aged children, their caretakers, and their instructors to or from activities being held on the property of a nonprofit corporation or a unit of local government. The local board of education that owns the bus shall ensure that the person driving the bus is licensed to operate the bus and that the lessee has adequate liability insurance to cover the use and operation of the leased bus.
(10) Sale by any State correctional or other institution of farm, dairy, livestock or poultry products raised or produced by it in its normal operations as authorized by the act creating it.
(11) The sale of textbooks, library books, forms, bulletins, and instructional supplies by the State Board of Education, State Department of Public Instruction, and local school authorities.
(12) The sale of North Carolina flags by or through the auspices of the Department of Administration, to the citizens of North Carolina.
(13) The operation by the Department of Correction of forestry management programs on State-owned lands, including the sale on the open market of timber cut as a part of the management program.
(14) The operation by the Department of Correction of facilities to manufacture and produce traffic and street name signs for use on the public streets and highways of the State.
(15) The operation by the Department of Correction of facilities to manufacture and produce paint for use on the public streets and highways of the State.
(16) The performance by the Department of Transportation of dredging services for a unit of local government.
(17) The sale by the State Board of Elections to political committees and candidate committees of computer software designed by or for the State Board of Elections to provide a uniform system of electronic filing of the campaign finance reports required by Article 22A of

Chapter 163 of the General Statutes and to facilitate the State Board's monitoring of compliance with that Article. This computer software for electronic filing of campaign finance reports shall not exceed a cost of one hundred dollars ($100.00) to any political committee or candidate committee without the State Board of Elections first notifying in writing the Joint Legislative Commission on Governmental Operations.

(18) Repealed by Session Laws 2009-329, s. 2.2, effective July 24, 2009.

(19) The use of the North Carolina Museum of Art's conservation lab by the Regional Conservation Services Program of the North Carolina Museum of Art Foundation for the provision of conservation treatment services on privately owned works of art. However, when providing this service, the Regional Conservation Services Program shall give priority to publicly owned works of art.

(d) A department, agency or educational unit named in subsection (b) shall not perform any of the prohibited acts for or on behalf of any other department, agency or educational unit.

(e) Any person, whether employee of the State of North Carolina or not, who shall violate, or participate in the violation of this section, shall be guilty of a Class 1 misdemeanor.

(f) Notwithstanding the provisions of G.S. 66-58(a), the operation by the Department of Corrections of facilities for the manufacture of any product or the providing of any service pursuant to Article 14 of Chapter 148 of the General Statutes not regulated by the provisions of subsection (c) of this section shall be subject to the prior approval of the Governor, with biennial review by the General Assembly, at the beginning of each fiscal year commencing after October 1, 1975. The Department of Correction shall file with the Director of the Budget quarterly reports detailing prison enterprise operations in such a format as shall be required by the Director of the Budget.

(g) Repealed by Session Laws 2006-66, s. 9.11(x), effective July 1, 2007.

(h) Notwithstanding the provisions of G.S. 66-58(b)(8), The University of North Carolina, its constituent institutions, the Centennial Campus of North Carolina State University, the Horace Williams Campus of the University of North Carolina at Chapel Hill, a Millennial Campus of a constituent institution of The University of North Carolina, or any corporation or other legal entity created or directly controlled by and using land owned by The University of North Carolina shall consult with and provide the following information to the Joint Legislative Commission on Governmental Operations before issuing debt or executing a contract for a golf course or for any transient accommodations facility, including a hotel or motel:

(1) Architectural concepts.
(2) Financial and debt service projections.
(3) Business plans.
(4) Operating plans.
(5) Feasibililty studies and consultant reports.

(i) The Board of Governors of The University of North Carolina shall establish a panel to determine whether The University of North Carolina is authorized pursuant to sub-subdivisions m., n., and o. of subdivision (8) of subsection (b) of this section to undertake an activity in competition with an existing or proposed nongovernmental entity. Pursuant to G.S. 138-5, panel members shall receive the same per diem and reimbursement for travel expenses as members of State boards and commissions. The University of North Carolina shall be responsible for staffing and paying the expenses of the panel. The panel shall consist of nine members as follows:

(1) Two members who are familiar with the interests of the business community of the State appointed by the Governor.

(2) Two members who are familiar with the interests of the business community of the State appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives under G.S. 120-121.

(3) Two members who are familiar with the interests of the business community of the State appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate under G.S. 120-121.

(4) Three members who are not employees of The University of North Carolina appointed by the Board of Governors.

The panel may make the determination whether a proposed or ongoing activity undertaken under sub-subdivisions m. or n. of subdivision (8) of subsection (b) of this section is unauthorized competition. The panel may also make a determination whether a proposed or ongoing activity undertaken under sub-subdivision o. of subdivision (8) of subsection (b) of this section is either unauthorized or unfair competition. The University will be bound by a decision of the panel that a proposed or ongoing activity is not justified by the exceptions set out in sub-subdivisions m., n., or o. of subdivision (8) of subsection (b) of this section.

The panel established by this subsection shall report to the Joint Legislative Economic Development Oversight Committee. The panel shall report to the Committee by May 1 of each year on the number and types of determinations made during the preceding year.

(j) The Board of Governors shall establish and publish procedures to be used by the panel created under subsection (i) of this section in making determinations. The procedures shall:

(1) Include that a determination may be initiated based on a request from any nongovernmental entity in the State that is in or proposes to be in the same or a similar or competing business or based on a request from the constituent institution or other university system entity engaging in or proposing to engage in the activity.

(2) Require the panel to maintain a registry of all parties that request to receive notification of the panel's proceedings. The notification may be electronic and shall be given to all parties that have requested to be notified at least seven days prior to the panel's meeting. The notice shall include the name of the constituent institution or other university system entity engaging in or proposing to engage in the activity and the nature of the activity. The panel shall provide the documents relating to any agenda item to anyone requesting them in advance of the panel's proceedings.

(3) Provide that the agendas for the panel's meetings, the minutes of the meetings, and the determinations of the panel shall be posted on The University of North Carolina Web site.

(k) The University of North Carolina and its employees may rely on a determination made by the panel created under subsection (i) of this section as to whether an activity violates this section, and a determination that an activity is authorized shall be an absolute defense in any prosecution for any activity undertaken before a contrary determination is made by a court or by an opinion of the Attorney General. The panel shall not have the power to overrule a prior determination of the Attorney General.

(*l*) The proceeds of any activity undertaken under sub-subdivisions m., n., or o. of subdivision (8) of subsection (b) of this section shall be placed in an institutional trust fund pursuant to G.S. 116-36.1 and shall be used to continue to conduct the activity that generated the proceeds or to further the mission of the constituent institution or other University entity engaging in the activity. (1929, c. 221, s. 1; 1933, c. 172, s. 18; 1939, c. 122; 1941, c. 36; 1951, c. 1090, s.

1; 1957, c. 349, ss. 6, 10; 1967, c. 996, s. 13; 1973, c. 476, ss. 48, 128, 143; c. 671, s. 1; c. 965; c. 1262, s. 86; c. 1294; c. 1457, s. 7; 1975, c. 730, ss. 2-5; c. 840; c. 879, s. 46; 1977, cc. 355, 715; c. 771, s. 4; 1979, c. 830, s. 4; 1981, c. 635, s. 3; 1983, c. 8; c. 476; c. 717, s. 13; c. 761, s. 168; 1985, c. 589, s. 28; c. 757, s. 206(d); 1989, c. 727, s. 218(9); 1989 (Reg. Sess., 1990), c. 1004, s. 1; 1991, c. 749, s. 7; 1991 (Reg. Sess., 1992), c. 902, s. 3; 1993, c. 539, s. 513; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 769, s. 17.15; c. 777, s. 4(e); 1995, c. 247, s. 2; c. 507, s. 13.1(a); 1997-258, s. 1; 1997-261, ss. 4-6; 1997-315, s. 1; 1997-443, s. 11A.21; 1997-456, s. 55.2A; 1997-527, s. 1; 1998-202, s. 4(d), (e); 1998-212, ss. 9.9, 13.3; 1999-234, s. 9; 1999-237, ss. 19.7, 27.23A; 2000-137, ss. 4(f), 4(g); 2000-148, s. 6; 2000-177, s. 10; 2001-41, s. 2; 2001-127, s. 1; 2001-368, s. 1; 2002-102, s. 3; 2002-109, s. 1; 2002-126, ss. 9.15(a), 18.5; 2004-124, ss. 8.17(b), 9.13; 2005-20, s. 1; 2005-63, s. 1; 2005-247, s. 1; 2005-344, s. 5; 2005-397, ss. 1, 2, 4; 2006-66, ss. 9.11(w), (x); 2006-264, s. 8; 2007-60, s. 1; 2007-280, ss. 4.1, 5; 2007-398, s. 5; 2008-134, s. 73(b); 2008-192, s. 12; 2009-207, s. 1; 2009-281, s. 1; 2009-329, ss. 2.1, 2.2; 2009-475, s. 9.)

Local Modification. — Columbus: 1977, c. 850; Translyvania: 2009-154, s. 1(a)-(e) (as to construction and provision of affordable housing for certain employees); City of Asheville: 2007-239, s. 2; City of Brevard: 2009-154, s. 1(a)-(e) (as to construction and provision of affordable housing for certain employees); Town of Rosman: 2009-154, s. 1(a)-(e) (as to construction and provision of affordable housing for certain employees); Asheville City Board of Education: 2007-239, s. 2; Bertie County Board of Education: 2006-61, ss. 1, 2; Dare County Board of Education: 2004-16 (as to lease of property to construct and provide up to three affordable rental housing projects with priority for teachers); Edgecombe County Board of Education: 2009-161, ss. 1-4 (as to construction and provision of affordable housing for certain employees); Graham County Board of Education: 2009-324 (as to permission to use public school activity buses to serve transportation needs of the Stecoah Valley Center during periodic field trips); Haywood County Consolidated School System Board of Education: 2006-3 (use of buses for events); Hertford County Board of Education: 2006-86, ss. 1-3 (as to construction, provision or maintenance of affordable rental housing on property owned or leased by Hertford County Board of Education and rent of housing units owned by the Board with priority for teachers); Moore County Board of Education: 1999-176, s. 1 (use of buses for tournament June 12, 1999-June 20, 1999); 2004-68; Roanoke Rapids Graded School District: 2006-8 (as to use of buses to serve transportation needs of BikeWalk Virginia event); Transylvania County Board of Education: 2009-154, s. 1(a)-(e) (as to construction and provision of affordable housing for certain employees).

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 902, s. 3 added a subdivision (b)(17) to this section, which was redesignated as present subdivision (b)(18) at the direction of the Revisor of Statutes.

Session Laws 2002-126, s. 9.15, which added subsection (h), provides: "This section [s. 9.15 of Session Laws 2002-126] does not apply if the golf course or transient accommodations facility is owned, operated, or leased by The University of North Carolina or one of its constituent institutions on or before July 1, 2002. This section [s. 9.15 of Session Laws 2002-126] is effective when it becomes law."

Session Laws 2005-276, s. 8.11, as amended by Session Laws 2005-345, s. 10, provides: "Of the funds appropriated in this act to the Community Colleges System Office, the sum of two million dollars ($2,000,000) for the 2005-2006 fiscal year shall be allocated to the Partnership for Defense Innovation for the establishment of the Defense Technology Innovation Center. These funds shall be used for the following:

"(1) Site selection and acquisition, including the purchase or lease of real property to house the Center; the construction of buildings or other site structures; the improvement or refurbishment of existing structures to provide appropriate laboratory and administrative space; and the improvement of existing infrastructure at the facility, including improvements to utility, telecommunications, and Internet infrastructure.

"(2) Equipment acquisition, including acquisition of laboratory equipment and supplies and office furniture, equipment, and supplies.

"(3) Employment of staff to support the mission of the Center and to oversee day-to-day operations of the Center.

"(4) Implementation of the business and marketing plan delivered to the General Assembly in 2005 by the North Carolina Electronics and Information Technologies Association (NCEITA) as directed by Section 8.17 of S.L. 2004-124, including contracting with an experienced incubator development team to develop the Center and implement the business plan.

"(5) Development of a tenant screening process and the recruitment of appropriate tenants for the Center.

"(6) Administration and operation of the Center and the development of a sustainable business plan for the Center."

Session Laws 2005-344, s. 14, provides: "Nothing in this act [enacting the North Carolina State Lottery] shall be construed to obligate the General Assembly to appropriate funds to implement this act."

Session Laws 2005-397, s. 4, was codified as the last paragraph in subsection (i) at the direction of the Revisor of Statutes.

Session Laws 2009-475, s. 15, provides: "The General Assembly finds that it is in the public interest of the State of North Carolina to ensure expeditious awards of ARRA funds to maximize the economic recovery impact of the ARRA. It is the policy of the State to provide fair regulation, oversight, and transparency for the use of ARRA funds and to quickly and efficiently complete the awards of grants and contracts under the ARRA. It is also the policy of this State that, due to the historic level of federal and State oversight of ARRA grant and contract awards, restraint should be exercised in the granting of legal and injunctive relief that might forestall awards to programs and contractors."

Effect of Amendments. — Session Laws 2008-134, s. 73(b), effective July 28, 2008, repealed subdivision (b)(21).

Session Laws 2008-192, s. 12, effective August 1, 2008, twice substituted "University of North Carolina School of the Arts" for "North Carolina School of the Arts" in subdivision (b)(8)k.

Session Laws 2009-207, s. 1, effective June 26, 2009, added subdivision (c)(3e).

Session Laws 2009-281, s. 1, effective July 10, 2009, substituted "National Guard" for "national guard" in subdivision (b)(24).

Session Laws 2009-329, ss. 2.1 and 2.2, effective July 24, 2009, added subdivision (b)(26), and deleted subdivision (c)(18), which read: "The leasing of no more than 50 acres within the North Carolina Zoological Park by the Department of Environment and Natural Resources to the North Carolina Zoological Society for the maintenance or operation, pursuant to a contract or otherwise, of an exhibition center, theater, conference center, and associated restaurants and lodging facilities.".

Session Laws 2009-475, s. 9, effective February 17, 2009, added subdivision (b)(27).

Legal Periodicals. — For note on the rejection of the "public purpose" requirement for state tax exemption, see 17 Wake Forest L. Rev. 293 (1981).

CASE NOTES

Enforcement of Section. — Governmental units created by the state have no duty or authority to attempt to enforce the provisions of this section by ad valorem taxation of State property. In re University of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980).

Section Does Not Create Private Cause of Action. — Although businesses claimed university, through its trademark licensing program, violated this section by engaging indirectly in the sale of goods, the court declined to find that the statute created a private cause of action; subsection (e) denominating violation of section a misdemeanor provided an exclusive remedy and there was no clear indication that the section was intended to protect any special class of which businesses might have been members. Board of Governors v. Helpingstine, 714 F. Supp. 167 (M.D.N.C. 1989).

Cited in N.C. Motorcoach Ass'n v. Guilford County Bd. of Educ., 315 F. Supp. 2d 784, 2004 U.S. Dist. LEXIS 7288 (M.D.N.C. 2004).

OPINIONS OF ATTORNEY GENERAL

The North Carolina State Fair exemption in subsection (b) of this section applies to the buildings and grounds on a year-round basis. See opinion of Attorney General to Governor James B. Hunt, Jr., and the Council of State, 53 N.C.A.G. 36 (1983).

Concessions on Ferries. — G.S. 136-82, which authorizes the Department of Transportation to provide certain items at concessions on ferries and at ferry facilities, must be read in conjunction with the clearly expressed public policy stated in subsection (a) of this section that prohibits government agencies from competing with private industries in business. See opinion of Attorney General to E.H. McEntire, P.E., State Highway Chief Engineer, 59 N.C.A.G. 53 (1989).

TACIT Program Not Violative of Section. — The TACIT Program, offered by North Carolina State University's Department of Urban Affairs to units of local government to educate employees with respect to selecting appropriate computer equipment, does not violate the provisions of this section. See opinion of the Attorney General to Mr. George E. Tatum, Register of Deeds, Cumberland County, 55 N.C.A.G. 101 (1986).

Hearing Aid Fitting Services May Be

Provided at UNC Clinics. — Hearing aid fitting services provided in University of North Carolina (UNC) clinics by graduate students in the UNC Audiology Master Degree programs were an integral part of their professional education and training and, therefore, the constituent institutions of UNC did not violate the Umstead Act by operating clinics in which their graduate students provided hearing aid evaluation and fitting services to the public. See opinion of Attorney General to M. Jackson Nichols, Allen & Pinnex, P.A., 2002 N.C. AG LEXIS 2 (1/8/02).

Conference Center/Hotel and Golf Course on Centennial Campus of North Carolina State University. — The expenditure of public funds by North Carolina State University for all purposes, business-related and otherwise, is not unlimited, but is subject to the "public purpose" constitutional analysis; i.e., an expenditure must be reasonably related to the purposes for which the university was established, and must primarily benefit public, as opposed to private interests. See opinion of Attorney General to Representative Martin L. Nesbitt, North Carolina General Assembly, 2002 N.C.A.G. 33 (11/26/02).

University of North Carolina Center for Public Television. — Agreements between the University of North Carolina Center for Public Television and private entities involving the production of commercial, noneducational products would both exceed its statutory authority and violate the Umstead Act; however, the Center is authorized to enter into agreements with private or public entities where such agreements will result in the creation of noncommercial, educational products. See opinion of Attorney General to Leslie J. Winner, University of North Carolina Vice President and General Counsel, 2002 N.C.A.G. 34 (10/16/02).

The endowment fund of the University of North Carolina Center for Public Television may enter into agreements with private or public entities for the use of the Center's facilities to create commercial materials which may be unrelated to educational purposes, so long as the proceeds of such agreements are used for the benefit of the Center's educational mission. See opinion of Attorney General to Leslie J. Winner, University of North Carolina Vice President and General Counsel, 2002 N.C.A.G. 34 (10/16/02).

ARTICLE 11A.

Electronic Commerce in Government.

§ 66-58.1. Title; purpose.

This Article shall be known and may be cited as the Electronic Commerce Act. The purpose of this Article is to facilitate electronic commerce with public agencies and regulate the application of electronic signatures when used in commerce with public agencies. (1998-127, s. 1.)

§ 66-58.2. Definitions.

The following definitions apply in this Article:

(1) "Certification authority" means a person authorized by the Secretary to facilitate electronic commerce by vouching for the relationship between a person or public agency and that person's or public agency's electronic signature.

(2) "Electronic signature" means any identifier or authentication technique attached to or logically associated with an electronic record which is intended by the party using it to have the same force and effect as the party's manual signature.

(3) "Person" means any individual, firm, partnership, corporation, or combination thereof of whatsoever form or character.

(4) "Public agencies" means and includes every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority, or other unit of government of the State or of any county, unit, special district, or other political subdivision of government.

(5) "Secretary" means Secretary of State.

(6) "Transaction" means an electronic transmission of data between a person and a public agency, or between public agencies, including, but not limited to, contracts, filings, and legally operative documents. (1998-127, s. 1.)

§ 66-58.3. Certification authority licensing.

All persons acting as a certification authority with respect to transactions under this Article shall be licensed by the Secretary prior to representing themselves or acting as a certification authority under this Article. Certification authority licensing standards set by the Secretary may include, but are not limited to, technical, physical, procedural, and personnel security controls, repository obligations, and financial responsibility standards. Upon payment of the required fees, a certification authority meeting the standards adopted by the Secretary by rule shall be licensed for a period of one year. Licenses of certification authorities complying with the standards adopted by the Secretary may be renewed for additional one-year terms upon payment of the required renewal fee. (1998-127, s. 1.)

§ 66-58.4. Use of electronic signatures.

All public agencies may use and accept electronic signatures pursuant to this Article, pursuant to Article 40 of this Chapter (the Uniform Electronic Transactions Act), or pursuant to other law. (1998-127, s. 1; 2003-233, s. 1; 2007-119, s. 1.)

Local Modification. — Cabarrus: 2002-115, s. 1; Durham: 2003-326, s. 2.1; Harnett: 2003-326, s. 2.1; Mecklenburg: 2002-115, s. 1; Moore: 2003-326, s. 2.1; New Hanover: 2003-326, s. 2.1; Randolph: 2003-326, s. 2.1.

Editor's Note. — Session Laws 2003-233, s. 5(a), provides: "This act is enacted or adopted after the date of the enactment of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., and hereby makes specific reference as required by that law."

§ 66-58.5. Validity of electronic signatures.

(a) An electronic signature contained in a transaction undertaken pursuant to this Article between a person and a public agency, or between public agencies, shall have the same force and effect as a manual signature provided all of the following requirements are met:

(1) The public agency involved in the transaction requests or requires the use of electronic signatures.

(2) The electronic signature contained in the transaction embodies all of the following attributes:
  a. It is unique to the person using it;
  b. It is capable of certification;
  c. It is under sole control of the person using it;
  d. It is linked to data in such a manner that if the data are changed, the electronic signature is invalidated; and
  e. It conforms to rules adopted by the Secretary pursuant to this Article.

(b) A transaction undertaken pursuant to this Article between a person and a public agency, or between public agencies, is not unenforceable, nor is it inadmissible into evidence, on the sole ground that the transaction is evidenced by an electronic record or that it has been signed with an electronic signature.

(c) This Article does not affect the validity of, presumptions relating to, or burdens of proof regarding an electronic signature that is accepted pursuant to Article 40 of this Chapter or other law. (1998-127, s. 1; 2003-233, s. 2.)

Editor's Note. — Session Laws 2003-233, s. 5(a), provides: "This act is enacted or adopted after the date of the enactment of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., and hereby makes specific reference as required by that law."

§ 66-58.6. Enforcement.

(a) The Secretary may investigate complaints or other information indicating fraudulent or unlawful conduct that violates this Article or the rules promulgated thereunder.

(b) The Superior Court Division of the General Court of Justice has jurisdiction and authority upon application of the Secretary to enjoin or restrain violations of this Article.

(c) It shall be the duty of the Attorney General, when requested, to represent the Secretary in actions or proceedings in connection with this Article.

(d) Nothing in this Article shall adversely affect any rights or the enforcement of any rights acquired by any person or public agency under any other statute or at common law with respect to matters also covered by this Article. (1998-127, s. 1.)

§ 66-58.7. Civil penalty.

The Secretary may assess a civil penalty of not more than five thousand dollars ($5,000) per violation against any certification authority that violates a provision of this Article or any rule promulgated thereunder. In determining the amount of a penalty under this section, the Secretary shall give due consideration to each of the following factors:

(1) The organizational size of the certification authority cited;
(2) The good faith of the certification authority cited;
(3) The gravity of the violation;
(4) The prior record of the violator in complying or failing to comply with this Article or a rule adopted pursuant to this Article; and
(5) The risk of harm caused by the violation.

Chapter 150B of the General Statutes governs the imposition of a civil penalty under this section. A civil penalty owed under this section may be recovered in a civil action brought by the Secretary or the Attorney General. (1998-127, s. 1.)

§ 66-58.8. Criminal penalty.

(a) Any person who willfully violates any provision of this Article, or who willfully violates any rule or order under this Article, with intent to defraud, is guilty of a Class I felony.

(b) The Secretary shall provide such evidence as is available concerning criminal violations of this Article or of any rule or order promulgated hereunder to the proper district attorney, who may, with or without such a reference, institute appropriate criminal proceedings under this Article.

(c) Nothing in this Article limits the power of the State to punish any person for any conduct which constitutes a crime by statute or common law. (1998-127, s. 1.)

§ 66-58.9. Exemptions.

This Article shall not apply to any of the following:

(1) Electronic signatures and facsimile signatures that are otherwise allowed by law.
(2) The execution of documents filed with, issued, or entered by a court of the General Court of Justice. However, a document or transaction validly executed under this Article is not rendered invalid because it is filed with, or attached to, a document issued or entered by a court of the General Court of Justice.
(3) Transactions where a public agency is not a party. (1998-127, s. 1.)

§ 66-58.10. Rule making.

(a) The Secretary may promulgate rules under this Article. Such rules may include, but are not limited to:
(1) Definitions, including, but not limited to, more technical definitions of "certification authority" and "electronic signature";
(2) The creation, accreditation, bonding, licensing, operation, regulation, and sanctioning of certification authorities;
(3) The imposition of licensing and renewal fees in amounts not to exceed five thousand dollars ($5,000) per year; and
(4) The imposition of civil monetary penalties for noncompliance with this Article or the rules promulgated thereunder.

(b) Notwithstanding G.S. 150B-21.1(a), the Secretary may adopt temporary rules to implement the certification authority technology provisions of this Article using the procedure for adoption of temporary rules under G.S. 150B-21.1(a2).

(c) The Secretary shall deposit licensing and renewal fees in the General Fund. (1998-127, s. 1.)

§ 66-58.11. Reciprocal agreements.

The Secretary is hereby authorized to enter into reciprocal arrangements with appropriate and duly authorized public agencies of other jurisdictions having a law substantially similar to this Article so as to further the purpose of this Article. (1998-127, s. 1.)

§ 66-58.12. Agencies may provide access to services through electronic and digital transactions; fees authorized.

(a) Public agencies are encouraged to maximize citizen and business access to their services through the use of electronic and digital transactions. A public agency may determine, through program and transaction analysis, which of its services may be made available to the public through electronic means, including the Internet. The agency shall identify any inhibitors to electronic transactions between the agency and the public, including legal, policy, financial, or privacy concerns and specific inhibitors unique to the agency or type of transaction. An agency shall not provide a transaction through the Internet that is impractical, unreasonable, or not permitted by laws pertaining to privacy or security.

(b) An agency may charge a fee to cover its costs of permitting a person to complete a transaction through the World Wide Web or other means of electronic access. The fee may be applied on a per transaction basis and may be calculated either as a flat fee or a percentage fee, as determined under an agreement between a person and a public agency. The fee may be collected by the agency or by its third party agent.

(c) The fee imposed under subsection (b) of this section must be approved by the Office of State Budget and Management, in consultation with the State Chief Information Officer and the Joint Legislative Commission on Governmental Operations. The revenue derived from the fee must be credited to a nonreverting agency reserve account. The funds in the account may be expended only for e-commerce initiatives and projects approved by the State Chief Information Officer, in consultation with the Joint Legislative Oversight Committee on Information Technology. For purposes of this subsection, the term "public agencies" does not include a county, unit, special district, or other political subdivision of government.

(d) This section does not apply to the Judicial Department. (2000-109, s. 8; 2004-129, s. 27; 2005-92, s. 1.)

CASE NOTES

Cited in Petroleum Traders Corp. v. State, 190 N.C. App. 542, 660 S.E.2d 662, 2008 N.C. App. LEXIS 1003 (2008).

§§ 66-58.13 through 66-58.19: Reserved for future codification purposes.

ARTICLE 11B.

Electronic Access to State Services.

§ 66-58.20. Development and implementation of Web portals; public agency links.

(a) The Office of Information Technology Services (ITS) shall develop the architecture, requirements, and standards for the development, implementation and operation of one or more centralized Web portals that will allow persons to access State government services on a 24-hour basis. ITS shall submit its plan for the implementation of the Web portals to the State Chief Information Officer for review and approval. When the plan is approved by the State Chief Information Officer, ITS shall move forward with development and implementation of the statewide Web Portal system.

(b) Each State department, agency, and institution under the review of the State Chief Information Officer shall functionally link its Internet or electronic services to a centralized Web portal system established pursuant to subsection (a) of this section. (2000-67, s. 7.9; 2004-129, s. 28.)

Editor's Note. — Session Laws 2000-67, s. 7.9, enacted this section as G.S. 66-58.12; it was recodified as this section at the direction of the Revisor of Statutes.

ARTICLE 12.

Coupons for Products of Photography.

§§ 66-59 through 66-64: Repealed by Session Laws 1995, c. 379, s. 18.5.

ARTICLE 13.

Miscellaneous Provisions.

§ 66-65. Indemnity bonds required of agents, etc., to state maximum liability and period of liability.

Wherever any person, firm, or corporation, engaged in the business of merchandising any articles whatsoever, shall require of its agents, solicitors, salesmen, representatives, consignees, or peddlers, or other persons selling or handling its merchandise, as a condition precedent to selling or handling any of the merchandise of said person, firm, or corporation, that such agents, solicitors, salesmen, representatives, consignees, or peddlers should furnish and provide a bond or guaranty or indemnity contract guaranteeing the full and faithful accounting of moneys collected from such merchandise, such bond or indemnity contract shall state specifically therein the maximum amount of money or other liability which the principal and the sureties or guarantors thereof undertake thereby to pay in event of default of said bond or indemnity or guaranty contract; and said bond or indemnity or guaranty contract shall also state specifically the period of time during which liability may be incurred on account of any default in said bond or indemnity or guaranty contract.

Any bond or indemnity or guaranty contract which does not comply with the provisions of this section shall be null and void and no action may be maintained against the surety or guarantor to recover any sum due thereon in any court of this State. (1943, c. 604, ss. 1, 2.)

Legal Periodicals. — For comment on this section, see 21 N.C.L. Rev. 362 (1943).

§ 66-66. Manufacture or sale of antifreeze solutions compounded with inorganic salts or petroleum distillates prohibited.

The manufacture or sale of antifreeze solutions which are designated, intended, advertised, or recommended by the manufacturer or seller for use in the cooling systems of motor vehicles or gasoline combustion engines, and which are compounded with calcium chloride, magnesium chloride, sodium chloride, or other inorganic salts or with petroleum distillates is hereby prohibited.

Any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1943, c. 625, ss. 1, 2; 1993, c. 539, s. 515; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-67. Disposition by laundries and dry cleaning establishments of certain unclaimed clothing.

(a) If any person fails to claim any garment, clothing, household article or other article delivered for laundering, cleaning or pressing to any laundry or dry cleaning establishment as defined in G.S. 105-85, or any dry cleaning establishment as defined in G.S. 105-74, for a period of 90 days after the surrender of such articles for processing, the laundry or dry cleaning establishment may dispose of such garments, clothing, household articles or other articles by whatever means it may choose, without liability or responsibility to the owner, 30 days after a notice has been mailed by certified mail, return receipt requested, to the last known address of the owner of the garment, clothing, or other article, stating that the article will be disposed of unless it is redeemed within 30 days of the mailing of the notice. Provided, however, that before such laundry or dry cleaning establishment may claim the benefit of this section it shall at the time of receiving such garments, clothing, household articles or other articles, have a notice of dimensions of not less than eight and one-half by 11 inches, prominently displayed in a conspicuous place in the office, branch office or retail outlet where said clothes, garments or articles are received, if the same be received at an office, on which notice shall appear the words "NOT RESPONSIBLE FOR GOODS LEFT ON HAND FOR MORE THAN 90 DAYS".

(b) If any person fails to claim any garment, clothing, household article or other article delivered to any laundry or dry cleaning establishment described in subsection (a) of this section and displaying the notice described in that subsection, for a period of 180 days, the laundry or dry cleaning establishment may, without giving notice to the owner, dispose of such garment, clothing, household article, or other article by whatever means it may choose, without liability or responsibility to the owner.

(c) The provisions of this section shall also be applicable with respect to the storage of garments, furs, rugs, clothing or other articles after the completion of the period for which storage was agreed to be provided. (1947, c. 975; 1953, c. 1054; 1967, c. 931; 1987, c. 158; 1991, c. 531, s. 1.)

§ 66-67.1. Disposal by repair businesses of certain unclaimed property.

(a) Disposal Authorized. — Notwithstanding the provisions of Article 1 of Chapter 44A of the General Statutes, a person who repairs, alters, treats, or improves personal property in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property may, upon compliance with the notice requirement of subsection (b), dispose of any personal property of a value of five hundred dollars ($500.00) or less, other than a motor vehicle, that has not been claimed by the owner or legal possessor for a period of sixty days or more after his receipt of written notice that the property is ready to be claimed.

(b) Notice Requirement. — The repair business shall, at the time the property is surrendered, have a written notice of dimensions of not less than eight and one-half by eleven inches prominently displayed in a conspicuous place in the office or shop where the property was surrendered containing the following message: "NOT RESPONSIBLE FOR GOODS LEFT ON HAND FOR MORE THAN 60 DAYS". When the property has been repaired or otherwise processed, the repair business shall notify the owner or legal possessor of the property, by certified mail with return receipt requested, that the property is ready to be claimed.

(c) Liability. — A person who disposes of property in accordance with this section is not liable for damages to the owner of the property disposed of.

(d) Definitions. — As used in this section, the terms "legal possessor" and "owner" have the meanings provided in G.S. 44A-1. (1987, c. 386.)

§ 66-67.2. Persons who sell used goods on consignment must keep certain records.

(a) A person who is engaged in the business of selling used tangible personal property on consignment must keep a record of each piece of property consigned to that person for sale. The record must contain all of the following information:

(1) A description of the property, including any model or serial number of the property.
(2) The name, residence address, telephone number, and drivers license number or other identifying number of the owner of the property.
(3) The date the property was consigned.
(4) The owner's stated value of the property.

(b) The consignee shall provide the owner with a copy of the record required by subsection (a) of this section.

(c) A person who fails to keep the records required by this section is guilty of a Class 2 misdemeanor. A law enforcement agency may examine the records required to be kept under this section during business hours.

(d) This section does not apply to a motor vehicle.

(e) This section does not apply to any nonprofit organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)). (1991, c. 536, s. 1; 1993, c. 539, s. 516; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-67.3. Disposal of dies, molds, forms, and patterns.

(a) Definitions. — The following definitions apply in this section:
(1) Customer. — Either of the following:
  a. A person who causes or caused a molder to fabricate, cast, or otherwise make a die, mold, form, or pattern.
  b. A person who causes or caused a molder to use a die, mold, form, or pattern to manufacture, assemble, or otherwise make a product.
(2) Molder. — A tool or die maker or any other person who does either of the following:
  a. Fabricates, casts, or otherwise makes a die, mold, form, or pattern.
  b. Uses a die, mold, form, or pattern to manufacture, assemble, or otherwise make a product.

(b) Ownership and Transfer. — A customer has all rights, title, and interest to a die, mold, form, or pattern made or used by a molder on behalf of the customer unless an agreement provides otherwise. If the customer does not claim possession of the die, mold, form, or pattern from the molder within three years after the last time it is used, the molder may choose to obtain all rights, title, and interest to the die, mold, form, or pattern by operation of law unless a written agreement provides otherwise.

(c) Procedure. — If a molder chooses to have all rights, title, and interest to a die, mold, form, or pattern transferred to the molder by operation of law, the molder must send a written notice, by registered mail, return receipt requested, to the customer and to any known secured creditor. The notice must state that the molder intends to terminate the customer's rights, title, and interest in a mold, die, form, or pattern by having those rights, title, and interest transferred to the molder by operation of law pursuant to this section. The notice to the customer must be sent to the customer's last known address or, if the customer has designated in writing a different address for receipt of the notice, to the designated address. If a return receipt cannot be obtained for a notice that is mailed, the molder may give notice by publication in accordance with G.S. 1A- 1, Rule 4(j1). The rights, title, and interest in a die, mold, form, or pattern are transferred by operation of law to a molder who gives notice as required by this section unless, within 30 days after the date the molder receives acknowledgement of the return receipt of a notice that is mailed or 45 days after the date of first publication of a notice made by publication, the customer takes possession of the die, mold, form, or pattern, or makes other contractual arrangements with the molder for taking possession of or for storing the die, mold, form, or pattern.

(d) Use Upon Transfer. — A molder to whom the rights, title, and interest in a die, mold, form, or pattern is transferred by operation of law under this section may destroy or otherwise dispose of the die, mold, form, or pattern as the molder's own property without any risk of liability to the customer. The molder may not use the die, mold, form, or pattern for any other purpose.

(e) Scope. — This section does not affect a right of a customer under federal patent or copyright law or any state or federal law pertaining to unfair competition. (1993, c. 541, s. 9.)

§ 66-67.4. Film and photographic print processor or computer technician to report film or computer images containing pictures of a minor engaging in sexual activity.

(a) As used in this section:

(1) "Computer technician" means any person who repairs, installs, or otherwise services any computer or computer network or system for compensation.

(2) "Minor" has the same meaning as in G.S. 14-190.13.

(3) "Processor of photographic images" means any person who, for compensation: (i) develops exposed photographic film into negatives, slides, or prints; (ii) makes prints from negatives, slides, digital images, or video; or (iii) develops, processes, transfers, edits, or enhances video or digital images.

(4) "Sexual activity" has the same meaning as in G.S. 14-190.13.

(b) Any processor of photographic images or any computer technician who, within the person's scope of employment, observes an image of a minor or a person who reasonably appears to be a minor engaging in sexual activity shall report the name and address of the person requesting the processing of the film or photographs or the owner or person in possession of the computer or computer network or system to the Cyber Tip Line at the National Center for Missing and Exploited Children or to the appropriate law enforcement official in the county or municipality in which the image or film was submitted.

(c) An employee of a processor of photographic images or computer technician may satisfy the requirements of this section by reporting the required information to a person designated by the employer. The person designated by the employer shall then report as required by subsection (b) of this section.

(d) Any person, their employer, or a third party complying with this section in good faith shall be immune from any civil or criminal liability that might otherwise be incurred as a result of the report. In any proceeding involving liability, good faith is presumed. (2007-263, s. 1.)

Editor's Note. — Subdivision (a)(2), defining "minor," and (a)(3), defining "processor of photographic images," were designated as such at the direction of the Revisor of Statutes, the designations in Session Laws 2007-263, s. 1, having been (a)(3) and (a)(2), respectively.

Session Laws 2007-263, s. 2, made this section effective September 1, 2007.

§ 66-67.5. Requirements for maintenance fees for gift cards.

(a) Disclosure. — The seller or issuer of a gift card must conspicuously disclose any maintenance fee charges at the time of purchase. The disclosure must be visible on the gift card itself. No person, firm, or corporation engaged in commerce shall charge any maintenance fee on a gift card for one calendar year following the date of the purchase of the gift card.

(b) Penalty. — A seller or issuer of a gift card who violates this section commits an unfair trade practice under G.S. 75-1.1 and is subject to a civil penalty in accordance with G.S. 75-15.2.

(c) Definitions. — As used in this section, the following terms mean:

(1) Gift card. — A record evidencing a promise, made for monetary consideration, by a seller or issuer that goods or services will be provided to the owner of the record to the value shown in the record. A gift card includes a record that contains a microprocessor chip, magnetic strip, or other storage medium that is prefunded and for which the value is adjusted upon each use, a gift certificate, a stored-value card or certificate, a store card, or a prepaid long-distance telephone service that is activated by a prepaid card that required dialing an access number or an access code in addition to dialing the phone number to which the user of the prepaid card seeks to connect.

(2) Maintenance fee. — Any fee that the owner of the gift card is subject to when the gift card is redeemed, including a service or inactivity fee.

(d) Limitation. — The provisions of this section shall not apply to gift cards that are issued by a financial institution or its operating subsidiary and that are usable at multiple unaffiliated sellers of goods or services. (2007-363, s. 1.)

Editor's Note. — Session Laws 2007-363, s. 2, made this section effective December 1, 2007, and applicable to gift cards as defined in G.S. 66-67.5, as enacted by Session Laws 2007-363, s. 1, that are sold on or after that date.

ARTICLE 14.

Business Under Assumed Name Regulated.

§ 66-68. Certificate to be filed; contents; exemption of certain partnerships and limited liability companies engaged in rendering professional services; withdrawal or transfer of assumed name.

(a) Unless exempt under subsection (e) hereof, before any person or partnership engages in business in any county in this State under an assumed name or under any designation, name or style other than the real name of the owner or owners thereof, before any limited partnership engaged in business in any county in this State other than under the name set out in the Certificate filed with the Office of the Secretary of State, before any limited liability company engages in business in any county other than under the name set out in the articles of organization filed with the Office of the Secretary of State, or before a corporation engages in business in any county other than under its corporate name, such person, partnership, limited partnership, limited liability company, or corporation must file in the office of the register of deeds of such county a certificate giving the following information:

(1) The name under which the business is to be conducted; and

(2) The name and address of the owner, or if there is more than one owner, the name and address of each.

(b) If the owner is an individual or a partnership, the certificate must be signed and duly acknowledged by the individual owner, or by each general partner. If the owner is a corporation or limited liability company, it must be signed in the name of the corporation or limited liability company and duly acknowledged as provided by G.S. 47-41.01 or G.S. 47-41.02.

(c) Whenever a general partner withdraws from or a new general partner joins a partnership, a new certificate shall be filed. For limited partnerships, the requirement of this subsection (c) shall be deemed satisfied if the partnership is identified as the owner as provided in subsection (a) and the partnership's certificate of limited partnership is amended as provided in G.S. 59-202.

(d) It is not necessary that any person, partnership, limited liability company, or corporation file such certificate in any county where no place of business is maintained and where the only business done in such county is the sale of goods by sample or by traveling agents or by mail.

(e) Any partnership or limited liability company engaged in rendering professional services, as defined in G.S. 55B-2(6), in this State, shall be exempt from the requirements of this section if it shall file annually with the licensing board responsible for regulating the rendering of such professional services, or at such intervals as shall be designated from time to time by such licensing board, a listing of the names and addresses of its partners or members. The listing shall be open to public inspection during normal working hours.

(f) Any person, partnership, limited liability company, or corporation executing and filing a certificate of assumed name as required by this section may, upon ceasing to engage in business in this State under the assumed name, withdraw the assumed name or transfer the assumed name to any other person, partnership, or corporation by filing in the office of the register of deeds of the county in which the certificate of assumed name is filed a certificate of withdrawal or a certificate of transfer executed as provided in subsection (b) of this section and setting forth:

(1) The assumed name being withdrawn or transferred;
(2) The date of filing of the certificate of assumed name;
(3) The name and address of the owner or owners of the business;
(4) A statement that such owner or owners have ceased engaging in business under the assumed name;
(5) If the assumed name is to be withdrawn, the effective date (which shall be a date certain but not more than 20 days from the date of filing) of the withdrawal if it is not to be effective upon the filing of the certificate of withdrawal; and
(6) If the assumed name is to be transferred, the name and address of the transferee or transferees, and the effective date (which shall be a date certain but not more than 20 days from the date of filing) of the transfer if it is not to be effective upon the filing of the certificate of transfer. This subsection does not relieve a transferee of the obligation to file a certificate of assumed name as required by this Article. (1913, c. 77, s. 1; C.S., s. 3288; 1951, c. 381, ss. 3, 7; 1967, c. 823, s. 28; 1977, c. 384; 1985, c. 264; 1987, c. 723, ss. 1, 2; 1987 (Reg. Sess., 1988), c. 1031, s. 4; 1991 (Reg. Sess., 1992), c. 1030, s. 18; 1999-189, s. 6; 2000-140, s. 101(t).)

Cross References. — As to prohibition of use of title "certified public accountant" by partnership or association unless all members qualified, see G.S. 93-4.

Legal Periodicals. — For comment on the 1951 amendments to this Article, see 29 N.C.L. Rev. 377 (1951).

For note, "The North Carolina Court of Appeals Provides a Solution to the Business Name Game," see 66 N.C.L. Rev. 1064 (1988).

CASE NOTES

Statute Is Highly Penal. — Chapter 77, Laws of 1913, codified as G.S. 66-68 through 66-71, is of a highly penal character, and its meaning will not be extended by interpretation to include cases that do not come clearly within its provision. Jennette v. Coppersmith, 176 N.C. 82, 97 S.E. 54 (1918); Security Fin. Co. v. Hendry, 189 N.C. 549, 127 S.E. 629 (1925).

And the courts will not lend their aid to extend a highly penal statute, although it is within the police power, unless the case comes within the letter of the law, and also within its meaning and palpable design. It is just as clearly the policy of the law that it will not lend its aid in enforcing a claim founded on its own violation. Security Fin. Co. v. Hendry, 189 N.C. 549, 127 S.E. 629 (1925).

Intent of the statute is to prevent fraud or imposition upon those dealing with a business conducted under an assumed name, and to afford them means for knowing the status and responsibility of the concern with which they deal. Price v. Edwards, 178 N.C. 493, 101 S.E. 33 (1919).

The statute was enacted as a police regulation to protect the general public from fraud and imposition. Courtney v. Parker, 173 N.C. 479, 92 S.E. 324 (1917); Security Fin. Co. v. Hendry, 189 N.C. 549, 127 S.E. 629 (1925).

The statute manifestly is for the protection of creditors of persons who fail to comply with its provisions, or of others who do business with them. The consequences of a violation are prescribed by G.S. 66-71. They seem to be limited to punishment as a misdemeanor, for it is expressly provided that failure to comply with this section, shall not prevent a recovery in a civil action by the person who shall violate the statute. Farmers' Bank & Trust Co. v. Murphy, 189 N.C. 479, 127 S.E. 527 (1925).

This section is intended to protect the public and creditors against fraud. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Statute does not apply between partners who are presumed to know the status and responsibility of the partnership; and a surviving partner may maintain his action against the heirs of the dead one to recover his share in the assets of a partnership in a legitimate business, notwithstanding the business had been conducted in the name solely of the dead partner, and the requirements of the statute had not been complied with. Price v. Edwards, 178 N.C. 493, 101 S.E. 33 (1919).

Where a partnership in a legitimate business has been conducted in the name of one of the partners alone, as between themselves the statute does not apply; and an action of the silent partner to recover his share of the assets from the other is not founded upon any wrong avoiding his recovery. Price v. Edwards, 178 N.C. 493, 101 S.E. 33 (1919).

Association Must Be Registered Under Section to Bring Suit Concerning Real Property. — Under the wording of G.S. 39-25, unincorporated, unregistered association may hold real property in its common name; however, if the association wishes to bring suit concerning this property, it must be registered in accordance with G.S. 66-68. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Filing of Certificate Does Not Manifest Intent to Form Partnership. — Filing of a certificate to transact business under an assumed name, pursuant to this section, does not manifest intent to form a partnership. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Controlling Effect of G.S. 1-69.1 over former G.S. 39-24. — Former G.S. 39-24 (repealed) was enacted in 1939. The amendment to G.S. 1-69.1, which added the requirement of an allegation of recordation under this section before suit may be brought by an unincorporated association in its common name, was enacted effective October 1, 1975. In the face of any irreconcilable conflict between the provisions of these two statutes, G.S. 1-69.1, being the later enactment, will control or be regarded as a qualification of the earlier statute. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Failure to Comply with G.S. 1-69.1 Held Fatal to Complaint. — Failure of plaintiff unincorporated association to comply with the directives of G.S. 1-69.1 was fatal to its complaint. G.S. 1-69.1 requires an allegation of a recordation under this section before suit may be brought by an unincorporated association in its common name. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Requirement That Unincorporated Association Allege Its Registration. — While it is true that G.S. 1-69.1 requires unincorporated association to allege its registration for purposes of bringing suit in its collective name, there is no concomitant requirement attached to its right to hold property under G.S. 39-25. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Where a partnership is being conducted under the surname of the proprietors in such manner as to afford a reasonable and sufficient guide to a correct knowledge of the individuals composing the firm, the statute does not apply. Befarah v. Spell, 176 N.C. 193, 96 S.E. 949 (1918).

In Jennette v. Coppersmith, 176 N.C. 82, 97 S.E. 54 (1918), it was held that the title of the plaintiffs' firm, Jennette Bros., afforded a reasonable and sufficient guide to correct knowledge of the individuals composing the firm, and therefore did not come clearly within the doctrine of "assumed" names within the meaning of this statute.

Delay in Substituting Correct Name Not Fatal. — Where plaintiffs sued and served the appropriate party, their delay in substituting the correct name of that party was not fatal.

Tyson v. L'eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987).

Sufficient Service on Corporate Agent. — Where at the time that plaintiffs instituted their action, corporation had not complied with this section, but was actively conducting business under an assumed name and holding itself out to the public and to its employees under that name, and where service of process was accomplished upon a corporate agent who might have been expected to know that the assumed name was a name used by the corporation, corporation was adequately served with sufficient legal process under its assumed name, and the trial court had jurisdiction. Tyson v. L'eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987).

Where corporation failed to comply with the provisions of former G.S. 55-13 (see now G.S. 55-5-01) and this section, it was estopped to complain that it did not receive complaint and summons forwarded to it by the Secretary of State, as its own dereliction resulted in those documents being returned undelivered. South Carolina Ins. Co. v. Hallmark Enters., Inc., 88 N.C. App. 642, 364 S.E.2d 678, cert. denied, 322 N.C. 482, 370 S.E.2d 228 (1988).

Cited in Patterson v. Southern Ry., 214 N.C. 38, 198 S.E. 364 (1938); In re Estate of Nissen, 345 F.2d 230 (4th Cir. 1965); Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987); Strang v. Hollowell, 97 N.C. App. 316, 387 S.E.2d 664 (1990).

OPINIONS OF ATTORNEY GENERAL

There is no authority for allowing a foreign limited partnership to operate under any more than one assumed name, and the assumed name under which it operates must be the one registered with the Secretary of State. See opinion of Attorney General to Mr. Clyde Smith, Deputy Secretary of State, 57 N.C.A.G. 21 (1987), issued under the law in effect prior to enactment of the 1987 and 1987 (Reg. Sess., 1988) amendments.

Domestic limited partnerships may not operate under assumed names in North Carolina. See opinion of Attorney General to Mr. Clyde Smith, Deputy Secretary of State, 57 N.C.A.G. 21 (1987), issued under the law in effect prior to enactment of the 1987 and 1987 (Reg. Sess., 1988) amendments.

§ 66-69. Index of certificates kept by register of deeds.

Each register of deeds of this State shall keep an index which will show alphabetically every assumed name with respect to which a certificate is hereafter so filed in his county. The index shall also contain notations of any certificates of withdrawal or certificates of transfer filed in the county. (1913, c. 77, s. 2; C.S., s. 3299; 1951, c. 381, ss. 4, 7; 1967, c. 823, s. 29; 1987, c. 723, s. 3.)

§ 66-69.1. Copy of certificate prima facie evidence.

A copy of such certificate duly certified by the register of deeds in whose office it has been filed shall be prima facie evidence of the facts required to be stated herein. (1913, c. 77, s. 2; C.S., s. 3299; 1951, c. 381, ss. 5, 7; 1967, c. 823, s. 30.)

§ 66-70: Repealed by Session Laws 1969, c. 751, s. 45.

§ 66-71. Violation of Article a misdemeanor; civil penalty.

(a) Any person, partner or corporation failing to file the certificate as required by G.S. 66-68(a) or G.S. 66-68(c) —

(1) Shall be guilty of a Class 3 misdemeanor, and

(2) Shall be liable in the amount of fifty dollars ($50.00) to any person demanding that such certificate be filed if he fails to file the certificate within seven days after such demand. Such penalty may be collected in a civil action therefor.

(b) The failure of any person to comply with the provisions of this Article does not prevent a recovery by such person in any civil action brought in any of the courts of this State. (1913, c. 77, s. 4; 1919, c. 2; C.S., s. 3291; 1951, c. 381, ss. 6, 7; 1987, c. 723, s. 4; 1993, c. 539, s. 517; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For note, "The North Carolina Court of Appeals Provides a Solution to the Business Name Game," see 66 N.C.L. Rev. 1064 (1988).

CASE NOTES

Contracts in Violation of Statute Not Void. — It is clear that the legislature intended, by adding what is now subsection (b) of this section, that the punishment should be confined to the fine or imprisonment set out, but that contracts made by persons carrying on or conducting or transacting business in violation of G.S. 66-68 should not be void. Security Fin. Co. v. Hendry, 189 N.C. 549, 127 S.E. 629 (1925). See also Williamson Real Estate Co. v. Sasser, 179 N.C. 497, 103 S.E. 73 (1920); Farmers' Bank & Trust Co. v. Murphy, 189 N.C. 479, 127 S.E. 527 (1925).

Subsection (b) had the effect of changing the decision in Courtney v. Parker, 173 N.C. 479, 92 S.E. 324 (1917). See Security Fin. Co. v. Hendry, 189 N.C. 549, 127 S.E. 629 (1925).

Applied in Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

ARTICLE 15.

Person Trading as "Company" or "Agent".

§ 66-72. Person trading as "company" or "agent" to disclose real parties.

If any person shall transact business as trader or merchant, with the addition of the words "factor," "agent," "& Company" or "& Co.," or shall conduct such business under any name or style other than his own, except in case of a corporation, and fail to disclose the name of his principal or partner by a sign placed conspicuously at the place wherein such business is conducted, then all the property, stock of goods and merchandise, and choses in action purchased, used and contracted in the course of such business shall, as to creditors, be liable for the debts contracted in the course of such business by the person in charge of same. Provided, this section shall not apply to any person transacting business under license as an auctioneer, broker, or commission merchant; in all actions under this section it is incumbent on such trader or merchant to prove compliance with the same. (1905, c. 443; Rev., s. 2118; C.S., s. 3292; 1951, c. 381, s. 8.)

Cross References. — As to running of statute of limitations against undisclosed partner, see G.S. 1-28.

Legal Periodicals. — For note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

CASE NOTES

Purpose Similar to G.S. 25-2-326(3). — A fair reading of this section's terms suggests that its purpose is similar to that of G.S. 25-2-326(3). BFC Chems., Inc. v. Smith-Douglass, Inc., 46 Bankr. 1009 (E.D.N.C. 1985).

Cited in In re Griffin, 225 F. Supp. 482 (W.D.N.C. 1963).

ARTICLE 16.

Unfair Trade Practices in Diamond Industry.

§ 66-73. Definitions.

For the purpose of this Article:

(1) A "diamond" is a natural mineral consisting essentially of pure carbon crystallized in the isometric system and is found in many colors. Its

hardness is 10; its specific gravity approximately 3.52; and it has a refractive index 2.42.

(2) "A member of the diamond industry" shall be construed to mean any person, firm, corporation or organization engaged in the business of selling, offering for sale, or distributing in commerce, diamonds (other than industrial diamonds), whether cut, polished, or in the rough, synthetic diamonds and imitation diamonds, and of any jewelry items or other products containing diamonds, synthetic diamonds, or imitation diamonds.

(3) "The diamond industry" or "the industry" as used in this Article is a trade, industry or business which shall be construed to embrace all persons, firms, corporations and organizations engaged in selling, offering for sale, or the distribution in commerce of diamonds (other than industrial diamonds), whether cut, polished or in the rough, synthetic diamonds and imitation diamonds, and of any jewelry item or other products containing diamonds, synthetic diamonds or imitation diamonds.

(4) "Unfair trade practices" as referred to herein are unfair methods of competition, unfair or deceptive acts or practices and other illegal practices which are prohibited by law. (1957, c. 585, s. 1.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 66-74. What constitutes unfair trade practice.

It is an unfair trade practice for any member of the diamond industry:

(1) To use, or cause or promote the use of, any trade promotional literature, advertising matter, guarantee, warranty, mark, brand, label, trade name, picture, design or device, designation, or other type of oral or written representation, however disseminated or published, which has the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers with respect to the type, kind, grade, quality, color, cut, quantity, size, weight, nature, substance, durability, serviceability, origin, preparation, production, manufacture, distribution, or customary or regular price, of any diamond or other product of the industry, or which has the capacity and tendency or effect of misleading or deceiving the purchasing or consuming public in any other material respect.

(2) In the sale, offering for sale, or distribution of products of the industry to use the unqualified word "diamond" as descriptive of or as an identification for any object or product not meeting the requirement specified in the definition of diamond hereinabove set forth, or which, though meeting such requirements, has not been symmetrically fashioned with at least 17 polished facets.

The foregoing provisions of subdivision (2) have application to the unqualified use of the word "diamond." They are not to be construed as inhibiting:

a. The use of the words "rough diamond" as descriptive of or as a designation for, uncut or unfaceted objects or products meeting the requirements specified in the mentioned definition of diamond; or

b. The use of the word "diamond" as descriptive of or as a designation for objects or products meeting the requirements of said definition of diamond, but which have not been symmetrically fashioned with at least 17 polished facets when in immediate conjunction with the word "diamond," there is either a disclosure of the number of facets and shape of the diamond or the name of a type of diamond which denotes shape and which usually has less than 17 facets (e.g., "rose diamond"); or

c. The use of the words "imitation diamond" as descriptive of or as a designation for objects or products which do not meet the requirements of said definition of diamond but have an appearance similar to that of a cut and polished diamond.

When the word "diamond" is so used, the qualifying word or words shall be of at least equal conspicuousness as the word "diamond."

(3) To use the words "reproduction," "replica," "diamond-like," or similar terms as descriptive of imitation diamonds.

(4) To use the term "synthetic diamond" as descriptive of any object or product unless such object or product has in fact been artificially created and is of similar appearance and of essentially the same optical and physical properties and chemical structure as a diamond, or to apply the term "diamond" to any man-made objects or products unless it is immediately preceded in each instance with equal conspicuity by the word "synthetic."

(5) To use the word "perfect" or any other word, expression or representation of similar import, as descriptive of any diamond which discloses flaws, cracks, carbon spots, clouds, or other blemishes or imperfection of any sort when examined in normal daylight, or its equivalent, by a trained eye under a 10-power corrected diamond eye loupe or other equal magnifier.

The use with respect to a stone which is not perfect of any phase (such as "commercially perfect") containing the word "perfect" or "perfectly" is regarded as misleading and in violation of this subdivision, and this subdivision shall not be construed as approving of the use of the word "perfect," or any word or representation of like import, as descriptive of any diamond that is of inferior color or make. Nothing is to be construed as inhibiting the use of the word "flawless" as descriptive of a diamond which meets the requirements for "perfect" set forth in this subdivision.

(6) In connection with the offering of any ring or rings or other articles of jewelry having a perfect center stone or stones, and side or supplementary stones which are not of such quality, to use the word "perfect" without clearly disclosing that such description applies only to the center stone or center stones.

(7) To use the term "blue white" or any other term, expression or representation of similar import as descriptive of any diamond which under normal, north daylight or its equivalent, shows any color or any trace of any color, other than blue or bluish.

(8) To advertise, offer for sale, or sell any diamond which has been artificially colored or tinted by coating, irradiating, or heating, or by use of nuclear bombardment, or by any other means, without disclosure of such fact to purchasers or prospective purchasers, or without disclosure that such artificial coloring or tinting is not permanent, if such is the fact.

(9) To use the terms "properly cut," "proper cut," "modern cut," "well made," or expressions of similar import, to describe any diamond that is lopsided or so thick or so thin in depth as materially to detract from the brilliance of the stone.

(10) To use the unqualified expressions "brilliant," or "brilliant cut," or "full cut" to describe, identify or refer to any diamond except a round

diamond which has at least 32 facets, plus the table above the girdle and at least 24 facets below.

Such terms should not be applied to single or rose-cut diamonds, either with or without qualification. They may be applied to emerald (rectangular) cut and marquise (pointed oval) cut diamonds meeting the above stated facet requirements when, in immediate conjunction with the term used, disclosure is made of the fact that the diamond is of emerald or marquise form.

(11) To use the terms "clean," "eye clean," "commercially clean," "commercially white," or any other terms, expressions, or representations of similar import in advertising, labeling, representing, or describing any diamond when such terms are used for the purpose, or with the capacity and tendency or effect, of misleading or deceiving purchasers, prospective purchasers, or the consuming public.

(12) To misrepresent the weight of any diamond or to deceive purchasers or prospective purchasers as to the weight of any diamond.

The standard unit for designation of the weight of a diamond is the carat, which is equivalent to 200 milligrams (one-fifth gram). While advertisements may state the approximate weight or range of weights of a group of products, all weight representations regarding individual products shall state the exact weight of the stone or stones and be accurate to within 1/200th of a carat (one-half "point").

(13) To state or otherwise represent the weight of all diamonds contained in a ring or other article of jewelry unless such weight figure is accompanied with equal conspicuity by the words "total weight" or words of similar import, so as to indicate clearly that the weight shown is that of all stones in the article and not that of the center or largest stone.

(14) To use the word "gem" to describe, identify or refer to any diamond which does not possess the requisite beauty, brilliance, value and other qualities necessary for classification as a gem.

Not all diamonds are gems. For example: Small pieces of diamond rough or melee weighing only one or two points are not to be described as "gems." Neither should stones which are grossly imperfect or of decidedly poor color be so classified unless they are of such a size as to be rare and desirable and valuable for that reason.

No imitation diamond can be described as a gem under any circumstances.

(15) In connection with the offering for sale, sale, or distribution of diamonds or articles set with diamonds, to use as part of any advertisement, label, packaging material, or other sales promotion literature, any illustration, picture, diagram or other depiction which either alone or in conjunction with accompanying words or phrases has the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers concerning the type, kind, grade, color, cut, quality, size, weight, or character of any diamond, or which has the capacity and tendency or effect of misleading the purchasing or consuming public in any other material respect.

(16) To use as part of any advertisement, label, packaging material, or other sales promotion literature, any illustration which exaggerates the size of a diamond inset or enlarges it out of proper proportion to the mounting, without clearly and conspicuously stating either the amount that the diamond has been enlarged in the illustration, or that the diamond in the illustration has been "enlarged to show detail."

(17) To represent, directly or indirectly, through the use of any statement or representation in advertising or through the use of any word or

term in a corporate or trade name, or otherwise, that said member is a producer, cutter, or importer of diamonds, or owns or controls a cutting plant, or has connections abroad, through which importations of rough or cut stones are secured, or maintains offices abroad, when such is not the fact, or in any other manner to misrepresent the character, extent, volume, or type of business being conducted.

(18) To publish or circulate false or misleading price quotations, price lists, terms or conditions of sale or reports as to production or sales which have the capacity and tendency or effect of misleading purchasers, prospective purchasers, or the consuming public, or to advertise, sell or offer to sell diamonds or articles set with diamonds at prices purporting to be reduced from what are, in fact, fictitious or exaggerated manufacturer's or distributor's suggested retail selling price, or that contains what purport to be bona fide price quotations which are in fact higher than the prices at which such products are regularly and customarily sold in bona fide retail transactions. It is likewise an unfair trade practice to distribute, sell or offer for sale to the consuming public in such manner diamonds or articles set with diamonds bearing such false, fictitious, or exaggerated price tags or labels.

(19) To offer for sale, sell, advertise, describe, or otherwise represent diamonds or diamond-set merchandise as "close-outs," "discontinued lines," or "special bargains," by use of such terms or by words or representations of similar import, when such is not true in fact; or to offer for sale, sell, advertise, describe or otherwise represent such articles where the capacity and tendency or effect thereof is to lead the purchasing or consuming public to believe the same are being offered for sale or sold at greatly reduced prices, or at so-called "bargain" prices when such is not the fact.

(20) To advertise a particular style or type of product for sale when purchasers or prospective purchasers responding to such advertisement cannot readily purchase the advertised style or type of product from the industry member and the purpose of the advertisement is to obtain prospects for the sale of a different style or type of product than that advertised.

(21) To use sale practices or methods which:

a. Deprive prospective customers of a fair opportunity to purchase any advertised style or type of product; or

b. To falsely disparage any advertised style or type of product or, without the knowledge of the customer, to substitute other styles or types of products which the advertiser intends to sell instead of the advertised style or type of product.

(22) To advertise or offer for sale a grossly inadequate supply of products at reduced or bargain prices without disclosure of the inadequacy of the supply available at such prices when such advertisement or offer has the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers.

(23) To describe, identify or refer to a diamond as "certified," or to use respecting it any other word or words of similar meaning or import unless:

a. The identity of the certifier and the specific matters or qualities certified are clearly disclosed in conjunction therewith; and

b. The certifier has examined such diamond, has made such certification and is qualified to certify as to such matters and qualities; and

c. There is furnished the purchaser a certificate setting forth clearly and nondeceptively the name of the certifier and the matters and qualities certified.

(24) To aid, abet, coerce or induce another, directly or indirectly, to use or promote the use of any unfair trade practice specified in this Article. (1957, c. 585, s. 2.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 66-75. Penalty for violation; each practice a separate offense.

Any person, firm, corporation or organization engaging in any unfair trade practice, as defined in this Article, shall be guilty of a Class 1 misdemeanor; and each and every unfair trade practice engaged in shall be deemed a separate offense. (1957, c. 585, s. 3; 1993, c. 539, s. 518; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

ARTICLE 17.

Closing-Out Sales.

§ 66-76. Definitions.

For the purposes of this Article, "closing-out sale" shall mean and include all sales advertised, represented or held forth under the designation of "going out of business," "discontinuance of business," "selling out," "liquidation," "lost our lease," "must vacate," "forced out," "removal," or any other designation of like meaning; "distress sale" shall mean and include all sales in which it is represented or implied that going out of business is possible or anticipated, in which closing out is referred to in any way, or in which it is implied that business conditions are so difficult that the seller is forced to conduct the sale; and "person" shall mean and include individuals, partnerships, voluntary associations and corporations. (1957, c. 1058, s. 1; 1981, c. 633, s. 1.)

§ 66-77. License required; contents of applications; inventory required; fees; bond; extension of licenses; records; false statements.

(a) No person shall advertise or offer for sale a stock of goods, wares or merchandise under the description of closing-out sale, or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise, or a distress sale unless he shall have obtained a license to conduct such sale from the clerk of the city or town in which he proposes to conduct such a sale or from the officer designated by the Board of County Commissioners if the sale is conducted in an unincorporated area. The applicant for such a license shall make to such clerk an application therefor, in writing and under oath at least seven days prior to the opening date of sale, showing all the facts relating to the reasons and character of such sale, including the opening and terminating dates of the proposed sale, the opening and terminating dates of any previous distress sale or closing-out sale held by the applicant within that county during the preceding 12 months, a complete inventory of the goods, wares or merchandise actually on hand in the place whereat such sale is to be conducted, and all details necessary to locate exactly and identify fully the goods, wares or merchandise to be sold. Provided, the seller in a distress sale need not file an inventory.

(b) If such clerk shall be satisfied from said application that the proposed sale is of the character which the applicant desires to advertise and conduct, the clerk shall issue a license, upon the payment of a fee of fifty dollars ($50.00) therefor, together with a bond, payable to the city or town or county in the penal sum of five hundred dollars ($500.00), conditioned upon compliance with this Article, to the applicant authorizing him to advertise and conduct a sale of the particular kind mentioned in the application. The license fee provided for herein shall be good for a period of 30 days from its date, and if the applicant shall not complete said sale within said 30-day period then the applicant shall make application to such clerk for a license for a new permit, which shall be good for an additional period of 30 days, and shall pay therefor the sum of fifty dollars ($50.00), and a second extension period of 30 days may be similarly applied for and granted by the clerk upon payment of an additional fee of fifty dollars ($50.00) and upon the clerk being satisfied that the applicant is holding a bona fide sale of the kind contemplated by this Article and is acting in a bona fide manner; provided, however, that the clerk may not grant an extension period as provided in this subsection if (i) the applicant conducted a distress sale immediately preceding the current sale for which the extension is applied for and (ii) the period of the extension applied for, when added to the period of the preceding sale and the period of the current sale, will exceed 120 days. No additional bond shall be required in the event of one or more extensions as herein provided for. Any merchant who shall have been conducting a business in the same location where the sale is to be held for a period of not less than one year, prior to the date of holding such sale, or any merchant who shall have been conducting a business in one location for such period but who shall, by reason of the building being untenantable or by reason of the fact that said merchant shall have no existing lease or ownership of the building and shall be forced to hold such sale at another location, shall be exempted from the payment of the fees and the filing of the bond herein provided for.

(c) Every city or town or county to whom application is made shall endorse upon such application the date of its filing, and shall preserve the same as a record of his office, and shall make an abstract of the facts set forth in such application, and shall indicate whether the license was granted or refused.

(d) Any person making a false statement in the application provided for in this section shall, upon conviction, be deemed guilty of perjury. (1957, c. 1058, s. 2; 1981, c. 633, ss. 2-4; 1987, c. 387, s. 1.)

Local Modification. — City of Charlotte: 2002-33, s. 1; city of Greensboro: 2002-33, s. 1, as amended by 2005-12; city of Hendersonville: 2002-33, s. 1, as amended by 2005-12, 2007-22; and Town of Cary: 2002-33, s. 1, as amended by 2005-12, 2007-22.

§ 66-78. Additions to stock in contemplation of sale prohibited.

No person in contemplation of a closing-out sale shall order any goods, wares or merchandise for the purpose of selling and disposing of the same at such sale, and any unusual purchase and additions to the stock of such goods, wares or merchandise within 60 days prior to the filing of application for a license to conduct such sale shall be presumptive evidence that such purchases and additions to stock were made in contemplation of such sale. (1957, c. 1058, s. 3; 1981, c. 633, s. 5.)

§ 66-79. Replenishment of stock prohibited.

No person carrying on or conducting a closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise, shall, during the continuance of such sale, add any goods, wares or merchandise to the damaged stock inventoried in his original application for such license, and no goods, wares or merchandise shall be sold as damaged merchandise at or during such sale, excepting the goods, wares or merchandise described and inventoried in such original application. (1957, c. 1058, s. 4; 1981, c. 633, s. 5.)

§ 66-80. Continuation of sale or business beyond termination date.

No person shall conduct a closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise or a distress sale beyond the termination date specified for such sale, except as otherwise provided for in subsection (b) of G.S. 66-77; nor shall any person, upon conclusion of such sale, continue that business which had been represented as closing out or going out of business under the same name, or under a different name, at the same location, or elsewhere in the same city or town where the inventory for such sale was filed for a period of 12 months; nor shall any person, upon conclusion of such sale, continue business contrary to the designation of such sale. As used in this section, the term “person” includes individuals, partnerships, corporations, and other business entities. If a business entity that is prohibited from continuing a business under this section reformulates itself as a new entity or as an individual, whether by sale, merger, acquisition, bankruptcy, dissolution, or any other transaction, for the purpose of continuing the business, the successor entity or individual shall be considered the same person as the original entity for the purpose of this section. If an individual who is prohibited from continuing a business under this section forms a new business entity to continue the business, that entity shall be considered the same person as the individual for the purpose of this section. (1957, c. 1058, s. 5; 1981, c. 633, s. 6; 1987, c. 387, s. 2.)

§ 66-81. Advertising or conducting sale contrary to Article; penalty.

Any person who shall advertise, hold, conduct or carry on any sale of goods, wares or merchandise under the description of closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise or a distress sale, contrary to the provisions of this Article, or who shall violate any of the provisions of this Article shall be deemed guilty of a Class 1 misdemeanor. (1957, c. 1058, s. 6; 1981, c. 633, s. 7; 1993, c. 539, s. 519; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-82. Sales excepted; liability for dissemination of false advertisement.

The provisions of this Article shall not apply to sheriffs, constables or other public or court officers, or to any other person or persons acting under the license, direction or authority of any court, State or federal, selling goods, wares or merchandise in the course of their official duties; provided, however, that no newspaper publisher, radio-broadcast licensee, television-broadcast licensee, or other agency or medium for the dissemination of advertising shall be liable under this Article by reason of the dissemination of any false advertisement prohibited by this Article, unless he has refused, on the written request of any law-enforcement officer or agency of this State, to furnish to such officer or agency the name and address of the person who caused the dissemination of such advertisement. (1957, c. 1058, s. 7.)

§ 66-83. Restraining or enjoining illegal act.

Upon complaint of any person the superior court shall have jurisdiction to restrain and enjoin any act forbidden or declared illegal by any provisions of this Article. (1957, c. 1058, s. 8.)

§ 66-84: Repealed by Session Laws 1981, c. 633, s. 8.

ARTICLE 18.

Labeling of Household Cleaners.

§ 66-85. Labeling cleaners containing volatile substances capable of producing toxic effects; definition.

It shall be unlawful for any person, firm, or corporation manufacturing household cleaners which contain volatile substances capable of producing toxic effects in or on their users when used for their intended domestic purposes to sell or offer for sale any such cleaner unless such cleaner shall be labeled with the word "caution" or other word of similar import and unless directions shall plainly appear thereon as to the safe and proper use of the contents. Such label shall identify the particular substance contained therein. The phrase "volatile substances capable of producing toxic effect" as used herein shall include, but shall not be limited to, the following: benzene (benzol), toluene (toluol), coal tar naphtha, carbon tetrachloride, trichlorethylene, tetrachlorethylene (perchlorethylene), tetrachlorethane, methyl alcohol, and aromatic and chlorinated hydrocarbons of comparable volatility and toxicity. (1957, c. 1241, s. 1.)

§ 66-86. Penalty for selling product in violation of Article.

Any person, firm or corporation selling or offering to sell any product in violation of the terms of this Article shall be guilty of a Class 1 misdemeanor. (1957, c. 1241, s. 2; 1993, c. 539, s. 520; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-87. Injunctions.

Upon complaint by the Department of Health and Human Services, the superior court shall have jurisdiction to enjoin any sale or offer of sale which is in violation of the provisions of this Article. (1957, c. 1241, s. 3; 1973, c. 476, s. 128; 1997-443, s. 11A.118(a).)

§ 66-88. Application of Article after enactment of federal legislation.

If the Congress of the United States shall, at any time hereafter, enact in any form legislation designed to regulate the interstate distribution, labeling and sale of hazardous articles in packages suitable for or intended for household use, the Department of Health and Human Services shall, upon so determining, issue a proclamation to such effect and, from and after the date of such proclamation, this Article shall be applicable only with respect to intrastate manufacture, distribution, sale and labeling by persons, firms or corporations who do not comply with the federal legislation as to interstate distribution, labeling and sale of the materials or articles described in G.S. 66-85. (1957, c. 1241, s. 31/2; 1973, c. 476, s. 128; 1997-443, s. 11A.118(a).)

§§ 66-89 through 66-93: Reserved for future codification purposes.

ARTICLE 19.

Business Opportunity Sales.

§ 66-94. Definition.

For purposes of this Article, "business opportunity" means the sale or lease of any products, equipment, supplies or services for the purpose of enabling the purchaser to start a business, and in which the seller represents:

(1) That the seller will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases or other similar devices, or currency-operated amusement machines or devices, on premises neither owned nor leased by the purchaser or seller; or

(2) That it may, in the ordinary course of business, purchase any or all products made, produced, fabricated, grown, bred or modified by the purchaser using in whole or in part the supplies, services or chattels sold to the purchaser; or

(3) The seller guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid for the business opportunity; or that the seller will refund all or part of the price paid for the business opportunity, or repurchase any of the products, equipment, supplies or chattels supplied by the seller, if the purchaser is unsatisfied with the business opportunity and pays to the seller an initial, required consideration which exceeds two hundred dollars ($200.00); or

(4) That it will provide a sales program or marketing program which will enable the purchaser to derive income from the business opportunity which exceeds the price paid for the business opportunity, provided that this subsection shall not apply to the sale of a marketing program made in conjunction with the licensing of a federally registered trademark or a federally registered service mark, or when the purchaser pays less than two hundred dollars ($200.00).

Provided, that "business opportunity" does not include the sale of an on-going business when the owner of that business sells and intends to sell only that one business opportunity; nor does it include the not-for-profit sale of sales demonstration equipment, materials, or samples, for a total price of two hundred dollars ($200.00) or less. (1977, c. 884, s. 1; 1981, c. 817, s. 1; 1983, c. 421, s. 2; 1991, c. 74, s. 1.)

Legal Periodicals. — For survey of 1977 law on trade regulation, see 56 N.C.L. Rev. 934 (1978).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

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In order for the Business Opportunity Sales Act to apply there must be a sale or lease of products, equipment, supplies, or services, for the purpose of enabling the purchaser to start a business; in addition, the seller must make one of the four types of representations listed in this section to the purchaser. Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985).

Violation Predating Effective Date of Article. — Where plaintiff initially contracted with defendant in June, 1976, over one year before October 1, 1977, the effective date of the Business Opportunity Sales Act, and all further contracts between plaintiff and defendant enabled plaintiff to continue and/or expand his business as an independent contract grower, none of them being for the purpose of starting a business, any violation of the Business Opportunity Sales Act, assuming its applicability, occurred before the statute became operative. Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985).

Precontract Dealings Regulated. — This section is not confined to regulating the behavior of the seller at the time the contract of sale is signed, but seeks to regulate precontract dealings as well. Martin v. Pilot Indus., 632 F.2d 271 (4th Cir. 1980).

When seller guaranteed income from a franchise, it came within statute's scope and had to comply with the act in its dealings with purchaser. Seller could not then remove the sale of the franchise from the act's requirements by later disclaiming any guarantee of profit. Martin v. Pilot Indus., 632 F.2d 271 (4th Cir. 1980).

Act Held Inapplicable. — Where the trial court found that no representations were made until after the sale was consummated and that the agreement was for sellers to be sales and purchase agents on a commission basis, based on these filings, the transaction did not come within the purview of the Business Opportunity Sales Act and plaintiffs were not required to comply with the provisions of the Act. Anchor Paper Corp. v. Anchor Converting Co., 79 N.C. App. 144, 338 S.E.2d 821, cert. denied, 317 N.C. 332, 346 S.E.2d 134 (1986).

§ 66-94.1. Responsible sellers exemption.

(a) The provisions of Article 19 shall not apply to the sale or lease of any products, equipment, supplies or services where:

(1) The seller has not derived net income from such sales within the State during either of its two previous fiscal years, and does not intend to derive net income from such sales during its current fiscal year; and

(2) The primary commercial activity of the seller or its affiliate is substantially different from the sale of the goods or services to the purchaser, and the gross revenues received by the seller from all such sales during the current and each of the two previous fiscal years do not exceed ten percent (10%) of the total gross revenues from all operations for the same period of the seller and any other affiliated entity contractually obligated to compensate the purchaser for the purchaser's business activities arising from the sale; and

(3) The sale results in an improvement to realty owned or leased by the purchaser which enables the purchaser to receive goods on consignment from the seller or its affiliate. An "improvement to realty" occurs when a building or other structure is constructed or when significant improvements to an existing building or structure are made; and

(4) The seller has either a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than five million dollars ($5,000,000) or has obtained a surety bond from a surety company authorized to do business in this State in an amount equal to or greater than the gross revenues received from the sale or lease of products, equipment, supplies or services in this State during the preceding 12-month period which enabled the purchaser to start a business.

(b) The provisions of Article 19 shall not apply to the sale or lease of any products, equipment, supplies, or services where:

(1) The seller has a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than five million dollars ($5,000,000); and

(2) The primary commercial activity of the seller is motor carrier transportation and the seller is subject to the jurisdiction of the Interstate

Commerce Commission or any other federal agency that regulates motor carrier transportation.

(c) Any seller satisfying the requirements of subsections (a) or (b) of this section shall file with the Secretary of State two copies of a document signed under oath by the seller or one authorized to sign on behalf of the seller containing the following information:

(1) The name of the seller and whether the seller is doing business as an individual, partnership, or corporation;

(2) The principal business address of the seller;

(3) A brief description of the products, equipment, supplies, or services being sold or leased by the seller; and

(4) A statement which explains the manner in which each of the requirements of subsections (a) or (b) of this section are met. (1983, c. 421, s. 1; 1987, c. 325.)

§ 66-95. Required disclosure statement.

At least 48 hours prior to the time the purchaser signs a business opportunity contract, or at least 48 hours prior to the receipt of any consideration by the seller, whichever occurs first, the seller must provide the prospective purchaser a written document, the cover sheet of which is entitled in at least 10-point bold face capital letters "DISCLOSURES REQUIRED BY NORTH CAROLINA LAW." Under this title shall appear the statement in at least 10-point type that "The State of North Carolina has not reviewed and does not approve, recommend, endorse or sponsor any business opportunity. The information contained in this disclosure has not been verified by the State. If you have any questions about this investment, see an attorney before you sign a contract or agreement." Nothing except the title and required statement shall appear on the cover sheet. The disclosure document shall contain the following information:

(1) The name of the seller, whether the seller is doing business as an individual, partnership, or corporation, the names under which the seller has done, is doing or intends to do business, and the name of any parent or affiliated company that will engage in business transactions with purchasers or who takes responsibility for statements made by the seller.

(2) The names and addresses and titles of the seller's officers, directors, trustees, general partners, general managers, principal executives, and any other persons charged with responsibility for the seller's business activities relating to the sale of business opportunities. The disclosure document shall additionally contain a statement disclosing who, if any, of the above persons:

a. Has been the subject of any legal or administrative proceeding alleging the violation of any business opportunity or franchise law, or fraud, embezzlement, fraudulent conversion, restraint of trade, unfair or deceptive practices, misappropriation of property or comparable allegations;

b. Has been the subject of any bankruptcy, reorganization or receivership proceeding, or was an owner, a principal officer or a general partner of any entity which has been subject to such proceeding.

The disclosure document shall set forth the name of the person, the nature of and the parties to the action or proceeding, the court or other forum, the date, the current status of the action or proceeding, the terms and conditions of any order of decree, the penalties or damages assessed and/or terms of settlement, and any other information to enable the purchaser to assess the prior business activities of the seller.

(3) The prior business experience of the seller relating to business opportunities including:
  a. The name, address, and a description of any business opportunity previously offered by the seller;
  b. The length of time the seller has offered each such business opportunity;
  c. The length of time the seller has conducted the business opportunity currently being offered to the purchaser.

(4) A full and detailed description of the actual services that the business opportunity seller undertakes to perform for the purchaser.

(5) A copy of a current (not older than 13 months) financial statement of the seller, updated to reflect any material changes in the seller's financial condition.

(6) If training of any type is promised by the seller, the disclosure statement must set forth a complete description of the training and the length of the training.

(7) If the seller promises services to be performed in connection with the placement of the equipment, product(s) or supplies at various location(s), the disclosure statement must set forth the full nature of those services as well as the nature of the agreements to be made with the owners or managers of these location(s) where the purchaser's equipment, product(s) or supplies will be placed.

(8) If the business opportunity seller is required to secure a bond or establish a trust deposit pursuant to G.S. 66-96, the document shall state either:
  a. "As required by North Carolina law, the seller has secured a bond issued by ______________________________
  (name and address of surety company)
  a surety company authorized to do business in this State. Before signing a contract to purchase this business opportunity, you should check with the surety company to determine the bond's current status," or
  b. "As required by North Carolina law, the seller has established a trust account ______________________________
  (number of account)
  with ______________________________
  (name and address of bank or savings institution)
  Before signing a contract to purchase this business opportunity, you should check with the bank or savings institution to determine the current status of the trust account."

(9) The following statement:

"If the seller fails to deliver the product(s), equipment or supplies necessary to begin substantial operation of the business within 45 days of the delivery date stated in your contract, you may notify the seller in writing and demand that the contract be cancelled."

(10) If the seller makes any statement concerning sales or earnings, or range of sales or earnings that may be made through this business opportunity, the document must disclose:
  a. The total number of purchasers of business opportunities involving the product(s), equipment, supplies or services being offered who to the seller's knowledge have actually received earnings in the amount or range specified, within three years prior to the date of the disclosure statement.
  b. The total number of purchasers of business opportunities involving the product(s), equipment, supplies or services being offered

within three years prior to the date of the disclosure statement. (1977, c. 884, s. 1; 1981, c. 817, s. 2.)

CASE NOTES

Purchaser's Remedies for Failure to Make Disclosures. — Where seller failed to make the disclosures required under this section, purchaser was entitled under G.S. 66-100(a) to void the contract and receive all sums paid to seller. Martin v. Pilot Indus., 632 F.2d 271 (4th Cir. 1980).

Cited in Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994).

§ 66-96. Bond or trust account required.

If the business opportunity seller makes any of the representations set forth in G.S. 66-94(3), the seller must either have obtained a surety bond issued by a surety company authorized to do business in this State or have established a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. The amount of the bond or trust account shall be an amount not less than fifty thousand dollars ($50,000). The bond or trust account shall be in favor of the State of North Carolina. Any person who is damaged by any violation of this Article, or by the seller's breach of the contract for the business opportunity sale or of any obligation arising therefrom may bring an action against the bond or trust account to recover damages suffered; provided, however, that the aggregate liability of the surety or trustee shall be only for actual damages and in no event shall exceed the amount of the bond or trust account. (1977, c. 884, s. 1.)

CASE NOTES

Cited in Martin v. Pilot Indus., 632 F.2d 271 (4th Cir. 1980).

§ 66-97. Filing with Secretary of State.

(a) The seller of every business opportunity shall file with the Secretary of State two copies of the disclosure statement required by G.S. 66-95, accompanied by a fee in the amount of two hundred fifty dollars ($250.00) made payable to the Secretary of State, prior to placing any advertisement or making any other representations to prospective purchasers in this State. The seller shall update this filing as any material change in the required information occurs, but no less than annually.

(b) Every seller shall file, in such form as the Secretary of State may prescribe, an irrevocable consent appointing the Secretary of State or his successors in office to be his attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against the seller or his successor, executor or administrator which arises under this Article after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. Service may be made by leaving a copy of the process in the office of the Secretary of State, but is not effective unless (i) the plaintiff, who may be the Attorney General in a suit, action or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his address on file with the Secretary of State, and (ii) the plaintiff's affidavit of compliance with this section is filed in the case on or before the return date of the process, if any, or within such further time as the court allows.

(c) If the seller of a business opportunity is required by G.S. 66-96 to provide a bond or establish a trust account, he shall file with the Secretary of State two copies of the bond or two copies of the formal notification by the depository that the trust account is established contemporaneously with compliance with subsections (a) or (d).

(d) The Secretary of State may accept the Uniform Franchise Offering Circular (UFOC) or the Federal Trade Commission Basic Disclosure Document, provided, that the alternative disclosure document shall be accompanied by a separate sheet setting forth the caption and statement and any other information required by G.S. 66-95.

(e) Failure to so file shall be a Class 1 misdemeanor. (1977, c. 884, s. 1; 1981, c. 817, s. 3; 1993, c. 539, s. 521; 1994, Ex. Sess., c. 24, s. 14(c); 2003-284, s. 35B.3(a).)

Editor's Note. — Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

§ 66-98. Prohibited acts.

Business opportunity sellers shall not:

(1) Represent that the business opportunity provides income or earning potential of any kind unless the seller has documented data to substantiate the claims of income or earning potential and discloses this data to the prospective purchaser at the time such representations are made;

(2) Use the trademark, service mark, trade names, logotype, advertising or other commercial symbol of any business which does not either control the ownership interest in the seller or accept responsibility for all representations made by the seller in regard to the business opportunity, unless it is clear from the circumstances that the owner of the commercial symbol is not involved in the sale of the business opportunity;

(3) Make or authorize the making of any reference to its compliance with this Article in any advertisement or other contact with prospective purchasers. (1977, c. 884, s. 1.)

CASE NOTES

Evidence Required. — Trial court erred by failing to make findings of fact as to whether defendant made representations of income or earning potential and whether it further failed to disclose information substantiating those representations. Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994).

Cited in Martin v. Pilot Indus., 632 F.2d 271 (4th Cir. 1980).

§ 66-99. Contracts to be in writing; form; provisions.

(a) Every business opportunity contract shall be in writing and a copy shall be given to the purchaser at the time he signs the contract.

(b) Every contract for a business opportunity shall include the following:

(1) The terms and conditions of payment;

(2) A full and detailed description of the acts or services that the business opportunity seller undertakes to perform for the purchaser;

(3) The seller's principal business address and the name and address of its agent in the State of North Carolina authorized to receive service of process in addition to the Secretary of State as provided in G.S. 66-97(b);

(4) The approximate delivery date of any product(s), equipment or supplies the business opportunity seller is to deliver to the purchaser. (1977, c. 884, s. 1; 1981, c. 817, s. 4; 1983, c. 721, s. 4.)

Cross References. — As to contracts requiring writing, see G.S. 22-1 through 22-4.

CASE NOTES

Cited in Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985).

§ 66-100. Remedies.

(a) If a business opportunity seller uses any untrue or misleading statements in the sale of a business opportunity, or fails to give the proper disclosures in the manner required by G.S. 66-95, or fails to deliver the equipment, supplies or product(s) necessary to begin substantial operation of the business within 45 days of the delivery date stated in the business opportunity contract, or if the contract does not comply with the requirements of G.S. 66-99, then, within one year of the date of the contract, upon written notice to seller, the purchaser may void the contract and shall be entitled to receive from the business opportunity seller all sums paid to the business opportunity seller. Upon receipt of such sums, the purchaser shall make available to the seller at purchaser's address or at the places at which they are located at the time notice is given, all product(s), equipment or supplies received by the purchaser. Provided, that purchaser shall not be entitled to unjust enrichment by exercising the remedies provided in this subsection.

(b) Any purchaser injured by a violation of this Article or by the business opportunity seller's breach of a contract subject to this Article or any obligation arising therefrom may bring an action for recovery of damages, including reasonable attorneys' fees.

(c) Upon complaint of any person that a business opportunity seller has violated the provisions of this Article, the superior court shall have jurisdiction to enjoin the defendant from further such violations.

(d) The remedies provided herein shall be in addition to any other remedies provided for by law or in equity.

(e) The violation of any provisions of this Article shall constitute an unfair practice under G.S. 75-1.1. (1977, c. 884, s. 1.)

Legal Periodicals. — For note, "Consumer Protection—The Unfair Trade Practice Act and the Insurance Code: Does Per Se Necessarily Preempt?", see 10 Campbell L. Rev. 487 (1988).

CASE NOTES

Where seller failed to make the disclosures required under G.S. 66-95 to purchaser, purchaser was entitled under subsection (a) of this section to void the contract and receive all sums paid to seller. Martin v. Pilot Indus., 632 F.2d 271 (4th Cir. 1980).

Cited in Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994).

§§ 66-101 through 66-105: Reserved for future codification purposes.

ARTICLE 20.

Loan Brokers.

§ 66-106. Definitions.

(a) For purposes of this Article the following definitions apply:

(1) A "loan broker" is any person, firm, or corporation who, in return for any consideration from any person, promises to (i) procure for such person, or assist such person in procuring, a loan from any third party; or (ii) consider whether or not it will make a loan to such person.

(2) A "loan" is an agreement to advance money or property in return for the promise to make payments therefor, whether such agreement is styled as a loan, credit card, line of credit, a lease or otherwise.

(b) Except for mortgage loans as defined in G.S. 53-243.01, this Article shall not apply to any party approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, a National Mortgage Association or any federal agency; nor to any party currently designated and compensated by a North Carolina licensed insurance company as its agent to service loans it makes in this State; nor to any insurance company registered with and licensed by the North Carolina Insurance Commissioner; nor, with respect to residential mortgage loans, to any residential mortgage banker or mortgage broker licensed pursuant to Article 19A of Chapter 53 of the General Statutes or exempt from licensure pursuant to G.S. 53-243.01(12) and G.S. 53-243.02; nor to any attorney-at-law, public accountant, or dealer registered under the North Carolina Securities Act, acting in the professional capacity for which such attorney-at-law, public accountant, or dealer is registered or licensed under the laws of the State of North Carolina. Provided further that subdivision (1)(ii) above shall not apply to any lender whose loans or advances to any person, firm or corporation in North Carolina aggregate more than one million dollars ($1,000,000) in the preceding calendar year. (1979, c. 705, s. 1; 1981, c. 785, s. 1; 1993, c. 339, s. 2; 2001-393, s. 4; 2008-228, s. 17.)

Effect of Amendments. — Session Laws 2008-228, s. 17, effective January 1, 2009, and applicable to anyone engaged in the business of mortgage servicing on or after that date, in subsection (b), substituted "53-243.01" for "53-243.01(15)" near the beginning; and substituted "53-243.01(12)" for "53-243.01(8)" near the middle.

CASE NOTES

"Loan Broker." — Court erred in granting summary judgment in favor of an investor where a business owner asserted that the investor was a loan broker, and the evidence showed that investor procured a loan to the owner's business from a third party in return for consideration. Johnson v. Wornom, 167 N.C. App. 789, 606 S.E.2d 372, 2005 N.C. App. LEXIS 2 (2005), cert. denied, 359 N.C. 411, 612 S.E.2d 321 (2005).

Violation of Act. — Trial court did not err in granting summary judgment to plaintiff, which had agreed to lease equipment from defendant, in its action under the Loan Broker Act; a "loan" included an agreement to advance property, and defendant did not show that it had complied with G.S. 66-107 and G.S. 66-108 by providing a disclosure statement and maintaining a surety bond or trust account; and defendant failed to dispute that it had failed to refund plaintiff's deposit. Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc., 180 N.C. App. 70, 637 S.E.2d 230, 2006 N.C. App. LEXIS 2253 (2006).

Defendant is not precluded from being considered a "loan broker" simply because the party for whom the loan is intended is a corporation and not an individual; thus, when plaintiff, a corporation, had agreed to lease equipment from defendant, defendant was a "loan broker" under the Loan Broker Act. Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc., 180 N.C. App. 70, 637 S.E.2d 230, 2006 N.C. App. LEXIS 2253 (2006).

Cited in Wilson Heights Church of God v. Autry, 94 N.C. App. 111, 379 S.E.2d 691 (1989); L.C. Williams Oil Co. v. NAFCO Capital Corp., 130 N.C. App. 286, 502 S.E.2d 415 (1998); Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, 136 N.C. App. 493, 524 S.E.2d 591, 2000 N.C. App. LEXIS 52 (2000).

§ 66-107. Required disclosure statement.

At least seven days prior to the time any person signs a contract for the services of a loan broker, or the time of the receipt of any consideration by the loan broker, whichever occurs first, the broker must provide to the party with whom he contracts a written document, the cover sheet of which is entitled in at least 10-point bold face capital letters "DISCLOSURES REQUIRED BY NORTH CAROLINA LAW." Under this title shall appear the statement in at least 10-point type that "The State of North Carolina has not reviewed and does not approve, recommend, endorse or sponsor any loan brokerage contract. The information contained in this disclosure has not been verified by the State. If you have any questions see an attorney before you sign a contract or agreement." Nothing except the title and required statement shall appear on the cover sheet. The disclosure document shall contain the following information:

(1) The name of the broker; whether the broker is doing business as an individual, partnership, or corporation; the names under which the broker has done, is doing or intends to do business; and the name of any parent or affiliated companies;

(2) The names, addresses and titles of the broker's officers, directors, trustees, general partners, general managers, principal executives, and any other persons charged with responsibility for the broker's business activities; and all the broker's employees located in North Carolina;

(3) The length of time the broker has conducted business as a loan broker;

(4) The total number of loan brokerage contracts the broker has entered within the past 12 months;

(5) The number of loan brokerage contracts in which the broker has successfully obtained a loan for the prospective borrower within the past 12 months;

(6) A copy of a current (not older than 13 months) financial statement of the broker, updated to reflect any material changes in the broker's financial condition;

(7) A full and detailed description of the actual services that the broker undertakes to perform for the prospective borrower;

(8) A specific statement of the circumstances in which the broker will be entitled to obtain or retain consideration from the party with whom he contracts;

(9) One of the following statements, whichever is appropriate:

a. "As required by North Carolina law, this loan broker has secured a bond by ____________________
(name and address of surety company)
a surety authorized to do business in this State. Before signing a contract with this loan broker, you should check with the surety company to determine the bond's current status," or

b. "As required by North Carolina law, this loan broker has established a trust account ____________________
(number of account)
with ____________________
(name/address of bank or savings institution).

Before signing a contract with this loan broker you should check with the bank or savings institution to determine the current status of the trust account." (1979, c. 705, s. 1.)

CASE NOTES

Cited in Goleta Nat'l Bank v. Lingerfelt, 211 F. Supp. 2d 711, 2002 U.S. Dist. LEXIS 19350 (E.D.N.C. 2002).

Violation of Act. — Trial court did not err in granting summary judgment to plaintiff, which had agreed to lease equipment from defendant, in its action under the Loan Broker Act; a "loan" included an agreement to advance property, and defendant did not show that it had complied with G.S. 66-107 and G.S. 66-108 by providing a disclosure statement and maintaining a surety bond or trust account; and defendant failed to dispute that it had failed to refund plaintiff's deposit. Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc., 180 N.C. App. 70, 637 S.E.2d 230, 2006 N.C. App. LEXIS 2253 (2006).

§ 66-108. Bond or trust account required.

(a) Every loan broker must obtain a surety bond issued by a surety company authorized to do business in this State, or establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. The amount of the bond or trust account shall be ten thousand dollars ($10,000). The bond or trust account shall be in favor of the State of North Carolina. Any person damaged by the loan broker's breach of contract or of any obligation arising therefrom, or by any violation of this Article, may bring an action against the bond or trust account to recover damages suffered. The aggregate liability of the surety or trustee shall be only for actual damages and in no event shall exceed the amount of the bond or trust account.

(b) Failure to comply with subsection (a) shall be a Class 1 misdemeanor.

(c) No loan broker shall collect any advance fee or other valuable consideration from a borrower prior to the closing of the loan. This prohibition shall not preclude the loan broker from collecting reasonable and necessary fees payable to third parties for appraisal, property survey, title examination, and credit reports. (1979, c. 705, s. 1; 1993, c. 339, s. 3; c. 539, s. 522; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Violation of Act. — Trial court did not err in granting summary judgment to plaintiff, which had agreed to lease equipment from defendant, in its action under the Loan Broker Act; a "loan" included an agreement to advance property, and defendant did not show that it had complied with G.S. 66-107 and G.S. 66-108 by providing a disclosure statement and maintaining a surety bond or trust account; and defendant failed to dispute that it had failed to refund plaintiff's deposit. Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc., 180 N.C. App. 70, 637 S.E.2d 230, 2006 N.C. App. LEXIS 2253 (2006).

Cited in Goleta Nat'l Bank v. Lingerfelt, 211 F. Supp. 2d 711, 2002 U.S. Dist. LEXIS 19350 (E.D.N.C. 2002).

§ 66-109. Filing with Secretary of State.

(a) Prior to placing any advertisement or making any other representations to prospective borrowers in this State, every loan broker shall file with the Secretary of State two copies of the disclosure statement required by G.S. 66-107, and either a copy of the bond required by G.S. 66-108, or a copy of the formal notification by the depository that the trust account required by G.S. 66-108 is established. These filings shall be updated as any material changes in the required information or the status of the bond or trust account occur, but no less than annually.

(b) Failure to comply with subsection (a) shall be a Class 1 misdemeanor. (1979, c. 705, s. 1; 1981, c. 785, s. 2; 1993, c. 539, s. 523; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Wilson Heights Church of God v. Autry, 94 N.C. App. 111, 379 S.E.2d 691 (1989); Goleta Nat'l Bank v. Lingerfelt, 211 F. Supp. 2d 711, 2002 U.S. Dist. LEXIS 19350 (E.D.N.C. 2002).

§ 66-110. Contracts to be in writing.

Every loan brokerage contract shall be in writing, and signed by all contracting parties. A copy of the contract shall be given to the prospective borrower at the time he signs the contract. (1979, c. 705, s. 1.)

§ 66-111. Remedies.

(a) If a loan broker uses any untrue or misleading statements in connection with a loan brokerage contract, fails to fully comply with the requirements of this Article, fails to comply with the terms of the contract or any obligation arising therefrom, or fails to make diligent effort to grant a loan to or procure a loan on behalf of the prospective borrower, then, upon written notice to the broker, the prospective borrower may void the contract, and shall be entitled to receive from the broker all sums paid to the broker, and recover any additional damages including attorney's fees.

(b) Upon complaint of any person that a loan broker has violated the provisions of this Article, the superior court shall have jurisdiction to enjoin that defendant from further such violations.

(c) The remedies provided herein shall be in addition to any other remedies provided for by law or in equity.

(d) The violation of any provisions of this Article shall constitute an unfair practice under G.S. 75-1.1. (1979, c. 705, s. 1.)

Legal Periodicals. — For note, "Consumer Protection—The Unfair Trade Practice Act and the Insurance Code: Does Per Se Necessarily Preempt?",see 10 Campbell L. Rev. 487 (1988).

CASE NOTES

Borrower Not Estopped from Contesting Compensation Paid. — The language in subsection (a) obviously contemplates that a borrower has received some form of "benefit" or service for which a broker received compensation; therefore, it logically follows that the fact that a broker rendered the agreed upon services to a prospective borrower would not estop the borrower from seeking recovery under the provisions of this section. Wilson Heights Church of God v. Autry, 94 N.C. App. 111, 379 S.E.2d 691 (1989).

Attorney Fees. — Although plaintiff was entitled to attorney fees under G.S. 75-16.1 and G.S. 66-111, there were no findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney; thus, the court could not determine the reasonableness of the trial court's award. Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc., 180 N.C. App. 70, 637 S.E.2d 230, 2006 N.C. App. LEXIS 2253 (2006).

Refusal of Partial Refund. — Trial court did not err in calculating damages under G.S. 75-16 and G.S. 66-111 when plaintiff had refused a partial refund proffered by defendant; there was no evidence showing that plaintiff had retained any money in settlement of the matter that could offset any money due to it. Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc., 180 N.C. App. 70, 637 S.E.2d 230, 2006 N.C. App. LEXIS 2253 (2006).

Cited in Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

§ 66-112. Scope.

The provisions of this Article shall apply in all circumstances in which any party to the contract conducted any contractual activity (including but not limited to solicitation, discussion, negotiation, offer, acceptance, signing, or performance) in this State. (1979, c. 705, s. 1.)

CASE NOTES

Applicability. — When an equipment lease agreement was signed in North Carolina, and presumably the solicitation, discussion, and negotiation of the agreement occurred there too, the Loan Broker Act applied. Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc., 180 N.C. App. 70, 637 S.E.2d 230, 2006 N.C. App. LEXIS 2253 (2006).

§§ 66-113 through 66-117: Reserved for future codification purposes.

Article 21.

Prepaid Entertainment Contracts.

§ 66-118. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Contract cost" means the total consideration paid by a buyer pursuant to a contract including but not limited to:
  a. Any initiation or nonrecurring fee charged;
  b. All periodic fees required by the contract;
  c. All dues or maintenance fees; and
  d. All finance charges, time-price differentials, interest, and other similar fees and charges.

(2) "Contract duration" means the total period of use allowed by a buyer's contract, including months or time periods that are called "free" or "bonus" or that are described in any other terms suggesting that they are provided free of charge.

(3) "Prepaid entertainment contract" means any contract in which:
  a. The buyer of a service pays for or is obligated to pay for service prior to the buyer's receipt of or enjoyment of any or all of the services;
  b. The seller is other than a licensed nonprofit school, college, or university; the State or any subdivision thereof; or a nonprofit religious, ethnic, or community organization; and
  c. The services to be performed are related to any one of the following:
    1. Dance lessons or facilities, or any related services or events;
    2. Matching, dating, or social club services or facilities, including any service represented as providing names of, introduction to, or opportunity to meet members of the opposite sex;
    3. Martial arts training;
    4. Health or athletic club services or facilities. (1979, c. 833, s. 1; 1991 (Reg. Sess., 1992), c. 1009, s. 1.)

§ 66-119. Contract requirements.

Every prepaid entertainment contract shall:

(1) Be in writing, fully completed, dated and signed by all contracting parties. A copy of the contract shall be given to the buyer at the time he signs the contract;

(2) Have a duration of service that is a precisely measured period of years or any definite part of a year;

(3) Contain a full statement of the buyer's rights under G.S. 66-120;

(4) Contain, in immediate proximity to the space reserved for the signature of the buyer, in bold face type of a minimum size of 10 points, a statement of the buyer's rights under G.S. 66-121, in substantially the following form:

"You the buyer, may cancel this contract at any time prior to midnight of the third business day after the date of this contract. To cancel, you must notify the seller in writing not later than midnight of ______."

(Date)

(1979, c. 833, s. 1.)

§ 66-120. Buyer's rights.

Every seller of a prepaid entertainment contract must:

(1) Deliver to the buyer all information of a personal or private nature, including but not limited to answers to tests or questionnaires, photographs, evaluations, and background information, within 30 days after request therefor;

(2) Refund to the buyer at least ninety percent (90%) of the pro rata cost of any unused services, within 30 days after request therefor, if:

a. The buyer is unable to receive benefits from the seller's services by reason of death or disability; or

b. The buyer relocates more than eight miles from his present location, and more than 30 miles from the seller's facility and any substantially similar facility that will accept the seller's obligation under the contract and this Article; or

c. The seller relocates his facility more than eight miles from its present location, or the services provided by the seller are materially impaired.

(3) Refund to the buyer the pro rata cost of any unused services under all contracts between the parties, within 30 days after request therefor, if the aggregate price of all contracts in force between the parties exceeds one thousand five hundred dollars ($1,500). Provided, if the contract so provides, the seller may retain a cancellation fee of not more than 25 percent (25%) of the pro rata cost of unused services on all contracts, not to exceed five hundred dollars ($500.00). (1979, c. 833, s. 1.)

§ 66-121. Buyer's right to cancel.

(a) In addition to any right otherwise to revoke an offer or cancel a sale or contract, the buyer has the right to cancel a prepaid entertainment contract sale until midnight of the third business day after the buyer signs a contract which complies with G.S. 66-119(4).

(b) Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the contract.

(c) Notice of cancellation, if given by mail, is given when it is deposited in the United States mail properly addressed and postage prepaid.

(d) Notice of cancellation need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the buyer not to be bound by the contract.

(e) For purposes of this Article, business days are all days other than Saturdays, Sundays, holidays, and days on which the seller's facility is not open to the buyer. (1979, c. 833, s. 1.)

§ 66-122. Rights and responsibilities after cancellation.

Within 30 days after a prepaid entertainment contract has been cancelled in accordance with G.S. 66-121, the seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness. (1979, c. 833, s. 1.)

§ 66-123. Prohibited practices.

(a) No person shall sell any prepaid entertainment contract or contracts which, when taken together with all other contracts in force between the parties have an aggregate duration of service in excess of three years.

(b) No person shall sell any prepaid entertainment contract unless performance of that contract is to begin within 180 days. (1979, c. 833, s. 1.)

§ 66-124. Bond or escrow account required.

(a) Prior to the sale of any prepaid entertainment contract for services which are available on the day of sale, the seller shall purchase a surety bond issued by a surety company authorized to do business in this State, as follows:

(1) The amount of the surety bond shall be equal to the aggregate value of outstanding liabilities to buyers, or ten thousand dollars ($10,000), whichever is greater. For purposes of this section, "liabilities" means the moneys actually received in advance from the buyer on or after January 1, 1993, for contract costs, less the prorated value of services rendered by the seller. The bond shall be in favor of the State of North Carolina and in a form approved by the Attorney General. The surety company shall have a duty to disclose the amount and status of the bond to the public upon request. Any person who is damaged by reason of the closing of a facility or bankruptcy of the seller, may bring an action against the bond to recover damages suffered; provided, however, that the aggregate liability of the surety shall be only for actual damages and in no event shall exceed the amount of the bond.

(2) The amount of the bond shall be based upon a written sworn statement by the seller under penalty of perjury stating the seller's outstanding liabilities to buyers. A corporate seller's statement shall be signed by the president of the corporation; the statement of a partnership shall be signed by a general partner; and the statement of a sole proprietorship shall be signed by the sole proprietor. The statement and a copy of the bond shall be filed with the Attorney General within 90 days after the first contract is sold and at 180-day intervals thereafter.

(3) The amount of the bond shall be increased or may be decreased, as necessary, to take into account changes in the seller's outstanding liabilities to buyers on a semiannual basis.

(4) The bonding requirement of this section applies to each location of the seller in any case where a seller operates or plans to operate more than one facility in the State. A separate bond for each separately located facility shall be filed with the Attorney General.

(5) Notwithstanding any other provision of this section, no seller is required to purchase a bond in excess of two hundred fifty thousand dollars ($250,000) per facility.

(6) A change in ownership shall not release, cancel, or terminate liability under any bond previously established unless the Attorney General agrees in writing to the release, cancellation, or termination because the new owner has established a new bond for the benefit of the

previous owner's members, or because the former owner has paid the required funds to its members.

(7) In lieu of purchasing the bond required by subdivision (1), an irrevocable letter of credit from a bank insured by the Federal Deposit Insurance Corporation, in a form acceptable to the Attorney General, may be filed with the Attorney General.

(8) Claims and actions by a buyer of prepaid entertainment contract services:

a. A buyer of prepaid entertainment contract services who suffers or sustains any loss or damage by reason of the closing of a facility or bankruptcy of the seller shall file a claim with the surety, and, if the claim is not paid, may bring an action based on the bond and recover against the surety. In the case of a letter of credit that has been filed with the Attorney General, the buyer may file a claim with the Attorney General;

b. Any claim under paragraph a. of this subdivision shall be filed no later than one year from the date on which the facility closed or bankruptcy was filed;

c. The Attorney General may file a claim with the surety on behalf of any buyer in paragraph a. of this subdivision. The surety shall pay the amount of the claims to the Attorney General for distribution to claimants entitled to restitution and shall be relieved of liability to that extent;

d. The liability of the surety under any bond may not exceed the aggregate amount of the bond, regardless of the number or amount of claims filed;

e. If the claims filed should exceed the amount of the bond, the surety shall pay the amount of the bond to the Attorney General for distribution to claimants entitled to restitution and shall be relieved of all liability under the bond.

(9) The seller shall be exempt from the bonding requirement if all of its unexpired contracts and present membership plans meet the following criteria: (i) no initiation fee or similar nonrecurring fee is charged, and (ii) at no time is any member charged to pay for the use of facilities or services more than 31 days in advance.

(b) If, for any reason, services under a prepaid entertainment contract are not available to the buyer on the date of sale, then:

(1) The seller shall establish a surety bond issued by a surety company authorized to do business in the State or shall establish an escrow account with a licensed and insured bank or savings institution located in this State. The surety bond or escrow account shall be in the amount of ten thousand dollars ($10,000) per location or in an amount equal to all contract costs received from the buyer, whichever is greater. The bond or escrow account shall be in favor of the State of North Carolina and a copy of the bond or escrow agreement shall be filed with the Attorney General prior to the sale of any prepaid entertainment contracts. The bond or escrow account shall remain in force until 60 days after all services of the seller are available to the buyer, at which time the seller shall comply with the bonding requirement of subsection (a) of this section. The escrow account shall be established and maintained only in a financial institution which agrees in writing with the Attorney General to hold all funds deposited and not to release such funds until receipt of written authorization from the Attorney General. The funds deposited will be eligible for withdrawal by the depositor after the facility has been open and providing services for 60 days and the Attorney General gives written

authorization for withdrawal. Any person who is damaged by any violation of this Article, or by the seller's breach of the contract for sale or any obligation arising therefrom may bring an action against the bond or escrow account to recover damages suffered; provided, however, that the aggregate liability of the surety or escrow agent shall be for actual damages only and in no event shall exceed the amount of the bond or escrow account.

(2) The buyer's right to cancel the contract pursuant to G.S. 66-121 shall be extended until midnight of the third business day after the date upon which the services become available and the buyer is notified that the services are available. (1979, c. 833, s. 1; 1991 (Reg. Sess., 1992), c. 1009, s. 2.)

§ 66-124.1. Record keeping; provision of records to the Attorney General.

(a) Any person or business bonded under this Article shall maintain accurate records of the bond and of premium payments on it. These records shall be open to inspection by the Attorney General at any time during normal business hours.

(b) Any person who sells prepaid entertainment contracts shall maintain accurate records, updated as necessary, of the name, address, contract terms, and payments of each buyer of services. These records shall be open to inspection by the Attorney General, upon reasonable notice not to exceed 72 hours, at any time during normal business hours.

(c) On the permanent closing of a facility, the seller of the services shall provide the following information to the Attorney General within 15 business days:

(1) A list of the names and addresses of all buyers holding unexpired contracts;

(2) The original or a copy of all buyers' contracts; and

(3) A record of all payments received under buyers' agreements. (1991 (Reg. Sess., 1992), c. 1009, s. 3.)

§ 66-125. Remedies.

(a) Any buyer injured by any violation of this Article may bring an action for recovery of damages, including reasonable attorney's fees.

(b) The remedies herein shall be in addition to any other remedies provided for by law or in equity, but the damages assessed shall not exceed the largest amount of damages available by any single remedy.

(c) The violation of any provisions of this Article shall constitute an unfair practice under G.S. 75-1.1. (1979, c. 833, s. 1.)

Legal Periodicals. — For note, "Consumer Protection—The Unfair Trade Practice Act and the Insurance Code: Does Per Se Necessarily Preempt?", see 10 Campbell L. Rev. 487 (1988).

CASE NOTES

Cited in Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

§§ 66-126 through 66-130: Reserved for future codification purposes.

ARTICLE 22.

Discount Buying Clubs.

§ 66-131. Definition.

For the purpose of this Article, a "discount buying club" is any person, firm or corporation, which in exchange for any valuable consideration offers to sell or to arrange the sale of goods or services to its customers at prices represented to be lower than are generally available. "Discount buying club" shall not include any cooperative buying association or other group in which no person is intended to profit or actually profits beyond the benefit that all members receive from buying at a discount; nor shall any person, firm or corporation be deemed "a discount buying club" solely by virtue of the fact that (i) for fifty dollars ($50.00) or less it sells tickets or coupons valid for use in obtaining goods or services from a retail merchant, or (ii) as a service collateral to its principal business, and for no additional charge it arranges for its members or customers to purchase or lease directly from particular merchants at a specified discount. (1981, c. 594, s. 1.)

Legal Periodicals. — For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

§ 66-132. Contracts to be in writing.

(a) Every contract between a discount buying club and its customers shall be in writing, fully completed, dated and signed by all contracting parties. A copy of the completed contract shall be given to the buyer at the time he signs it. The contract shall in clear, conspicuous and simple language:

(1) State the duration of the contract in a definite period of years or months. If the contract may be periodically renewed, the contract shall state specifically the terms under which it may be renewed; and the amount of any renewal fees must be stated unless the contract meets the requirements of subsection (b) of this section.

(2) State that the buying club will maintain a trust account and bond in compliance with G.S. 66-135, and identify the location of the trust account and the name and address of the surety company.

(3) Contain, immediately above the customer's signature in boldface type of not less than 10 points size, a statement substantially as follows:

"You, the customer, may cancel this contract at any time prior to midnight of the third business day after the date of this contract. To cancel you must notify the company in writing of your intent to cancel."

(4) List the categories of goods and services the buying club contracts to make available.

(5) State the procedures by which the customer can select, order, and pay for merchandise or services and state the time and manner of delivery.

(6) State the method the discount buying club will use in setting the price customers will pay for goods or services.

(7) List any charges, however denominated, which are incidental to the purchase of goods or services and which must be paid by the customer.

(8) State the discount buying club's obligations with respect to warranties on goods or services ordered.

(9) State the customer's rights and obligations with respect to the cancellation or return of ordered goods.

(b) The written contract required by subsection (a) above need not be signed or dated by the customer if the following requirements are met:

(1) The total consideration paid by each member or customer does not exceed a one-time or annual fee of one hundred dollars ($100.00);

(2) The member or customer has the unconditional right to cancel the contract at any time and receive within 10 days a full refund of the one-time membership fee, or the annual membership fee covering the current membership period, whichever the case may be;

(3) Instead of the notice required in subsection (a)(3), above, the written contract contains on its first page in boldface type of not less than 10 points size, or not less than the point size of the contract terms or information printed immediately adjacent thereto, whichever point size shall be larger, a statement substantially as follows:

"You, the customer, may cancel this contract at any time and receive a total refund of any fees or consideration already paid for the current membership period. To cancel you must notify the company in writing of your intent to cancel."; and

(4) The written contract is mailed to the buyer on or before the date the membership is first charged or billed. (1981, c. 594, s. 1; 1989, c. 495, s. 1.)

Cross References. — As to contracts requiring writing, see G.S. 22-1 through 22-4.

§ 66-133. Customer's right to cancel.

(a) In addition to any other right to revoke an offer or cancel a sale or contract, the customer has the right to cancel a contract for the services of a discount buying club until midnight of the third business day after the buyer signs a contract which complies with G.S. 66-132.

(b) Cancellation occurs when the customer gives written notice of cancellation to the discount buying club at the address stated in the contract.

(c) Notice of cancellation, if given by mail, is given when it is deposited in the United States mail properly addressed with postage prepaid.

(d) Notice of cancellation need not take any particular form and is sufficient if it indicates by any form of written expression that the customer intends or wishes not to be bound by the contract.

(e) For purposes of this Article, business days are all days other than Saturdays, Sundays, holidays, and days on which the discount buying club is not open for business. (1981, c. 594, s. 1.)

§ 66-134. Prohibited acts.

Discount buying clubs shall not:

(1) Represent to any potential customer that his opportunity to join is limited in time or that his delay in joining may subject him to an increased price. This shall not preclude reference to a general price increase that will take effect on a specified date.

(2) Discourage or refuse to allow potential customers to inspect all of their current merchandise catalogs and price lists during normal business hours at their place of business.

(3) Compare their prices for goods or services with other prices unless the comparison prices are prices at which substantial sales of the same goods or services were made in the same area within the past 90 days, and unless a written copy of the comparison is given to the buyer to keep.

(4) Fail upon the customer's request to cancel without charge any purchase order for:

a. Services, if such services have not been substantially performed;
b. Goods to be specially manufactured, if such manufacture has not been substantially performed; or
c. Any other goods, if they have not been delivered to the customer or consigned to a certified public carrier for delivery;

within 90 days after the purchase order was received by the buying club. This provision shall not be construed to limit a customer's right to earlier performance created by contract or by any other applicable law or regulation.

(5) Charge any amount in excess of demonstrable actual damages upon a customer's cancellation of an order. (1981, c. 594, s. 1.)

§ 66-135. Bond and trust account required.

(a) Every discount buying club shall obtain and maintain a bond from a surety company licensed to do business in North Carolina. Such bond shall be in an amount not less than one hundred times the one-time or annual membership fee, or fifty thousand dollars ($50,000), whichever is greater.

(b) Every discount buying club shall hold advance payments for goods and services in trust in a separate account used solely for that purpose. The funds in such account shall be held free from all liens. Records of such account shall be kept by the buying club in the regular course of its business sufficient to identify the amount held for each customer, the dates of the receipt and withdrawal of funds, and the purpose of withdrawal. Such records must be retained for a period not less than four years following withdrawal. Funds may not be withdrawn from the trust account unless and until (i) the ordered goods have been actually delivered to the customer or consigned to a certified public carrier, or (ii) ordered services have been provided in full, or (iii) the buying club has refunded the customer's payment. Provided, the discount buying club shall not be required to comply with the foregoing trust account requirements if the discount buying club meets the requirements of G.S. 66-132(b), bills its customers through a credit card account and obtains and maintains an additional bond in the amount of fifty thousand dollars ($50,000) from a surety company licensed to do business in North Carolina.

(c) Any person who is damaged by any violation of this Article, or by any breach by the discount buying club of its contract, may bring an action against the bond, provided that the aggregate liability of the surety shall not exceed the amount of the bond.

(d) Violations of subsections (a) or (b) of this section shall constitute a Class I felony. (1981, c. 594, s. 1; 1989, c. 495, ss. 2, 3; 1993, c. 539, s. 1282; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-136. Remedies.

(a) Any person injured by a violation of this Article, or breach of any obligation created by this Article or contract subject thereto, may bring an action for recovery of damages, including reasonable attorneys' fees.

(b) The violation of any provision of this Article shall constitute an unfair act or practice under G.S. 75-1.1.

(c) The remedies provided herein shall be in addition to any other remedies provided by law or equity. (1981, c. 594, s. 1.)

§ 66-137. Taxes.

Discount buying clubs must pay North Carolina sales taxes and other applicable North Carolina taxes. (1989, c. 495, s. 4.)

§§ 66-138 through 66-141: Reserved for future codification purposes.

ARTICLE 23.

Rental Referral Agencies.

§ 66-142. Definition.

For the purposes of this Article, a "rental referral agency" is a person or business which offers to assist any person in locating residential rental property in return for any consideration from a prospective tenant. (1981, c. 610, s. 1.)

§ 66-143. Fees and deposits.

(a) A rental referral agency shall not charge or attempt to collect any fees or other consideration from any prospective tenant except where rental housing is in fact obtained by such person through the assistance of that agency. For the purposes of this Article, such housing is obtained when the prospective tenant has contracted to rent the property.

(b) Deposits to be applied toward fees may be required by a rental referral agency pursuant to a written contract which includes provisions stating:

(1) The specifications of housing sought by the prospective tenant, including maximum rent, desired lease period, geographic area, number of bedrooms required, number of children to be housed, and number and type of pets;

(2) That the deposit will be refunded within 10 days of the prospective tenant's request should the specified housing not be obtained through the agency's assistance within 30 days of the date of the contract;

(3) That the rental referral agency will maintain a trust account or bond in compliance with G.S. 66-145, and identifying the depository institution or bonding company by name and address.

(c) Notwithstanding subsections (a) and (b) of this section, a rental referral agency may charge or retain from any deposit a fee, not to exceed twenty dollars ($20.00), even if the prospective tenant fails to obtain rental housing through its assistance, provided that the following conditions are met:

(1) Any and all advertising for the rental referral agency discloses in a clear and conspicuous manner the agency's name, the fact that it is a "rental referral agency" using that term, and the fact that it charges a fee; and

(2) If a prospective tenant contacts the rental referral agency in response to an advertisement for a specific property listed by the agency and inquires about that property, the rental referral agency shall neither collect a fee nor obtain the prospective tenant's signature on a contract without first verifying that the advertised property remains available and disclosing to the prospective tenant whether or not it is still available.

(d) Prospective tenants shall apply in writing for a refund no sooner than 30 days after the date of the contract and no later than one year after the date of the contract. If the prospective tenant does not apply for a refund before one year has elapsed, the fee shall be deemed earned by the rental referral agency and may be removed from the trust account. (1981, c. 610, s. 1; 1991, c. 737, s. 1.)

§ 66-144. Representations of availability.

(a) A rental referral agency shall not make any representation that any property is available for rent unless availability has been verified by the agency within 48 hours prior to the representation. The availability of property described in media advertisements shall be verified within eight hours before being submitted to the advertising medium and in no event earlier than 96 hours prior to publication of the advertisement.

(b) Notations of the time and date of verification and the verifier's identity shall be recorded by the agency and made available for inspection by any person from whom the agency has received a deposit or a fee. (1981, c. 610, s. 1; 1991, c. 737, s. 2.)

§ 66-145. Bond or trust account required.

(a) Every rental referral agency before beginning business shall establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. Each deposit to be applied towards a fee collected under G.S. 66-143(b) shall be placed in the trust account and shall be withdrawn only to refund the deposit to the applicant pursuant to G.S. 66-143(b)(2) or when a fee is earned by the agency as provided in G.S. 66-143(a).

(b) A rental referral agency may elect to post a bond in lieu of the trust account required by this section. The amount of the bond shall at no time be less than the amount that would be required by this section to be held in trust. In no event, however, shall the bond be less than five thousand dollars ($5,000). The rental referral agency shall file the bond with the clerk of the superior court of the county in which its principal place of business is located.

(c) Any person who is damaged by any violation of this Article, or by any breach by the rental referral agency of its contract, may bring an action for the remedies referred to and provided in G.S. 66-146 against the bond or trust account; provided that the aggregate liability of the surety or trustee shall not exceed the amount of the bond or trust account.

(d) Violation of subsections (a) or (b) of this section shall constitute a Class 1 misdemeanor. (1981, c. 610, s. 1; 1993, c. 539, s. 524; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-146. Remedies.

(a) Any person injured by a violation of this Article, or breach of any obligation created by this Article or contract subject thereto, may bring an action for recovery of damages, including reasonable attorneys' fees.

(b) The violation of any provision of this Article shall constitute an unfair act or practice under G.S. 75-1.1.

(c) The remedies provided herein shall be in addition to any other remedies provided by law or equity. (1981, c. 610, s. 1.)

CASE NOTES

Unfair Act or Deceptive Practice. — As the evidence supported a determination that a staffing agency and its new manager had misappropriated trade secrets of an agency competitor, which was a violation of the Trade Secrets Protection Act pursuant to G.S. 66-146, such constituted an unfair act or practice pursuant to G.S. 75-1.1. Medical Staffing Network, Inc. v. Ridgway, — N.C. App. —, 670 S.E.2d 321, 2009 N.C. App. LEXIS 39 (2009).

§§ 66-147 through 66-151: Reserved for future codification purposes.

Article 24.

Trade Secrets Protection Act.

§ 66-152. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Misappropriation" means acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.

(2) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial entity.

(3) "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:

a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and

b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The existence of a trade secret shall not be negated merely because the information comprising the trade secret has also been developed, used, or owned independently by more than one person, or licensed to other persons. (1981, c. 890, s. 1.)

Legal Periodicals. — For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

For article discussing the North Carolina Trade Secrets Protection Act, see 18 Wake Forest L. Rev. 823 (1982).

For comment, "The Incompatibility of Copyright and Computer Software: An Economic Evaluation and a Proposal for a Market-Place Solution," see 66 N.C.L. Rev. 977 (1988).

For comment, "Is the North Carolina Trade Secrets Protection Act Itself a Secret, and Is the Act Worth Protecting?," see 77 N.C.L. Rev. 2149 (1999).

For note, "The Court of Appeals of North Carolina's Narrow Appraoch to Trade Secrets Protection in North Carolina Farm Partnership v. Pig Improvement Company," see 83 N.C. L. Rev. 1567 (2005).

CASE NOTES

G.S. 75-1.1 Applicable to Violations of This Act. — G.S. 75-1.1 is applicable to violations of the Trade Secrets Protection Act. Drouillard v. Keister Williams Newspaper Servs., Inc., 108 N.C. App. 169, 423 S.E.2d 324 (1992), cert. denied, 333 N.C. 344, 427 S.E.2d 617 (1993).

Duty to Maintain Trade Secret. — Subdivision (3)(b) of this section places upon trade secret owners an affirmative duty to take reasonable measures to maintain the information's secrecy as a definitional element of the property right. Glaxo, Inc. v. Novopharm Ltd., 931 F. Supp. 1280 (E.D.N.C. 1996), aff'd, 110 F.3d 1562 (Fed. Cir. 1997).

Establishing a Trade Secret. — Subdivision (3) of this section, defines a trade secret as valuable business or technical information that a) is neither "generally known nor readily ascertainable through independent development or reverse engineering," and b) has been subject to "efforts that are reasonable under the circumstances to maintain its secrecy." In order to resist a motion for summary judgment, plaintiff must allege facts sufficient to allow a reasonable finder of fact to conclude that his concept satisfies these two requirements. Bank Travel Bank v. McCoy, 802 F. Supp. 1358 (E.D.N.C. 1992), aff'd sub nom., Amariglio-Dunn v. McCoy, 4 F.3d 984 (4th Cir. 1993).

Plaintiff adequately defined its trade secrets for the purposes of summary judgment by identifying its customer list, vendor lists, and technical information as trade secrets accessed by defendant competitor; plaintiff produced the actual customer list and vendor information that it claimed were trade secrets and a list of employees who could explain in detail which technical information was classified as a trade secret. Static Control Components, Inc. v. Darkprint Imaging, Inc., 200 F. Supp. 2d 541, 2002 U.S. Dist. LEXIS 13271 (M.D.N.C. 2002).

Factors in Determining Whether Information Is Trade Secret. — Proper factors to consider when determining whether information is a trade secret are: (1) the extent to which it is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard its secrecy; (4) its value to the business and competitors; (5) the amount of money or effort expended in its development; and (6) the ease or difficulty with which it could properly be acquired or duplicated by others. State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

A trade secret need not be comprised of positive information, such as specific formula, but can include negative, inconclusive, or sufficiently suggestive research data that would give a person skilled in the art a competitive advantage one might not otherwise enjoy but for the knowledge gleaned from the owner's research investment. Glaxo, Inc. v. Novopharm Ltd., 931 F. Supp. 1280 (E.D.N.C. 1996), aff'd, 110 F.3d 1562 (Fed. Cir. 1997).

Plaintiffs showed that projected launch dates and marketing plan for new drug was competitively valuable information, not generally known, sufficient to enjoin disclosure by former employee to his new employer, plaintiff's competitor. Merck & Co. v. Lyon, 941 F. Supp. 1443 (M.D.N.C. 1996).

In a specialized construction equipment rental market where customer pricing was highly competitive, a corporation's pricing, customer, and employee salary information met the factors of a trade secret under G.S. 66-152, and those trade secrets were misappropriated when a competing limited liability company (LLC) solicited the corporation's employees who had that information. Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C., 174 N.C. App. 49, 620 S.E.2d 222, 2005 N.C. App. LEXIS 2290 (2005).

Customer List Is Not Trade Secret. — Defendant former employees had the right to utilize information contained in plaintiff's customer lists, as a list of customer names and addresses is not a "trade secret" under this section. UBS PaineWebber, Inc. v. Aiken, 197 F. Supp. 2d 436, 2002 U.S. Dist. LEXIS 4510 (W.D.N.C. 2002).

Trade Secret Properly Found to Have Been Misappropriated. — The plaintiff, a lawn and landscaping corporation, presented sufficient evidence to support a finding that its historical cost information was a trade secret as defined by this section and that the defendant, an ex-employee, misappropriated the information in order to underbid and compete with the plaintiff. Byrd's Lawn & Landscaping, Inc. v. Smith, 142 N.C. App. 371, 542 S.E.2d 689, 2001 N.C. App. LEXIS 99 (2001).

Targeted solicitation, and the use of those targeted employees to solicit other employees with that information, was an unfair trade practice under G.S. 75-1.1; since the corporation also showed that the customers it lost and the geographical areas where it lost business were the same customers and areas of the employees who the LLC hired away from the corporation, the corporation showed a proximate cause connection to its lost profits and those lost profit damages, along with treble damages and attorney fees, were properly awarded. Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C., 174 N.C. App. 49, 620 S.E.2d 222, 2005 N.C. App. LEXIS 2290 (2005).

Establishing Misappropriation. — Plaintiff proved a real threat of misappropriation of information by former employee to competitor where plaintiff showed employee had access to trade secret information, employee's new position involved similar responsibilities as his former position, and employee was not entirely forthright with his former employer regarding his new employment. Merck & Co. v. Lyon, 941 F. Supp. 1443 (M.D.N.C. 1996).

Trial court did not err in dismissing a bank's misappropriation of trade secrets counterclaims against employees because the bank did not identify with sufficient specificity either the trade secrets the employees allegedly misappropriated or the acts by which the alleged misappropriations were accomplished; the identification of the trade secrets allegedly misappropriated was broad and vague. Washburn v. Yadkin Valley Bank & Trust Co., 190 N.C. App. 315, 660 S.E.2d 577, 2008 N.C. App. LEXIS 865 (2008).

Trade Secrets Not Shown. — Plaintiff did not present sufficient evidence that its processes were trade secrets where defendant came forward with evidence that it could purchase the same technology on the market from three or four other vendors. FMC Corp. v. Cyprus Foote Mineral Co., 899 F. Supp. 1477 (W.D.N.C. 1995).

Where drug manufacturer's choice of solvent system, pH, temperature and seeding could or would determine the polymorphic form of ranitidine hydrochloride was generally known, it could not be a secret. Glaxo, Inc. v. Novopharm Ltd., 931 F. Supp. 1280 (E.D.N.C. 1996), aff'd, 110 F.3d 1562 (Fed. Cir. 1997).

Employee did not misappropriate trade secrets, as defined by G.S. 66-152(3), when the information he communicated was not subject to reasonable efforts to maintain its secrecy, could have been compiled from public information, or originated with another party. Combs & Assocs., Inc. v. Kennedy, 147 N.C. App. 362, 555 S.E.2d 634, 2001 N.C. App. LEXIS 1169 (2001).

Plaintiff's claim that its former customer's employee revealed to plaintiff's competitor confidential information from plaintiff's bid that allowed the competitor to underbid, thereby committing fraud and violating G.S. 66-153 and G.S. 75-1.1, was properly dismissed on summary judgment; plaintiff, by submitting information to its customer and allowing it to use and disclose bid information at its sole discretion, did not act reasonably to maintain the secrecy of its bid information, so that it was not a "trade secret." Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 586 S.E.2d 507, 2003 N.C. App. LEXIS 1825 (2003).

A lessee of facilities for pig breeding and nursery failed to prove that the genetic information contained in the pigs was not a trade secret with a confidential and proprietary interest; therefore, the lessee failed to show irreparable harm and was not entitled to a preliminary injunction seeking to prevent the lessor from appropriating any genetic information incorporated into the animals. N.C. Farm P'ship v. Pig Improvement Co., 163 N.C. App. 318, 593 S.E.2d 126, 2004 N.C. App. LEXIS 374 (2004), cert. denied, 358 N.C. 544, 599 S.E.2d 401 (2004).

Former employer did not show that the former employee misappropriated any G.S. 66-152(3) trade secrets when the former employer erased all data from the former employee's hard drive after the former employee had been terminated and asked to return the former employee's company-issued computer. As a result, the former employer did not establish even a G.S. 66-155 prima facie case of trade secret misappropriation and was not entitled to bring a G.S. 66-153 civil action for trade secret misappropriation. Panos v. Timco Engine Ctr., Inc., — N.C. App. —, 677 S.E.2d 868, 2009 N.C. App. LEXIS 743 (2009).

The trial court correctly denied plaintiff's motion for a preliminary injunction where plaintiff did not establish a likelihood of success on the merits regarding its claim for trade secret protection because it failed to produce any evidence to show that company took any special precautions to ensure the confidentiality of its customer information. Novacare Orthotics & Prosthetics E., Inc. v. Speelman, 137 N.C. App. 471, 528 S.E.2d 918, 2000 N.C. App. LEXIS 407 (2000).

Trial court did not err in refusing to issue a preliminary injunction in favor of a former employer after two of its former employees began working for a competitor, as misappropriation of its trade secrets by the competitor was unlikely because the evidence at trial indicated that the products made by the former employer and the competitor were too divergent to allow interchangeable use of the former employer's trade secrets. Therefore, misappropriation of the former employer's trade secrets by the competitor was unlikely, and a claim of misappropriation on the evidence presented to the trial court had to fail. Analog Devices, Inc. v. Michalski, 157 N.C. App. 462, 579 S.E.2d 449, 2003 N.C. App. LEXIS 752 (2003).

A prima facie case of misappropriation existed so as to support a preliminary injunction where defendant helped to develop software during his employ with plaintiff, had access to copies of the software source code prior to his resignation, and where it was practically impossible to make any substantial modification to the software without access to the source code. Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993).

Animals in Research Projects. — What type and how many animals are going to be used in a particular research project is not a trade secret, nor is whether surgery is going to be performed or the type of anesthesia to be used. Pre and post operative procedures are not trade secrets, nor is how the animal's pain and discomfort are to be minimized nor the method of euthanasia, if any. S.E.T.A. Unc-Ch, Inc. v. Huffines, 101 N.C. App. 292, 399 S.E.2d 340 (1991).

An employee will not be enjoined from working for its former employer's competitor under the doctrine of "inevitable discovery" absent some showing of bad faith, underhanded dealing, or employment by an entity so plainly lacking comparable technology that misappropriation can be inferred. FMC Corp. v. Cyprus Foote Mineral Co., 899 F. Supp. 1477 (W.D.N.C. 1995).

Trial court did not err in refusing to issue a preliminary injunction in favor of a former employer after two of its former employees began working for a competitor, as misappropriation of its trade secrets by the competitor was unlikely because the evidence at trial indicated that the products made by the former employer and the competitor were too divergent to allow interchangeable use of the former employer's trade secrets. Therefore, misappropriation of the former employer's trade secrets by the competitor was unlikely, and a claim of misappropriation on the evidence presented to the trial court had to fail. Analog Devices, Inc. v. Michalski, 157 N.C. App. 462, 579 S.E.2d 449, 2003 N.C. App. LEXIS 752 (2003).

Where price lists in a contract between a public hospital and a private HMO were not property of a private person within the meaning of G.S. 132-1.2(2), they were not trade secrets as defined by this section and were subject to disclosure under the North Carolina Public Records Act, pursuant to G.S. 132-1 et

seq. Wilmington Star-News, Inc. v. New Hanover Regional Medical Ctr., Inc., 125 N.C. App. 174, 480 S.E.2d 53 (1997), appeal dismissed, 346 N.C. 557, 488 S.E.2d 826 (1997).

Applied in Moore v. American Barmag Corp., 710 F. Supp. 1050 (W.D.N.C. 1989); Barker Indus., Inc. v. Gould, 146 N.C. App. 561, 553 S.E.2d 227, 2001 N.C. App. LEXIS 974 (2001); Asheboro Paper & Packaging, Inc. v. Dickinson, 599 F. Supp. 2d 664, 2009 U.S. Dist. LEXIS 12766 (M.D.N.C. 2009).

Cited in Western Steer — Mom 'N' Pop's, Inc. v. FMT Invs., Inc., 578 F. Supp. 260 (W.D.N.C. 1984); Industrial Innovators, Inc. v. Myrick-White, Inc., 99 N.C. App. 42, 392 S.E.2d 425 (1990); North Carolina Elec. Membership Corp. v. North Carolina Dep't of Economic & Community Dev., 108 N.C. App. 711, 425 S.E.2d 440 (1993); Cox v. Dine-A-Mate, Inc., 129 N.C. App. 773, 501 S.E.2d 353 (1998); Replacements, Ltd. v. MidweSterling, 133 N.C. App. 139, 515 S.E.2d 46 (1999); Cook Group, Inc. v. Wilson, 248 Bankr. 745, 2000 U.S. Dist. LEXIS 7380 (M.D.N.C. 2000); Marketing Assocs. v. Baker, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 2536 (M.D.N.C. Jan. 21, 2000); Precision Walls, Inc. v. Servie, 152 N.C. App. 630, 568 S.E.2d 267, 2002 N.C. App. LEXIS 980 (2002); Eli Research Inc. v. United Communs. Group, LLC, 312 F. Supp. 2d 748, 2004 U.S. Dist. LEXIS 5792 (M.D.N.C. 2004).

OPINIONS OF ATTORNEY GENERAL

Information Relating to State's Investments. — Basic fund information and management fee information are not trade secrets and are not exempt from disclosure under the Public Records Act. Review of case law shows that portfolio company information meets tests of "trade secret" as defined by G.S. 66-152(3). See opinion of Attorney General to The Honorable Richard H. Moore, State Treasurer, Department of State Treasurer, 2006 N.C. AG LEXIS 2 (6/6/06).

§ 66-153. Action for misappropriation.

The owner of a trade secret shall have remedy by civil action for misappropriation of his trade secret. (1981, c. 890, s. 1.)

CASE NOTES

Summary Judgment Held Proper. — Plaintiff's claim that its former customer's employee revealed to plaintiff's competitor confidential information from plaintiff's bid that allowed the competitor to underbid, thereby committing fraud and violating G.S. 66-153 and G.S. 75-1.1, was properly dismissed on summary judgment; plaintiff, by submitting information to its customer and allowing it to use and disclose bid information at its sole discretion, did not act reasonably to maintain the secrecy of its bid information, so that it was not a "trade secret." Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 586 S.E.2d 507, 2003 N.C. App. LEXIS 1825 (2003).

Former employer did not show that the former employee misappropriated any G.S. 66-152(3) trade secrets when the former employer erased all data from the former employee's hard drive after the former employee had been terminated and asked to return the former employee's company-issued computer. As a result, the former employer did not establish even a G.S. 66-155 prima facie case of trade secret misappropriation and was not entitled to bring a G.S. 66-153 civil action for trade secret misappropriation. Panos v. Timco Engine Ctr., Inc., — N.C. App. —, 677 S.E.2d 868, 2009 N.C. App. LEXIS 743 (2009).

Court Denied Defendants' Motion to Dismiss. — In an action filed by plaintiffs, two corporations, against defendants, its former editors and their new employer, the court denied defendants' motion to dismiss, filed under Fed. R. Civ. P. 12(b)(6), as to plaintiffs' misappropriation of trade secrets claim under G.S. 66-153 because plaintiffs: (1) alleged the identity of the trade secrets; (2) the measures taken to protect their secrecy; (3) their value to plaintiffs; (4) and the fact that they could not easily be duplicated. Eli Research Inc. v. United Communs. Group, LLC, 312 F. Supp. 2d 748, 2004 U.S. Dist. LEXIS 5792 (M.D.N.C. 2004).

In an action filed by plaintiffs, two corporations, against defendants, its former editors and their new employer, the court denied defendants' motion to dismiss, filed under Fed. R. Civ. P. 12(b)(6), as to plaintiffs' negligence claims, based on defendants' alleged failure to act with due care in protecting the corporations' trade secrets, because the North Carolina Trade Secret Protection Act, N.C. Gen. Stat. § 66-153, was not the type of statute upon which a negligence duty could be based, as the protection of trade secrets had nothing to do with protecting the public; in addition, North Carolina did not recognize a common law duty to protect trade secrets. Eli Research Inc. v. United Communs. Group, LLC, 312 F. Supp. 2d 748, 2004 U.S. Dist. LEXIS 5792 (M.D.N.C. 2004).

Misappropriation of Trade Secrets Claim Dismissed. — Trial court did not err in dismissing a bank's misappropriation of trade secrets counterclaims against employees because the bank did not identify with sufficient specificity either the trade secrets the employees allegedly misappropriated or the acts by which the alleged misappropriations were accomplished; the identification of the trade secrets allegedly misappropriated was broad and vague. Washburn v. Yadkin Valley Bank & Trust Co., 190 N.C. App. 315, 660 S.E.2d 577, 2008 N.C. App. LEXIS 865 (2008).

§ 66-154. Remedies.

(a) Except as provided herein, actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation for the period that the trade secret exists plus an additional period as the court may deem necessary under the circumstances to eliminate any inequitable or unjust advantage arising from the misappropriation.

(1) If the court determines that it would be unreasonable to enjoin use after a judgment finding misappropriation, an injunction may condition such use upon payment of a reasonable royalty for any period the court may deem just. In appropriate circumstances, affirmative acts to protect the trade secret may be compelled by order of the court.

(2) A person who in good faith derives knowledge of a trade secret from or through misappropriation or by mistake, or any other person subsequently acquiring the trade secret therefrom or thereby, shall be enjoined from disclosing the trade secret, but no damages shall be awarded against any person for any misappropriation prior to the time the person knows or has reason to know that it is a trade secret. If the person has substantially changed his position in good faith reliance upon the availability of the trade secret for future use, he shall not be enjoined from using the trade secret but may be required to pay a reasonable royalty as deemed just by the court. If the person has acquired inventory through such knowledge or use of a trade secret, he can dispose of the inventory without payment of royalty. If his use of the trade secret has no adverse economic effect upon the owner of the trade secret, the only available remedy shall be an injunction against disclosure.

(b) In addition to the relief authorized by subsection (a), actual damages may be recovered, measured by the economic loss or the unjust enrichment caused by misappropriation of a trade secret, whichever is greater.

(c) If willful and malicious misappropriation exists, the trier of fact also may award punitive damages in its discretion.

(d) If a claim of misappropriation is made in bad faith or if willful and malicious misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party. (1981, c. 890, s. 1.)

Legal Periodicals. — For note, "The Court of Appeals of North Carolina's Narrow Appraoch to Trade Secrets Protection in North Carolina Farm Partnership v. Pig Improvement Company," see 83 N.C. L. Rev. 1567 (2005).

CASE NOTES

Failure to Provide Evidence of Misappropriation. — Where appellant presented sufficient evidence that it was likely to succeed in showing that certain documents sought by an adverse party in an arbitration proceeding contained trade secrets, but it offered no evidence of misappropriation, it failed to show a likelihood of success on the merits with respect to any claim brought pursuant to the Trade Secret Protection Act to enjoin disclosure of the documents. North Carolina Elec. Membership Corp. v. North Carolina Dep't of Economic & Community Dev., 108 N.C. App. 711, 425 S.E.2d 440 (1993).

Trade Secrets Not Shown. — Plaintiff did not present sufficient evidence that its processes were trade secrets where defendant came forward with evidence that it could purchase the same technology on the market from three or four other vendors. FMC Corp. v. Cyprus Foote Mineral Co., 899 F. Supp. 1477 (W.D.N.C. 1995).

A lessee of facilities for pig breeding and nursery failed to prove that the genetic information contained in the pigs was not a trade secret with a confidential and proprietary interest; therefore, the lessee failed to show irreparable harm and was not entitled to a preliminary injunction seeking to prevent the lessor from appropriating any genetic information incorporated into the animals. N.C. Farm P'ship v. Pig Improvement Co., 163 N.C. App. 318, 593 S.E.2d 126, 2004 N.C. App. LEXIS 374 (2004), cert. denied, 358 N.C. 544, 599 S.E.2d 401 (2004).

Trial court held that a covenant not to compete was overbroad and unenforceable, and thus properly denied a company's motion for a preliminary injunction against a competitor and a former employee given the unlikelihood of success on the merits; the company failed to show a violation of the North Carolina Trade Secrets Protection Act, G.S. 66-154(a), because the company did not identify any specific trade secrets that were endangered. VisionAIR, Inc. v. James, 167 N.C. App. 504, 606 S.E.2d 359, 2004 N.C. App. LEXIS 2389 (2004).

An employee will not be enjoined from working for its former employer's competitor under the doctrine of "inevitable discovery" absent some showing of bad faith, underhanded dealing, or employment by an entity so plainly lacking comparable technology that misappropriation can be inferred. FMC Corp. v. Cyprus Foote Mineral Co., 899 F. Supp. 1477 (W.D.N.C. 1995).

Inevitable Disclosure of Trade Secret. — A threatened misappropriation of information based upon inevitable disclosure by a former employee to his new employer can be enjoined where the injunction is limited to protecting specifically defined trade secrets, clearly identified, and of significant value. Merck & Co. v. Lyon, 941 F. Supp. 1443 (M.D.N.C. 1996).

Injunctive Relief Granted. — Plaintiffs showed that projected launch dates and marketing plan for new drug was competitively valuable information, not generally known, sufficient to enjoin disclosure by former employee to his new employer, plaintiff's competitor. Merck & Co. v. Lyon, 941 F. Supp. 1443 (M.D.N.C. 1996).

Pursuant to the North Carolina Trade Secrets Protection Act, G.S. 66-154(a), a former employer was entitled to a preliminary injunction to prevent a former employee from competing with it and from using or disclosing alleged confidential and proprietary information because the employer established that it was likely to succeed in showing that the employee misappropriated trade secrets when he set up a competing entity, while still employed by it, using confidential information, and selling similar products to one of the employer's main customers. Philips Elecs. N. Am. Corp. v. Hope, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 55279 (M.D.N.C. June 30, 2009).

Injunction Sufficiently Narrow. — Injunction sought by plaintiffs to prohibit employee from disclosing trade secrets was sufficiently narrow where plaintiffs sought only to prevent employee from working on a particular competitor's product and plaintiffs produced evidence of the precise nature of at least a portion of the information they claimed as a trade secret. Merck & Co. v. Lyon, 941 F. Supp. 1443 (M.D.N.C. 1996).

Injunctive Relief Not Required. — Plaintiff failed to show a likelihood of irreparable harm to justify injunctive relief, because the Trade Secrets Protection Act provides a wide range of relief to which plaintiff would be entitled including royalties, actual and punitive damages, and attorney's fees for violation. FMC Corp. v. Cyprus Foote Mineral Co., 899 F. Supp. 1477 (W.D.N.C. 1995).

Trial court did not err in refusing to issue a preliminary injunction in favor of a former employer after two of its former employees began working for a competitor, as misappropriation of its trade secrets by the competitor was unlikely because the evidence at trial indicated that the products made by the former employer and the competitor were too divergent to allow interchangeable use of the former employer's trade secrets. Therefore, misappropriation of the former employer's trade secrets by the competitor was unlikely, and a claim of misappropriation on the evidence presented to the trial court had to fail. Analog Devices, Inc. v. Michalski, 157 N.C. App. 462, 579 S.E.2d 449, 2003 N.C. App. LEXIS 752 (2003).

Measure of Damages. — Trial court properly looked to G.S. 66-154(b) of the North Carolina Trade Secrets Protection Act, G.S. 66-152 et seq., for guidance in fashioning a remedy for violation of a consent judgment because the consent judgment made it appear that, as between the parties, Substance X was considered a trade secret; appellants' unjust enrichment was an appropriate measure of damages, although attorney's fees were inappropriate since the misappropriation of Substance X was not malicious. Potter v. Hilemn Labs., Inc., 150 N.C. App. 326, 564 S.E.2d 259, 2002 N.C. App. LEXIS 492 (2002).

Trial court based an award of damages to an agency competitor on its misappropriation of trade secrets claim on an improper measure pursuant to G.S. 66-154(b) where the damages awarded did not indicate which portion was attributable to the misappropriation claim and which portion was attributable to other claims, some of which were reversed on appeal. Medical Staffing Network, Inc. v. Ridgway, — N.C. App. —, 670 S.E.2d 321, 2009 N.C. App. LEXIS 39 (2009).

Attorney's Fees. — Finding that a suit was brought with malicious intent did not exclude the possibility that it was brought in good faith, which excluded an award of attorney's fees under G.S. 66-154(d). Reichhold Chems., Inc. v. Goel, 146 N.C. App. 137, 555 S.E.2d 281, 2001 N.C. App. LEXIS 854 (2001), cert. dismissed, 356 N.C. 677, 577 S.E.2d 635 (2003).

Trial court's denial of defendants' motion for attorney fees was proper in a trade secrets case because attorney fees may have been awarded to the prevailing party if a claim of misappropriation was made in bad faith or if willful and malicious misappropriation existed. Bruning & Federle Mfg. Co. v. Mills, 185 N.C. App. 153, 647 S.E.2d 672, 2007 N.C. App. LEXIS 1717 (2007).

Applied in Asheboro Paper & Packaging, Inc. v. Dickinson, 599 F. Supp. 2d 664, 2009 U.S. Dist. LEXIS 12766 (M.D.N.C. 2009).

Cited in Moore v. American Barmag Corp., 710 F. Supp. 1050 (W.D.N.C. 1989); Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993); Cook Group, Inc. v. Wilson, 248 Bankr. 745, 2000 U.S. Dist. LEXIS 7380 (M.D.N.C. 2000); Static Control Components, Inc. v. Darkprint Imaging, Inc., 240 F. Supp. 2d 465, 2002 U.S. Dist. LEXIS 25255 (M.D.N.C. 2002); Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 586 S.E.2d 507, 2003 N.C. App. LEXIS 1825 (2003); WMS, Inc. v. Weaver, 166 N.C. App. 352, 602 S.E.2d 706, 2004 N.C. App. LEXIS 1782 (2004).

§ 66-155. Burden of proof.

Misappropriation of a trade secret is prima facie established by the introduction of substantial evidence that the person against whom relief is sought both:

(1) Knows or should have known of the trade secret; and
(2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

This prima facie evidence is rebutted by the introduction of substantial evidence that the person against whom relief is sought acquired the information comprising the trade secret by independent development, reverse engineering, or it was obtained from another person with a right to disclose the trade secret. This section shall not be construed to deprive the person against whom relief is sought of any other defenses provided under the law. (1981, c. 890, s. 1.)

CASE NOTES

A prima facie case of misappropriation existed so as to support a preliminary injunction where defendant helped to develop software during his employ with plaintiff, had access to copies of the software source code prior to his resignation, and where it was practically impossible to make any substantial modification to the software without access to the source code. Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993).

Plaintiff proved a real threat of misappropriation of information by former employee to competitor where plaintiff showed employee had access to trade secret information, employee's new position involved similar responsibilities as his former position, and employee was not entirely forthright with his former employer regarding his new employment. Merck & Co. v. Lyon, 941 F. Supp. 1443 (M.D.N.C. 1996).

In a specialized construction equipment rental market where customer pricing was highly competitive, a corporation's pricing, customer, and employee salary information met the factors of a trade secret under G.S. 66-152, and those trade secrets were misappropriated when a competing limited liability company solicited the corporation's employees who had that information. Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C., 174 N.C. App. 49, 620 S.E.2d 222, 2005 N.C. App. LEXIS 2290 (2005).

There was evidence to support a determination that a staffing agency and its new manager had misappropriated trade secrets of an agency competitor, for whom the manager had previously worked, where the competitor provided evidence that the agency had access to its trade secrets through the manager and that it had the opportunity to use them for purposes of G.S. 66-155; there was evidence that the manager had accessed confidential information of the competitor with unusual frequency just shortly prior to meeting with the agency to work out a new employment relationship with them. Medical Staffing Network, Inc. v. Ridgway, — N.C. App. —, 670 S.E.2d 321, 2009 N.C. App. LEXIS 39 (2009).

Court Denied Defendants' Motion to Dismiss. — In an action filed by plaintiffs, two corporations, against defendants, its former editors and their new employer, the court denied defendants' motion to dismiss, filed under Fed. R. Civ. P. 12(b)(6), as to plaintiffs' misappropriation of trade secrets claim under G.S. 66-153 because plaintiffs: (1) alleged the identity of the trade secrets; (2) the measures taken to protect their secrecy; (3) their value to plaintiffs; (4) and the fact that they could not easily be duplicated. Eli Research Inc. v. United Communs. Group, LLC, 312 F. Supp. 2d 748, 2004 U.S. Dist. LEXIS 5792 (M.D.N.C. 2004).

Burden of Proof. — Where plaintiff assigned as error the jury instruction that it was required to prove a violation of the trade secrets act by a preponderance of the evidence, rather than by "substantial evidence,", and where plaintiff failed to object to this instruction, and where it invited error when it proposed the preponderance-of-the-evidence instruction, the error was harmless. AG Sys. v. United Decorative Plastics Corp., 55 F.3d 970 (4th Cir. 1995).

Strong circumstantial evidence as to the misappropriation of trade secrets, which included hiring away plaintiff's employees including its top scientist and then developing competing products in a brief period of time, was sufficient to withstand defendant competitor's motion for summary judgment. Static Control Components, Inc. v. Darkprint Imaging, Inc., 200 F. Supp. 2d 541, 2002 U.S. Dist. LEXIS 13271 (M.D.N.C. 2002).

Defendant's Burden of Proof. — After an initial finding of misappropriation in 1995, the burden should have been placed on the defendant to show that it obtained the processes that it was using in October of 1997, during the plaintiff's surprise inspection, either through independent development or from someone with a right to disclose the processes. Cook Group, Inc. v. Wilson, 248 Bankr. 745, 2000 U.S. Dist. LEXIS 7380 (M.D.N.C. 2000).

Former employer did not show that the former employee misappropriated any G.S. 66-152(3) trade secrets when the former employer erased all data from the former employee's hard drive after the former employee had been terminated and asked to return the former employee's company-issued computer. As a result, the former employer did not establish even a G.S. 66-155 prima facie case of trade secret misappropriation and was not entitled to bring a G.S. 66-153 civil action for trade secret misappropriation. Panos v. Timco Engine Ctr., Inc., — N.C. App. —, 677 S.E.2d 868, 2009 N.C. App. LEXIS 743 (2009).

Independent development is an absolute defense to claim of trade secret misappropriation. Glaxo, Inc. v. Novopharm Ltd., 931 F. Supp. 1280 (E.D.N.C. 1996), aff'd, 110 F.3d 1562 (Fed. Cir. 1997).

Maintenance of Secrets. — Measures taken to maintain the integrity of trade secrets must be narrowly tailored so as not to needlessly encroach upon the strong public interest in maintaining open courts. Glaxo, Inc. v. Novopharm Ltd., 931 F. Supp. 1280 (E.D.N.C. 1996), aff'd, 110 F.3d 1562 (Fed. Cir. 1997).

Cited in Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986); Moore v. American Barmag Corp., 710 F. Supp. 1050 (W.D.N.C. 1989); Byrd's Lawn & Landscaping, Inc. v. Smith, 142 N.C. App. 371, 542 S.E.2d 689, 2001 N.C. App. LEXIS 99 (2001).

§ 66-156. Preservation of secrecy.

In an action under this Article, a court shall protect an alleged trade secret by reasonable steps which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action subject to further court order, and ordering any person who gains access to an alleged trade secret during the litigation not to disclose such alleged trade secret without prior court approval. (1981, c. 890, s. 1.)

§ 66-157. Statute of limitations.

An action for misappropriation of a trade secret must be commenced within three years after the misappropriation complained of is or reasonably should have been discovered. (1981, c. 890, s. 1.)

CASE NOTES

Laches Inapplicable Where There was No Delay in Bringing Action Within Limitation Period. — Since corporation brought a misappropriation action within three years, as required by the statute of limitations in G.S. 66-157, and since there was no delay in bringing the action, laches was properly held not to bar the corporation's action. Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C., 174 N.C. App. 49, 620 S.E.2d 222, 2005 N.C. App. LEXIS 2290 (2005).

§§ 66-158 through 66-162: Reserved for future codification purposes.

ARTICLE 25.

Regulation of Precious Metal Businesses.

§ 66-163. Legislative finding.

The General Assembly finds and declares that precious metal businesses in North Carolina vitally affect the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate such businesses, in order to prevent thefts, disposal of stolen property, and other abuses upon its citizens. (1981, c. 956, s. 1.)

Editor's Note. — Session Laws 1981, c. 956, which enacted this Article, provided in s. 3: "All general or local laws governing precious metals businesses in counties or towns are repealed."

§ 66-164. Definitions.

The following definitions apply in this Article:

(1) Dealer. — A person who purchases precious metals from the public, other than by an exempted transaction, in the form of jewelry, flatware, silver services, or other forms and holds himself or herself out to the public by signs, advertising, or other methods as engaging in such purchases, including any independent contractor purchasing precious metals under any arrangement in any department store. An exempted transaction is one that is (i) not considered in determining whether a person is a dealer under this Article and (ii) not subject to the requirements of this Article, even if it is entered into by a person otherwise defined and regulated as a dealer. Exempted transactions are:

  a. Purchases directly from manufacturers or wholesalers of precious metals by permanently located retail merchants for their inventories.

  b. Pawns, pledges, or purchases of items made of precious metals, if the transaction is entered into by a licensed pawnbroker and the transaction is regulated under the provisions of Chapter 91A of the General Statutes.

  c. The acquisition of precious metals by a permanently located retail merchant through barter or exchange for other items sold in the ordinary course of the merchant's business, provided that the seller does not receive, as part of the transaction, any sum of money or any gift card or stored-value card, unless the card is redeemable only at that merchant's business.

(2) Local law enforcement agency. — The term means the following, as applicable:

a. The county police force, if the dealer's business is located within a county with a county police force and outside the corporate limits of a municipality.
b. The municipal police force, if the dealer's business is located within the corporate limits of a municipality having a police force.
c. The county sheriff's office of the county in which the dealer's business is located, if neither sub-subdivision a. nor b. of this subdivision applies.

(3) Precious metal. — Gold, silver, platinum, or palladium, as defined below, but excluding coins, medals, medallions, tokens, numismatic items, art ingots, or art bars.
a. Gold. — Any item or article containing 10 karats of gold or more which may be in combination or alloy with any other metal.
b. Silver. — Any item or article containing 925 parts per thousand of silver which may be in combination or alloy with any nonprecious metal or which is marked "sterling".
c. Platinum. — Any item or article containing 900 parts per thousand or more of platinum which may be in combination or alloy with any other metal.
d. Palladium. — Any item or article containing 950 parts per thousand or more of palladium which may be in combination or alloy with any other metal. (1981, c. 956, s. 1; c. 1001, s. 3; 1989 (Reg. Sess., 1990), c. 1024, s. 10(b); 2009-482, s. 1.)

Editor's Note. — Session Laws 2009-482, s. 6, provides in part: "No dealer who is required to be licensed under this act, but who was not required to be licensed prior to the effective date of this act, shall be guilty of engaging as a dealer in the business of purchasing precious metals without a license during the period between October 1, 2009, and January 1, 2010." This act became effective October 1, 2009.

Effect of Amendments. — Session Laws 2009-482, s. 1, effective October 1, 2009, rewrote the section. For applicability provision, see Editor's note.

§ 66-165. Permits.

(a) Dealer Permit. — Except as provided in subsection (c) of this section, it is unlawful for any person to engage as a dealer in the business of purchasing precious metals either as a separate business or in connection with other business operations without first obtaining a permit for the business from the local law enforcement agency. The Department of Crime Control and Public Safety shall approve the forms for both the application and the permit. The application shall be given under oath and shall be notarized. A 30-day waiting period from the date of filing of the application is required prior to initial issuance of a permit. A separate permit shall be issued for each location, place, or premises within the jurisdiction of the local law enforcement agency which is used for conducting a precious metals business, and each permit shall designate the location, place or premises to which it applies. No business shall be conducted in a place other than that designated in the permit, or in a mobile home, trailer, camper, or other vehicle, or structure not permanently affixed to the ground or in any room customarily used for lodging in any hotel, motel, tourist court, or tourist home. The permit shall be posted in a prominent place on the designated premises. Permits shall be valid for a period of 12 months from the date issued and may be renewed without a waiting period upon filing of an application and payment of the annual fee. The annual fee for a permit within each jurisdiction is one hundred eighty dollars ($180.00) to provide for the administrative costs of the local law enforcement agency, including the purchase of required forms and the cost of conducting the criminal history record check of the applicant. The fee is not refundable even if the permits are denied or later suspended or revoked. A permit issued under this section is in addition to and not in lieu of other business licenses and is not transferable. No person other than the dealer named on the permit and that dealer's employees may engage in the business of purchasing precious metals under the authority of the permit.

Any dealer applying to the local law enforcement agency for a permit shall furnish the local law enforcement agency with the following information:

(1) The applicant's full name, and any other names used by the applicant during the preceding five years. In the case of a partnership, association, or corporation, the applicant shall list any partnership, association, or corporate names used during the preceding five years.
(2) Current address, and all addresses used by the applicant during the preceding five years.
(3) Physical description.
(4) Age.
(5) Driver's license number, if any, and state of issuance.
(6) Recent photograph.
(7) Record of felony convictions.
(8) Record of other convictions during the preceding five years.
(9) A full set of fingerprints of the applicant.

If the applicant for a dealer's permit is a partnership or association, all persons owning a ten percent (10%) or more interest in the partnership or association shall comply with the provisions of this subsection. These permits shall be issued in the name of the partnership or association.

If the applicant for a dealer's permit is a corporation, each officer, director and stockholder owning ten percent (10%) or more of the corporation's stock, of any class, shall comply with the provisions of this subsection. These permits shall be issued in the name of the corporation.

No permit shall be issued to an applicant who has been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state, unless the applicant has had his or her rights of citizenship restored pursuant to Chapter 13 of the General Statutes for five years or longer immediately preceding the date of application. In the case of a partnership, association, or corporation, no permit shall be issued to any applicant with an officer, partner, or director who has been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state, unless that person has had his or her rights of citizenship restored pursuant to Chapter 13 of the General Statutes for five years or longer immediately preceding the date of application.

The Department of Justice may provide a criminal history record check to the local law enforcement agency for a person who has applied for a permit through the agency. The agency shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The agency shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection.

(b) Employee Requirements. — Every employee engaged in the precious metals purchasing business shall, within two business days of being so engaged, register his or her name and address with the local law enforcement agency and have his or her photograph taken by the agency. The employee also shall consent to a criminal history record check, which shall be performed by the local law enforcement agency. A person who refuses to consent to a criminal history record check shall not be employed by a dealer required to be licensed under this section. A person who has been convicted of a felony involving a crime of moral turpitude, larceny, receiving stolen goods, or of similar charges shall not be employed by a dealer required to be licensed under this section, unless the person has had his or her rights of citizenship restored pursuant to Chapter 13 of the General Statutes for five years or longer immediately preceding the date of registration. The agency shall issue to the employee a certificate of compliance with this section upon the applicant's payment of the sum of ten dollars ($10.00) to the agency. The certificate shall be renewed annually for a three-dollar ($3.00) fee and shall be posted in the work area of the registered employee. An employee is not subject to the requirements of this subsection if the employee is engaged in the precious metals purchasing business only incidentally to his or her main job responsibilities, and each precious metals transaction with which the employee is involved is overseen by a licensed dealer or registered employee. All records of transactions must be signed by the licensed dealer or registered employee at the time of the transaction, as required under G.S. 66-169(a).

The Department of Justice may provide a criminal history record check to the local law enforcement agency for an employee engaged in the precious metals business. The agency shall provide to the Department of Justice, along with the request, the fingerprints of the employee, any additional information required by the Department of Justice, and a form signed by the employee consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The employee's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The agency shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each employee a fee for conducting the checks of criminal history records authorized by this subsection.

(c) Special Occasion Permit. — A special occasion permit authorizes the permittee to purchase precious metals as a dealer participating in any trade shows, antique shows, and crafts shows conducted within the State. A special occasion permit shall be issued by any local law enforcement agency; provided, however, that a permittee under subsection (a) of this section shall apply for a special occasion permit with the local law enforcement agency that issued the dealer's permit. The Department of Crime Control and Public Safety shall approve the forms for both the application and the permit. The application shall be given under oath and notarized. A 30-day waiting period from the date of filing of the application is required prior to initial issuance of a permit.

Any dealer applying to a local law enforcement agency for a special occasion permit shall furnish the local law enforcement agency with the information required in an application for a dealer's permit as set forth in subsection (a) of this section. In addition, the applicant shall provide a physical address where any item included in a dealer purchase will be held for the period required under G.S. 66-170. The physical address shall be the location where the purchase was made, unless another physical address within the law enforcement jurisdiction where the purchase was made is approved by the law enforcement agency that issues the permit. The items shall be available at all reasonable times for inspection on the premises by law enforcement agencies.

If the applicant for a special occasion permit is a partnership or association, all persons owning a ten percent (10%) or more interest in the partnership or association shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the partnership or association.

If the applicant for a special occasion permit is a corporation, each officer, director and stockholder owning ten percent (10%) or more of the corporation's stock, of any class, shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the corporation.

No permit shall be issued to an applicant who has been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state, unless the applicant has had his or her rights of citizenship restored pursuant to Chapter 13 of the General Statutes for five years or longer immediately preceding the date of application. In the case of a partnership, association, or corporation, no permit shall be issued to any applicant with an officer, partner, or director who has been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state, unless that person has had his or her rights of citizenship restored pursuant to Chapter 13 of the General Statutes for five years or longer immediately preceding the date of application.

The Department of Justice may provide a criminal history record check to the local law enforcement agency for a person who has applied for a permit through the agency. The agency shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The agency shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection.

The filing fee for a special occasion permit application is one hundred eighty dollars ($180.00) to provide for the administrative cost of the local law enforcement agency including purchase of required forms and the cost of conducting the criminal history record check of the applicant. The fee is not refundable even if the permit is denied or is later suspended or revoked. A special occasion permit is in addition to and not in lieu of other business licenses and is not transferable. No person other than the dealer named on the permit and that dealer's employees may engage in the business of purchasing precious metals under the authority of the permit.

A special occasion permit is valid for 12 months from the date issued, unless earlier surrendered, suspended, or revoked. Application for renewal of a permit for an additional 12 months shall be on a form approved by the Department of Crime Control and Public Safety and shall be accompanied by a nonrefundable renewal fee of one hundred eighty dollars ($180.00).

Each special occasion permit shall be posted in a prominent place on the premises of any show at which the permittee purchases precious metals. (1981, c. 956, s. 1; 2002-147, s. 2; 2009-482, s. 2.)

Editor's Note. — Session Laws 2009-482, s. 6, provides in part: "No dealer who is required to be licensed under this act, but who was not required to be licensed prior to the effective date of this act, shall be guilty of engaging as a dealer in the business of purchasing precious metals without a license during the period between October 1, 2009, and January 1, 2010."

Effect of Amendments. — Session Laws 2009-482, s. 2, effective October 1, 2009, rewrote the section heading and section. For applicability provision, see Editor's note.

§ 66-166: Repealed by Session Laws 2009-482, § 3, effective October 1, 2009.

Editor's Note. — Former § 66-166, Exemption from permits, was enacted by Session Laws 1981, c. 956, s. 1.

Session Laws 2009-482, s. 6, provides in part: "No dealer who is required to be licensed under this act, but who was not required to be licensed prior to the effective date of this act, shall be guilty of engaging as a dealer in the business of purchasing precious metals without a license during the period between October 1, 2009, and January 1, 2010." This act became effective October 1, 2009.

§ 66-167. Perjury; punishment.

Any person who shall willfully commit perjury in any application for a permit or exemption filed pursuant to this Article shall be guilty of a Class 2 misdemeanor. (1981, c. 956, s. 1; 1993, c. 539, s. 525; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-168. Bond or trust account required.

Before any permit shall be issued to a dealer pursuant to G.S. 66-165, the dealer shall execute a satisfactory cash or surety bond or establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina in the sum of ten thousand dollars ($10,000). The bond or trust account shall be in favor of the State of North Carolina. A surety bond is to be executed by the dealer and by two responsible sureties or a surety company licensed to do business in the State of North Carolina and shall be on a form approved by the Department of Crime Control and Public Safety. Any bond shall be kept in full force and effect and shall be delivered to the law-enforcement agency which first issued a current permit to the dealer. A bond or trust account shall be for the faithful performance of the requirements and obligations of the dealer's business in conformity with this Article. Any law-enforcement agency shall have full power and authority to revoke the permit and sue for forfeiture of the bond or trust account upon a breach thereof. Any person who shall have suffered any loss or damage by any act of the permittee that constitutes a violation of this Article shall have the right to institute an action to recover against such permittee and the surety or trust account. Upon termination of the bond or trust account the permit shall become void. (1981, c. 956, s. 1; c. 1001, s. 4.)

§ 66-169. Records to be kept.

(a) Every dealer to whom a permit has been issued pursuant to G.S. 66-165 shall maintain consecutively numbered records of each precious metals transaction. Each consecutively numbered record shall be made at the time of the transaction and shall contain a clear and accurate description of the transaction. A valid description shall include each of the following applicable and available items of information: the manufacturer's name, the model, the model number, the serial number, and any engraved numbers or initials found on the items; the date of the transaction; the name, sex, race, residence, telephone number and driver's license number of the person selling the items purchased;

and the signature of both the dealer or registered employee and the seller. In the event the seller cannot furnish valid, unexpired photographic identification in the form of a drivers license, State-issued identification card, passport, or military identification card, the dealer shall require two forms of positive identification.

(b) The consecutively numbered records required by this section shall be kept either (i) in a paginated, bound book or set of books with pages numbered in sequence or (ii) in an electronic database that prevents record deletion, tracks all modifications to records, and provides for electronic signatures.

(c) The records shall be open at all reasonable times to inspection on the premises by law enforcement agencies, and an individual record shall be retained for at least two years after a transaction. If a dealer maintains a record book rather than an electronic database, the book shall be retained until at least two years following the last recorded transaction.

(d) A copy of each consecutively numbered record entry shall be filed within 48 hours of the transaction in the office of the local law enforcement agency. Records shall be filed in the manner authorized by the local law enforcement agency, which may include reporting electronically by transmission over a computer network, by facsimile machine, or by hand delivering hard copies to the local law enforcement agency. In any case where a technological failure prevents a dealer from reporting electronically or by facsimile, the dealer shall have the option of hand delivering a hard copy of the record to the local law enforcement agency. Regardless of the manner in which the local law enforcement agency allows reporting, a dealer shall provide a hard copy of records upon the request of a law enforcement agency.

(e) The files of local law enforcement agencies that contain copies of records shall not be subject to inspection and examination as authorized by G.S. 132-6. Any public official or employee who shall knowingly and willfully permit any person to have access to or custody or possession of any portion of such files, unless the person is one specifically authorized by the local law enforcement agency to have access for purposes of law enforcement investigation or civil or criminal proceedings, shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined up to five hundred dollars ($500.00) in the discretion of the court. (1981, c. 956, s. 1; 1993, c. 539, s. 526; 1994, Ex. Sess., c. 24, s. 14(c); 2009-482, s. 4.)

Editor's Note. — Session Laws 2009-482, s. 6, provides in part: "No dealer who is required to be licensed under this act, but who was not required to be licensed prior to the effective date of this act, shall be guilty of engaging as a dealer in the business of purchasing precious metals without a license during the period between October 1, 2009, and January 1, 2010." This act became effective October 1, 2009.

Effect of Amendments. — Session Laws 2009-482, s. 4, effective October 1, 2009, rewrote the section. For applicability provision, see Editor's note.

§ 66-170. Items not to be modified.

No item included in a dealer purchase shall be sold, traded or otherwise disposed of, melted, cut or otherwise changed in form nor shall any item be removed from the licensed premises, or other location specified on the application for a special occasion permit, for a period of seven days from the date the transaction was reported in accordance with G.S. 66-169. (1981, c. 956, s. 1; 2009-482, s. 5.)

Editor's Note. — Session Laws 2009-482, s. 6, provides in part: "No dealer who is required to be licensed under this act, but who was not required to be licensed prior to the effective date of this act, shall be guilty of engaging as a dealer in the business of purchasing precious metals without a license during the period between October 1, 2009, and January 1, 2010."

This act became effective October 1, 2009.

Effect of Amendments. — Session Laws 2009-482, s. 5, effective October 1, 2009, deleted "such" preceding "item", inserted "or other location specified on the application for a special occasion permit" in the middle, substituted "seven days" for "five days", and substituted "transaction was reported in accordance with G.S. 66-169" for "purchase was made" at the end.

OPINIONS OF ATTORNEY GENERAL

The five-day time period during which a precious metal dealer must hold purchased items before sale is calculated under G.S. 1A-1, Rule 6(a), and the dealer may sell such items on the sixth day. See opinion of Attorney General to Mr. Robert F. Thomas, Jr., Police Attorney, Charlotte Police Department, 52 N.C.A.G. 74 (1983).

§ 66-171. Purchasing from juvenile.

No dealer or employee or agent thereof shall purchase from any juvenile under 18 years of age any article made, in whole or in part, of precious metal. (1981, c. 956, s. 1.)

§ 66-172. Penalties.

Any dealer who violates the provisions of this Article shall be deemed guilty of a Class 2 misdemeanor. In addition any dealer so convicted shall be ineligible for a dealer's permit for a period of three years from the date of conviction. Each and every violation shall constitute a separate and distinct offense. (1981, c. 956, s. 1; 1993, c. 539, s. 527; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-173. Portable smelters prohibited.

It shall be unlawful for any person to possess or operate a smelter in any mobile home, trailer, camper, or other vehicle or structure not permanently affixed to the ground, for the purpose of refining precious metals. Violation of the provisions of this section shall constitute a Class 2 misdemeanor. (1981, c. 956, s. 1; 1993, c. 539, s. 528; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 66-174 through 66-179: Reserved for future codification purposes.

ARTICLE 26.

Farm Machinery Agreements.

§ 66-180. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Agreement" means a written or oral contract or agreement between a dealer and a wholesaler, manufacturer, or distributor by which the dealer is granted one or more of the following rights:
   a. To sell or distribute goods or services.
   b. To use a trade name, trademark, service mark, logo type, or advertising or other commercial symbol.

(2) "Current model" means a model listed in the wholesaler's, manufacturer's, or distributor's current sales manual or any supplements.

(3) "Current net price" means the price listed in the supplier's price list or catalog in effect at the time the agreement is terminated, less any applicable discounts allowed.

(4) "Dealer" means a person engaged in the business of selling at retail farm, construction, utility or industrial, equipment, implements, machinery, attachments, outdoor power equipment, or repair parts.

(5) "Family member" means a spouse, brother, sister, parent, grandparent, child, grandchild, mother-in-law, father-in-law, daughter-in-law, son-in-law, stepparent, or stepchild, or a lineal descendant of the dealer or principal owner of the dealership.

(6) "Good cause" means failure by a dealer to comply with requirements imposed upon the dealer by the agreement if the requirements are not different from those imposed on other dealers similarly situated in this State. In addition, good cause exists in any of the following circumstances:

a. A petition under bankruptcy or receivership law has been filed against the dealer.

b. The dealer has made an intentional misrepresentation with the intent to defraud supplier.

c. Default by the dealer under a chattel mortgage or other security agreement between the dealer and the supplier or a revocation or discontinuance of a guarantee of a present or future obligation of the retailer to the supplier.

d. Closeout or sale of a substantial part of the dealer's business related to the handling of goods; the commencement or dissolution or liquidation of the dealer if the dealer is a partnership or corporation; or a change, without the prior written approval of the supplier, which shall not be unreasonably withheld, in the location of the dealer's principal place of business or additional locations set forth in the agreement.

e. Withdrawal of an individual proprietor, partner, major shareholder, or manager of the dealership, or a substantial reduction in interest of a partner or major shareholder, without the prior written consent of the supplier.

f. Revocation or discontinuance of any guarantee of the dealer's present or future obligations to the supplier.

g. The dealer has failed to operate in the normal course of business for seven consecutive business days or has otherwise abandoned the business.

h. The dealer has pleaded guilty to or has been convicted of a felony affecting the relationship between the dealer and the supplier.

i. The dealer transfers an interest in the dealership, or a person with a substantial interest in the ownership or control of the dealership, including an individual proprietor, partner, or major shareholder, withdraws from the dealership or dies, or a substantial reduction occurs in the interest of a partner or major shareholder in the dealership.

(7) "Inventory" means farm implements and machinery, construction, utility and industrial equipment, consumer products, outdoor power equipment, attachments, or repair parts.

(8) "Net cost" means the price the dealer paid the supplier for the inventory, less all applicable discounts allowed, plus the amount the dealer paid for freight costs from the supplier's location to the dealer's location, plus reasonable cost of assembly or disassembly performed by the dealer.

(9) "Supplier" means a wholesaler, manufacturer, distributor, or any purchaser of assets or stock of any surviving corporation resulting from a merger or liquidation, any receiver or assignee, or any trustee of the original manufacturer, wholesaler, or distributor who enters into an agreement with a dealer.

(10) "Superseded part" means any part that will provide the same function as a currently available part as of the date of cancellation.

(11) "Termination" of an agreement means the termination, cancellation, nonrenewal, or noncontinuance of the agreement. (1985, c. 441, s. 1; 2001-343, s. 1.)

Legal Periodicals. — For comment, "The North Carolina Farm Machinery Franchise Act: Its Provisions, Context and Contribution to the Law of Franchising," see 8 Campbell L. Rev. 289 (1986).

CASE NOTES

Editor's Note. *— The case below was decided under former Article 26, regarding Farm Machinery Franchises.*

Article Applies Only to Agreements Created After October 1, 1985. — There is no indication in either the express language or in the necessary application of the statute that the General Assembly intended that the warranty obligations created by this article should apply to franchise agreements (now "agreement") created prior to the act's effective date. Without the expression of such an intent, the entire statute must be interpreted as applying only to franchise agreements (now "agreement") created after October 1, 1985. Wilson Ford Tractor, Inc. v. Massey-Ferguson, Inc., 105 N.C. App. 570, 414 S.E.2d 43, aff'd, 332 N.C. 662, 422 S.E.2d 576 (1992).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— . — The opinions below were rendered under former Article 26.*

Agreements Regulated by Article. — The use of the language "granted the right to sell or distribute goods or services" in the definition of "franchise agreement" (now "agreement") in defining the scope of this Article evidences an intent to regulate only those agreements in which an ongoing franchise relationship exists between a supplier and a dealer. See opinion of Attorney General to the Honorable H. Martin Lancaster, 55 N.C.A.G. 47 (1985).

"Franchise Agreement" (Now "Agreement") Does Not Include Item-by-Item Sale Arrangement. — An arrangement whereby a business sells farm equipment and parts to various retailers on an item-by-item basis, with each sale constituting a completed and final transaction, and with no requirement that a retailer maintain an inventory of the equipment or parts or that a retailer continue to purchase equipment or parts from the business in the future, does not constitute a "franchise agreement" (now "agreement") within the scope of this Article. See opinion of Attorney General to the Honorable H. Martin Lancaster, 55 N.C.A.G. 47 (1985).

§ 66-181. Usage of trade.

The terms "utility" and "industrial," when used to refer to equipment, implements, machinery, attachments, or repair parts, shall have the meaning commonly used and understood among dealers and suppliers of farm equipment as a usage of trade in accordance with G.S. 25-1-303(c). (1985, c. 441, s. 1; 2006-112, s. 22.)

Editor's Note. — Session Laws 2006-112, s. 60, provides that: "A document of title issued or a bailment that arises before October 1, 2006, and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

§ 66-182. Notice of termination of agreements.

(a) Notwithstanding any agreement to the contrary, a supplier who terminates or otherwise fails to renew or substantially changes the competitive circumstances of an agreement with a dealer without good cause shall notify the dealer of the termination not less than 90 days prior to the effective date of the termination and shall provide a 60-day right-to-cure the deficiency. If the deficiency is cured within the allotted time, the notice is void. In the case where cancellation is enacted due to market penetration, a reasonable period of time shall have existed where the supplier has worked with the dealer to gain the desired market share. If there is any reason constituting good cause for action, the notice shall state that reason.

(a1) Notwithstanding any agreement to the contrary, a supplier who terminates or otherwise fails to renew or substantially changes the competitive circumstances of an agreement with a dealer for good cause is not required to notify the dealer of the termination or to provide a right-to-cure the deficiency.

(b) Notwithstanding any agreement to the contrary, a dealer who terminates an agreement with a supplier shall notify the supplier of the termination not less than 90 days prior to the effective date of the termination.

(b1) Repealed by Session Laws 2003-195, s. 1, effective October 1, 2003.

(c) Notification under this section shall be in writing and shall be by certified mail or personally delivered to the recipient. It shall contain all of the following:

(1) A statement of intention to terminate the dealership.
(2) A statement of the reasons for the termination.
(3) The date on which the termination takes effect. (1985, c. 441, s. 1; 2001-343, s. 1; 2003-195, s. 1.)

§ 66-183. Supplier's duty to repurchase.

(a) Whenever a dealer enters into an agreement evidenced by a written or oral contract in which the dealer agrees to maintain an inventory, and the agreement is terminated by either party, the supplier shall repurchase the dealer's inventory as provided in this Article unless the dealer chooses to keep the inventory. If the dealer has any outstanding debts to the supplier, then the repurchase amount may be set off or credited to the retailer's account.

(b) Whenever a dealer enters into an agreement in which the dealer agrees to maintain an inventory, and the dealer or the majority stockholder of the dealer, if the dealer is a corporation, dies or becomes incompetent, the supplier shall, at the option of the heir, personal representative, or guardian of the dealer, or the person who succeeds to the stock of the majority stockholder, repurchase the inventory as if the agreement had been terminated. The heir, personal representative, guardian, or succeeding stockholder has one year from the date of the death of the dealer or majority stockholder to exercise the option under this Article. (1985, c. 441, s. 1; 2001-343, s. 1.)

§ 66-184. Repurchase terms.

(a) The supplier shall repurchase from the dealer within 90 days after termination of the agreement all inventory previously purchased from the supplier that remains unsold on the date of termination of the agreement.

(b) The supplier shall pay the dealer:

(1) One hundred percent (100%) of the current net price of all new, unused, unsold, undamaged, and complete farm, construction, utility, and industrial equipment, implements, machinery, outdoor power equipment, and attachments.
(2) Ninety percent (90%) of the current net price of all new, unused, and undamaged repair and superseded parts.
(3) Seventy-five percent (75%) of the net cost of all specialized repair tools purchased in the previous three years and fifty percent (50%) of the net cost of all specialized repair tools purchased in the previous four

through six years pursuant to the requirements of the supplier and held by the dealer on the date of termination. Such specialized repair tools shall be unique to the supplier's product line and shall be in complete and resalable condition. Farm implements, machinery, utility and industrial equipment, and outdoor power equipment used in demonstrations, including equipment leased primarily for demonstration or lease, shall also be subject to repurchase under this section at its agreed depreciated value, provided the equipment is in new condition and has not been damaged.

(4) At its amortized value, the price of any specific data processing hardware and software and telecommunications equipment that the supplier required the dealer to purchase within the past five years.

(c) Repealed by Session Laws 2001-343, s. 1, effective October 1, 2001.

(d) The supplier shall pay the cost of shipping the inventory from the dealer's location and shall pay the dealer ten percent (10%) of the current net price of all new, unused, undamaged repair parts returned, to cover the cost of handling, packing, and loading. The supplier may perform the handling, packing, and loading instead of paying the ten percent (10%) for the services. The dealer and the supplier may each furnish a representative to inspect all parts and certify their acceptability when packed for shipment.

(e) The supplier shall pay the full repurchase amount to the dealer not later than 30 days after receipt of the inventory. If the dealer has any outstanding debts to the supplier, then the repurchase amount may be credited to the dealer's account.

(f) Upon payment of the repurchase amount to the dealer, the title and right of possession to the repurchased inventory shall transfer to the supplier. Annually, at the end of each calendar year, or after termination or cancellation of the agreement, the dealer's reserve account for recourse, retail sale, or lease contracts shall not be debited by a supplier or lender for any deficiency unless the dealer or the heirs of the dealer have been given at least seven business days' notice by certified or registered United States mail, return receipt requested, of any proposed sale of the equipment financed and an opportunity to purchase the equipment. The former dealer or the heirs of the dealer shall be given quarterly status reports on any remaining outstanding recourse contracts. As the recourse contracts are reduced, any reserve account funds shall be returned to the dealer or the heirs of the dealer in direct proportion to the liabilities outstanding.

(g) In the event of the death of the dealer or the majority stockholder of a corporation operating as a dealer, the supplier shall, at the option of the heir, repurchase the inventory from the heir of the dealer or majority stockholder as if the supplier had terminated the agreement. The heir shall have one year from the date of the death of the dealer or majority stockholder to exercise the heir's options under this section. Nothing in this section shall require the repurchase of any inventory if the heir and the supplier enter into a new agreement to operate the retail dealership.

(h) A supplier shall have 90 days in which to consider and make a determination upon a request by a family member to enter into a new agreement to operate the dealership. In the event the supplier determines that the requesting family member is not acceptable, the supplier shall provide the family member with a written notice of its determination with the stated reasons for nonacceptance. This section does not entitle an heir, personal representative, or family member to operate a dealership without the specific written consent of the supplier.

(i) Notwithstanding the provisions of this section, in the event that a supplier and a dealer have executed an agreement concerning succession rights prior to the dealer's death, and if the agreement has not been revoked, that agreement shall be enforced even if it designates someone other than the surviving spouse or heir of the decedent as the successor. (1985, c. 441, s. 1; 2001-343, s. 1.)

§ 66-185. Exceptions to repurchase requirement.

This Article does not require the repurchase from a dealer of:

(1) A repair part with a limited storage life or otherwise subject to deterioration, such as gaskets or batteries, except for industrial "press on" or industrial pneumatic tires.

(2) A single repair part that is priced as a set of two or more items.

(3) A repair part that, because of its condition, is not resalable as a new part without repackaging or reconditioning.

(3a) Any repair part that is not in new, unused, undamaged condition.

(4) An item of inventory for which the dealer does not have title free of all claims, liens, and encumbrances other than those of the supplier.

(5) Any inventory that the dealer chooses to keep.

(6) Any inventory that was ordered by the dealer after either party's receipt of notice of termination of the agreement.

(6a) Any farm implements and machinery, construction, utility and industrial equipment, outdoor power equipment, and attachments that are not current models or that are not in new, unused, undamaged, complete condition, provided that the equipment used in demonstrations or leased, as provided in G.S. 66-184, shall be considered new and unused.

(6b) Any farm implements and machinery, construction, utility and industrial equipment, outdoor power equipment, and attachments that were purchased more than 36 months prior to notice of termination of the agreement.

(7) Any inventory that was acquired by the dealer from a source other than the supplier. (1985, c. 441, s. 1; 2001-343, s. 1.)

§ 66-186. Uniform commercial practice.

(a) This Article does not affect a security interest of the supplier in the inventory of the dealer.

(b) Repealed by Session Laws 2004-190, s. 4, effective January 1, 2005.

(c) The dealer and supplier shall furnish representatives to inspect all parts and certify their acceptability when packed for shipment. Failure of the supplier to provide a representative within 60 days shall result in automatic acceptance by the supplier of all returned items. (1985, c. 441, s. 1; 2001-343, s. 1; 2004-190, s. 4.)

§ 66-187. Warranty obligations.

(a) Whenever a supplier and a dealer enter into an agreement, the supplier shall pay any warranty claim made by the dealer for warranty parts or service within 30 days after its approval. The supplier shall approve or disapprove a warranty claim within 30 days after its receipt. If a claim is disapproved, the manufacturer, wholesaler, or distributor shall notify the dealer within 30 days stating the specific grounds upon which the disapproval is based. If a claim is not specifically disapproved in writing within 30 days after its receipt it is approved and payment must follow within 30 days.

(b) Whenever a supplier and a dealer enter into an agreement, the supplier shall indemnify and hold harmless the dealer against any judgment for damages or any settlement agreed to by the supplier, including court costs and a reasonable attorney's fee, arising out of a complaint, claim, or lawsuit including negligence, strict liability, misrepresentation, breach of warranty, or rescission of the sale, to the extent the judgment or settlement relates to the manufacture, assembly, or design of inventory, or other conduct of the supplier beyond the dealer's control.

(c) If, after termination of an agreement, the dealer submits a claim to the manufacturer, wholesaler, or distributor for warranty work performed prior to the effective date of the termination, the manufacturer, wholesaler, or distributor shall accept or reject the claim within 30 days of receipt.

(d) If a claim is not paid within the time allowed under this section, interest shall accrue at the maximum lawful interest rate.

(e) Warranty work performed by the dealer shall be compensated in accordance with the reasonable and customary amount of time required to complete the work, expressed in hours and fractions thereof. The cost of the work shall be computed by multiplying the time required to complete the work by the dealer's established customer hourly retail labor rate. The dealer shall inform the manufacturer, wholesaler, or distributor for whom the dealer is performing warranty work of the dealer's established customer hourly retail labor rate before the dealer performs any work.

(f) Expenses expressly excluded under the warranty of the manufacturer, wholesaler, or distributor to the customer shall neither be included nor required to be paid for warranty work performed, even if the dealer requests compensation for the work performed.

(g) The dealer shall be paid for all parts used by the dealer in performing warranty work. Payment shall be in an amount equal to the dealer's net price for the parts, plus a minimum of fifteen percent (15%).

(h) The manufacturer, wholesaler, or distributor has a right to adjust compensation for errors discovered during an audit and, if necessary, to adjust claims paid in error.

(i) The dealer shall have the right to accept the reimbursement terms and conditions of the manufacturer, wholesaler, or distributor in lieu of the terms and conditions of this section. (1985, c. 441, s. 1; 2001-343, s. 1.)

§ 66-187.1. Prohibited acts.

No supplier shall do any of the following:

(1) Coerce any dealer to accept delivery of equipment, parts, or accessories which the dealer has not ordered voluntarily, except as required by any applicable law, or unless the parts or accessories are safety parts or accessories required by the supplier.

(2) Condition the sale of additional equipment to a dealer upon a requirement that the dealer also purchase other goods or services, except that a supplier may require the dealer to purchase those parts reasonably necessary to maintain the quality of operation in the field of the equipment used in the trade area.

(3) Coerce a dealer into refusing to purchase equipment manufactured by another supplier.

(4) Terminate, cancel, or fail to renew or substantially change the competitive circumstances of the retail agreement based on the results of any circumstance beyond the dealer's control, including a natural disaster such as a sustained drought, high unemployment in the dealership market area, or a labor dispute. (2001-343, s. 1.)

§ 66-188. Failure to repurchase; civil remedy.

(a) If a supplier fails or refuses to repurchase any inventory covered under the provisions of this Article within the time periods established in G.S.

66-184, the supplier is civilly liable for one hundred percent (100%) of the current net price of the inventory, any freight charges paid by the dealer, the dealer's reasonable attorney's fee and court costs, and interest on the current net price of the inventory computed at the legal rate of interest from the 91st day after termination of the agreement.

(b) Notwithstanding any agreement to the contrary, and in addition to any other legal remedies available, any person who suffers monetary loss due to a violation of this Article or because he refuses to accede to a proposal for an arrangement that, if consummated, is in violation of this Article, may bring a civil action to enjoin further violations and to recover damages sustained by him together with the costs of the suit, including a reasonable attorney's fee.

(b1) The provisions of G.S. 66-182 through G.S. 66-187.1 shall not be waivable in any contract or agreement, and any such attempted waiver shall be null and void.

(c) A civil action commenced under the provisions of this Article shall be brought within four years after the violation complained of is or reasonably should have been discovered, whichever occurs first. (1985, c. 441, s. 1; 2001-343, s. 1.)

§ 66-189: Reserved for future codification purposes.

ARTICLE 27.

Sales Representative Commissions.

§ 66-190. Definitions.

The following definitions apply in this Article:

(1) "Commission" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of orders, sales, or profits or as a specified amount per order or per sale.

(2) "Person" means an individual, corporation, limited liability company, partnership, unincorporated association, estate, trust, or other entity.

(3) "Principal" means a person who:
  a. Manufactures, produces, imports, or distributes a product or service;
  b. Contracts with a sales representative to solicit orders for the product or service; and
  c. Compensates the sales representative, in whole or in part, by commission.

(4) "Sales representative" means a person who:
  a. Contracts with a principal to solicit orders for products or services;
  b. Is compensated, in whole or in part, by commission;
  c. Is not a seller who complies with:
    1. G.S. 25A-39 and G.S. 25A-40; or
    2. Part 429 of 16 Code of Federal Regulations (January 1, 2003);
  d. Repealed by Session Laws 2003-331, s. 1, effective October 1, 2003.
  e. Is not an employee of the principal;
  f. Does not sell or take orders for the sale of advertising services; and
  g. Is not a person requiring a real estate broker's or sales agent's license under Chapter 93A of the General Statutes.

(5) "Terminate" and "termination" mean the end of the business relationship between the sales representative and the principal, whether by agreement, by expiration of time, or by exercise of a right of termination of either party. (1989, c. 506, s. 1; 2003-331, s. 1.)

CASE NOTES

Cited in D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

§ 66-190.1. Written contracts.

The agreement or contract between a sales representative and a principal shall be in writing. The absence of a written agreement or contract shall not bar a cause of action by, or any remedy available to, a party. (2003-331, s. 1.)

§ 66-191. Payment of commissions; termination.

When a contract between a sales representative and a principal is terminated for any reason other than malfeasance on the part of the sales representative, the principal shall pay the sales representative all commissions due under the contract within 30 days after the effective date of the termination and all commissions that become due after the effective date of termination within 15 days after they become due. If the principal does not make payment as required by this section, the sales representative shall make a written demand upon the principal, sent by certified mail, for the commissions then due. The principal shall respond in writing to the demand within 15 days after the principal receives the written demand. (1989, c. 506, s. 1; 2003-331, s. 1.)

CASE NOTES

Termination and Malfeasance Findings Are Factual Issues. — Summary judgment was improper where a reasonable jury could find that appellant's activities rose to the level of a breach or "termination" of an agreement, and that the agreement was terminated because of the malfeasance of appellant, but whether a jury would so find depended on the resolution of a number of factual issues. GAVCO, Inc. v. Chem-Trend Inc., 81 F. Supp. 2d 633, 1999 U.S. Dist. LEXIS 21344 (W.D.N.C. 1999).

§ 66-192. Civil liability.

(a) A principal who fails to comply with the provisions of G.S. 66-191 or is shown to have wrongfully revoked an offer of commission under G.S. 66-192.1 is liable to the sales representative in a civil action for (i) all amounts due the sales representative plus exemplary damages in an amount not to exceed two times the amount of commissions due the sales representative, (ii) attorney's fees actually and reasonably incurred by the sales representative in the action, and (iii) court costs.

(b) Where the court determines that an action brought by a sales representative against a principal under this Article is frivolous, the sales representative is liable to the principal for court costs and for attorney's fees actually and reasonably incurred by the principal in defending the action.

(c) A principal who is not a resident of this State who contracts with a sales representative to solicit orders in this State shall be subject to personal jurisdiction as provided in G.S. 1-75.4.

(d) Nothing in this Article shall invalidate or restrict any other or additional right or remedy available to a sales representative or preclude a sales representative from seeking to recover in one action on all claims against a principal. (1989, c. 506, s. 1; 2003-331, s. 1.)

CASE NOTES

Subsection (c) of this section is a "Special Jurisdictional Statute" as that term is used in G.S. 1-75.4. D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

Where plaintiff and defendants entered into a sales representation agreement whereby plaintiff agreed to act as a sales representative for defendants in this and other states and in return, defendants agreed to pay commissions to plaintiff, defendants were within the provisions of G.S. 1-75.4(5)(a) and (b), a statute that is to be liberally construed. D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

Piercing the Corporate Veil. — Allegations in the state's complaint against a tobacco manufacturing corporation's failure to make payments to an escrow fund in violation of G.S. 66-192 were sufficient to state a claim for piercing the corporate veil; the complaint alleged that the principal of the corporation overwhelmingly dominated and controlled the corporation to the extent that it had no separate identity, and used that control to set the corporation's pricing structure so as to violate G.S. 66-291(b); thus, the principal's control and statutory violation proximately caused unjust capital loss to the escrow fund. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 184 N.C. App. 613, 646 S.E.2d 790, 2007 N.C. App. LEXIS 1613 (2007), aff'd in part, rev'd in part, 362 N.C. 431, 666 S.E.2d 107 (2008).

Cited in GAVCO, Inc. v. Chem-Trend Inc., 81 F. Supp. 2d 633, 1999 U.S. Dist. LEXIS 21344 (W.D.N.C. 1999).

§ 66-192.1. Revocable offers of commission; entitlement.

If a principal makes a revocable offer of a commission to a sales representative, the sales representative is entitled to the commission agreed upon if:

(1) The principal revokes the offer of commission;

(2) The sales representative establishes that the revocation was for the purpose of avoiding payment of the commission;

(3) The revocation occurs after the principal has obtained a written order for the principal's product or service because of the efforts of the sales representative; and

(4) The principal's product or service that is the subject of the order is provided to and paid for by a customer. (2003-331, s. 1.)

§ 66-193. Contracts void.

A provision in any contract between a sales representative and a principal purporting to waive any provision of this Article, whether by expressed waiver or by a contract subject to the laws of another state, is void. (1989, c. 506, s. 1; 2003-331, s. 1.)

§§ 66-194 through 66-199: Reserved for future codification purposes.

ARTICLE 28.

Rental Car Advertising and Sales Practices.

§ 66-200. Scope.

This Article applies to all persons renting vehicles from locations within this State. (1989, c. 631, s. 2; c. 770, s. 62.)

§ 66-201. Definitions.

As used in this Article:

(1) "Collision damage waiver" means any contract or contractual provision, whether separate from or a part of a rental agreement, whereby

the rental car company agrees for a charge to waive any and all claims against the renter for any damages to the rented vehicle during the term of the rental agreement.

(2) "Damage" means any damage or loss to the rented vehicle, including loss of use and any costs and expenses incident to the damage or loss.

(3) "Person" includes an individual, aggregation of individuals, corporation, company, association, or partnership.

(4) "Rental agreement" means any written agreement setting forth the terms and the conditions governing the use of a vehicle provided by the rental car company.

(5) "Rental car company" means any person in the business of providing vehicles to the public.

(6) "Renter" means any person obtaining the use of a vehicle from a rental car company under the terms of a rental agreement.

(7) "Vehicle" means a motor vehicle of the private passenger type including passenger vans and minivans that are primarily intended for transport of persons.

(8) "Vehicle license and registration fees" means charges that may be imposed upon any rental transaction originating in this State to recoup the costs incurred by a rental car company to license, title, inspect, and register rental vehicles. Rental car companies shall make a good faith effort to ensure that any vehicle license and registration fees collected do not exceed the actual costs incurred by the rental car company to license, title, inspect, and register rental vehicles. Any amounts collected by the rental car company in excess of the actual amount of its costs incurred shall be retained by the rental car company and applied to the costs incurred in the next calendar year for licensing, titling, inspecting, and registering rental vehicles. In that event, the good faith estimate of any vehicle license and registration fees to be charged by the company in the next calendar year shall be reduced to take into account the excess amount collected from the prior year. (1989, c. 631, s. 2; c. 770, s. 62; 2007-235, s. 1.)

§ 66-202. Rental car advertising.

(a) Except as set forth in subsections (d) and (e) of this section and G.S. 66-204(a), a rental car company shall only advertise and charge a rental rate that includes the entire amount, except taxes and a mileage charge, if any, that a renter must pay to hire or lease a vehicle for the period of time to which the rental rate applies.

(b) If a rental car company states a rental rate in a print advertisement or in an in-person or computer-transmitted quotation contained in the rental car company's proprietary computer reservation system, the rental car company shall clearly disclose or cause to be disclosed in that advertisement or quotation the terms of any mileage conditions relating to the advertised or quoted rental rate, including, but not limited to: To the extent applicable, the amount of mileage and fuel charges; the number of miles for which no charge will be imposed; and a description of the geographic driving limitations, if any, within the United States and Canada.

(c) A rental car company shall also include in all price advertising the daily rate it charges for collision damage waivers; shall state in such advertising that collision damage waivers are not required; and shall state that prospective renters should examine or inquire about their automobile insurance policies to see whether such policies will cover damage to rental vehicles.

(d) For a rental rate stated in an advertisement, quotation, or reservation for an airport location, a rental car company shall clearly and conspicuously disclose the existence and actual amount of the airport charges or fees, if any. For a rental rate stated in an advertisement, quotation, or reservation involving more than one airport location, a rental car company shall clearly and conspicuously disclose the existence and range of airport charges or fees, if any, or the maximum airport charge or fee. A rental car company, in its discretion, may elect to separate vehicle license and registration fees from its rental rate. For a rental rate stated in an advertisement, quotation, or reservation with a separate vehicle license and registration fee, a rental company shall clearly and conspicuously disclose the existence and range of vehicle license and registration fees or the maximum vehicle license and registration fee. For purposes of this section, advertisements shall include radio, television, other electronic media, and print. For purposes of this section, quotations and reservations shall include in-person or proprietary computer-transmitted reservation systems.

(e) A rental car company shall clearly and conspicuously display the total estimated price, and the amount of the airport charges or fees, if any, and vehicle license and registration fees, if any, in any proprietary computer-assisted reservation system, shown or referenced on the same page on the computer screen viewed by the renter as the displayed rental rate and in a print size not smaller than the print size of the rental rate. When providing a renter a quotation of a rental rate in person or over a voice system, a rental car company shall inform the renter of the total estimated price, inclusive of all taxes, fees, and charges, or shall disclose the amount of airport charges or fees, if any, and vehicle license and registration fees, if any. A rental car company shall separately identify the amount and existence of airport charges or fees and vehicle license and registration fees on the rental agreement. (1989, c. 631, s. 2; c. 770, s. 62; 2001-432, s. 1; 2007-235, s. 2.)

§ 66-203. Prohibited charges.

(a) No rental car company may charge, in addition to the rental rate, taxes, airport charges and fees, if any, vehicle license and registration fees, if any, and mileage charge, if any, any fee that must be paid by the renter as a condition of hiring or leasing a vehicle, such as, but not limited to, required fuel charges or any fee for transporting the renter to the location where the rented vehicle will be delivered to that person.

(b) If a rental car company delivers a vehicle to a person at a location other than the location where the rental car company normally carries on its business, the rental car company shall not charge that person any amount for the rental for the period before the delivery of the vehicle. If a rental car company picks up a rented vehicle from a person at a location other than the location where the rental car company normally carries on its business the rental car company shall not charge to the renter any amount for the rental for the period after the rented vehicle is available for pickup in accordance with the notification given to the rental car company to pick up the rented vehicle. (1989, c. 631, s. 2; c. 770, s. 62; 2001-432, s. 2; 2007-235, s. 3.)

§ 66-204. Permitted charges.

(a) In addition to the rental rate, taxes, airport charges and fees, if any, vehicle license and registration fees, if any, and mileage charge, if any, a rental car company may charge a renter for an item or service provided in connection with a particular rental transaction if the renter can avoid incurring that charge by choosing not to obtain or utilize the optional item or service. Items and services for which a rental car company may impose an additional charge include, but are not limited to: Optional insurance and accessories requested by the renter unless otherwise prohibited by law; service charges incident to a person's optional return of the vehicle to a location other than the location where the vehicle was hired or leased; optional collision damage waivers; and charges for refueling the vehicle at the conclusion of the rental transaction in the event the rented vehicle is not returned with as much fuel as was in its fuel tank at the beginning of the rental.

(b) A rental car company may also impose an additional charge based on reasonable driving experience criteria established by the rental car company. (1989, c. 631, s. 2; c. 770, s. 62; 2001-432, s. 3; 2007-235, s. 4.)

§ 66-205. Agent licenses required.

No employee or other representative of a rental car company shall solicit or sell any kind of insurance in connection with a rental agreement unless he is duly licensed under Article 33 of Chapter 58 of the General Statutes. (1989, c. 631, s. 2; c. 770, s. 62.)

§ 66-206. Effects of violations.

Any violation of the provisions of this Article constitutes an unfair trade practice under G.S. 75-1.1. (1989, c. 631, s. 2; c. 770, s. 62.)

§ 66-207. Rental car companies assist in publicizing law.

(a) A rental car company shall notify renters of the law requiring motorists to stop for and not pass stopped school buses that are properly marked and designated and that are receiving or discharging passengers. The Division of Motor Vehicles shall design a written notification in English, French, German, Japanese, and Spanish and the notification shall be no more than one side of a page. The Division of Motor Vehicles shall also develop a design for use on placards under subdivisions (b)(2) and (b)(3) of this section. The design may be used or adapted by the rental car company. The placards shall consist of the words "It is unlawful in North Carolina to pass a school bus that is stopped and receiving or discharging passengers.", or a visual symbol indicating passing a stopped school bus is unlawful in North Carolina, or both. The Division of Motor Vehicles shall publish the written notification and the design for placards on the Internet and rental car companies shall obtain both by downloading and printing them from that source.

(b) The notification required under subsection (a) of this section may be made either:

(1) By handing each renter who presents an International Driver Permit with a copy of the written notification prepared by the Division of Motor Vehicles under subsection (a) of this section;

(2) If the rental car company operates airport shuttle buses to transport renters to pick up vehicles, by posting on each bus at least one placard containing a written notification or visual symbol, or both; or

(3) If the rental car company operates a counter at which renters pick up documentation, by posting on that counter or at a place easily visible from the counter at least one placard containing a written notification or visual symbol, or both.

Each placard that contains a written notification shall provide that information in all the languages listed in subsection (a) of this section.

(c) There shall be no civil or criminal liability in negligence nor shall an action under G.S. 66-206 apply for any car rental company that fails to provide the information or post the placard required by this section. (2001-331, s. 2.)

§ 66-208: Reserved for future codification purposes.

Article 29.
Invention Development Services.

§ 66-209. Definitions.

As used in this Article, the following terms shall have the meanings given:

(1) "Contract" or "contract for invention development services" means a contract by which an invention developer undertakes invention development services for a customer for a stated payment or consideration, whether or not the payment or consideration has yet been made.

(2) "Customer" means any natural person who is solicited by, inquires about, seeks the services of, or enters into a contract with an invention developer for invention development services.

(3) "Invention development services" means any act done by or for an invention developer for the procurement or attempted procurement by the invention developer of a licensee or buyer of an intellectual property right in an invention. The term includes the evaluation, perfecting, marketing, brokering, or promoting of an invention, a patent search, and preparation or prosecution of a patent application by a person not registered to practice before the United States Patent and Trademark Office.

(4) "Invention" means any discovery, process, machine, design, formulation, composition of matter, product, concept, or idea, or any combination of these.

(5) "Invention developer" is an individual, firm, partnership, or corporation, or an agent, employee, officer, partner, or independent contractor of one of those entities, that offers to perform or performs invention development services for a customer and that is not:

a. A department or agency of the federal, State, or local government;

b. A charitable, scientific, educational, religious, or other organization qualified under G.S. 105-130.9 or described in Section 170(b)(1)(A) of the Internal Revenue Code of 1986, as amended;

c. A person registered before the United States Patent and Trademark Office acting solely within the scope of that person's professional license;

d. A person, firm, corporation, association, or other entity that does not charge a fee, including reimbursement for expenditures made or costs incurred by the entity, for invention development services other than payment made from a portion of the income received by a customer by virtue of the acts performed by the entity; or

e. An attorney licensed to practice law in North Carolina acting solely within the scope of that person's professional license.

(6) "Business day" means any day other than a Saturday, Sunday, or legal holiday. (1989, c. 746, s. 1; c. 770, s. 62.1(1), (2); 1991, c. 235, s. 1.)

Editor's Note. — Session Laws 2001-424, ss. 15.1(a) and (b), provide: "(a) Prior to (i) the transfer of any patentable intellectual property or (ii) the release of any State grants or loans to non-State entities for purposes related to the development of patentable intellectual property, the transferring State agency, institution, or other entity of the State shall prepare and submit to the Governor, the Joint Legislative Commission on Governmental Operations, and the Chairs of the House of Representatives Science and Technology Committee and the Senate Information Technology Committee a written evaluation of the following matters:

"(1) If the proposed or pending transaction involves the transfer of patentable intellectual property developed by State employees within the scope of their employment:

"a. The nature of the State's interest in the patentable intellectual property.

"b. The potential value of the State's interest in the patentable intellectual property.

"c. How to best protect the State's interest in the patentable intellectual property, as appropriate.

"(2) If the proposed or pending transaction involves the release of State grants or loans to a non-State entity for purposes related to the development of patentable intellectual property, the measures employed by the non-State entity to assure that the State funds do not inappropriately inure to the benefit of individuals serving in an official capacity for the State, a State agency, or the non-State entity that receives the funds.

"(b) The provisions of subsection (a) of this section [s. 15.1(a) of Session Laws 2001-424] do not apply to The University of North Carolina and its constituent institutions, or to the North Carolina Community Colleges System, or to employees of these respective institutions who are subject to the intellectual property and inventor policies of the institutions employing them."

§ 66-210. Disclosures made prior to contract.

In either the first written communication from the invention developer to a specific customer, or at the first personal meeting between the invention developer and a customer whichever may first occur, the invention developer shall make a written disclosure to the customer of the information required in this section which includes:

(1) The median fee charged to all of the invention developer's customers who have signed contracts with the developer in the preceding six months, excluding customers who have signed in the preceding 30 days;

(2) A single statement setting forth (i) the total number of customers who have contracted with the invention developer, except that the number need not reflect those customers who have contracted within the preceding 30 days, and (ii) the number of customers who have received, by virtue of the invention developer's performance of invention development services, an amount of money in excess of the amount of money paid by those customers to the invention developer pursuant to a contract for invention development services;

(3) The following statement: "Unless the invention developer is a lawyer or person registered before the United States Patent and Trademark Office, he is NOT permitted to give you legal advice concerning patent, copyright, trademark law, or the law of unfair competition or to advise you of whether your idea or invention may be patentable or may be protected under the patent, copyright, or trademark laws of the United States, or any other law. No patent, copyright, or trademark protection will be acquired for you by the invention developer. Your failure to inquire into the law governing patent, trademark, or copyright matters may jeopardize your rights in your idea or invention, both in the United States and in foreign countries. Your failure to identify and investigate existing patents, trademarks, or registered copyrights may place you in jeopardy of infringing the copyrights, patent, or trademark rights of other persons if you proceed to make, use, distribute, or sell your idea or invention." (1989, c. 746, s. 1; c. 770, s. 62.1(1), (2); 1991, c. 235, s. 1.)

§ 66-211. Standard provisions for cover notice.

(a) A contract for invention development services must have a conspicuous and legible cover sheet attached. The cover sheet must set forth:

(1) The name, home address, office address, and local address of the invention developer; and

(2) The following notice printed in bold-faced type of not less than 10-point size:

THIS CONTRACT BETWEEN YOU AND AN INVENTION DEVELOPER IS REGULATED BY ARTICLE 29 OF CHAPTER 66 OF THE GENERAL STATUTES OF THE STATE OF NORTH CAROLINA. YOU ARE NOT PERMITTED OR REQUIRED TO MAKE ANY PAYMENTS UNDER THIS CONTRACT UNTIL FOUR WORKING DAYS AFTER YOU SIGN THIS CONTRACT AND RECEIVE A COMPLETED COPY OF IT.

YOU CAN TERMINATE THIS CONTRACT AT ANY TIME BEFORE YOU MAKE PAYMENT. YOU CAN TERMINATE THIS CONTRACT SIMPLY BY NOT SUBMITTING PAYMENT.

IF YOU ASSIGN EVEN A PARTIAL INTEREST IN THE INVENTION TO THE INVENTION DEVELOPER, THE INVENTION DEVELOPER MAY HAVE THE RIGHT TO SELL OR DISPOSE OF THE INVENTION WITHOUT YOUR CONSENT AND MAY NOT HAVE TO SHARE THE PROFITS WITH YOU.

THE TOTAL NUMBER OF CUSTOMERS WHO HAVE CONTRACTED WITH THE INVENTION DEVELOPER SINCE (year) IS (number). THE TOTAL NUMBER OF CUSTOMERS KNOWN BY THIS INVENTION DEVELOPER TO HAVE RECEIVED BY VIRTUE OF THIS INVENTION DEVELOPER'S PERFORMANCE, AN AMOUNT OF MONEY IN EXCESS OF THE AMOUNT PAID BY THE CUSTOMER TO THIS INVENTION DEVELOPER IS (number).

YOU ARE ENCOURAGED TO CONSULT WITH A QUALIFIED ATTORNEY BEFORE SIGNING THIS CONTRACT. BY PROCEEDING WITHOUT THE ADVICE OF A QUALIFIED ATTORNEY YOU COULD LOSE ANY RIGHTS YOU MIGHT HAVE IN YOUR IDEA OR INVENTION.

(b) The invention developer shall complete the cover sheet with the proper information to be provided in the blanks. In the first blank the invention developer shall enter the year that the invention developer began business, or January 1, 1990, whichever is earlier. The numbers entered in the last two blanks need not include those who have contracted with the invention developer during the 30 days immediately preceding the date of the contract. If the number to be inserted in the third blank is zero, it must be so stated.

(c) The cover notice may not contain anything in addition to the information required by subsection (a) of this section. (1989, c. 746, s. 1; c. 770, s. 62.1(1)-(3); 1991, c. 235, s. 1.)

§ 66-212. Contracting requirements.

(a) Each contract for invention development services by which an invention developer undertakes invention development services for a customer is subject to this act. The contract must be in writing and the invention developer shall give a copy of the contract to the customer at the time the customer signs the contract.

(b) If it is the invention developer's normal practice to seek more than one contract in connection with an invention, or if the invention developer normally seeks to perform services in connection with an invention in more than one phase with the performance of each phase covered in one or more subsequent contracts, the invention developer shall give to the customer at the time the customer signs the first contract:

(1) A written statement describing that practice; and

(2) A written summary of the developer's normal terms, if any, of subsequent contracts, including the approximate amount of the developer's normal fees or other consideration, if any, that may be required from the customer.

(c) For the purposes of this section, delivery of a promissory note, check, bill of exchange, or negotiable instrument of any kind to the invention developer or to a third party for the benefit of the invention developer irrespective of the date or dates appearing in that instrument is payment.

(d) Notwithstanding any contractual provisions of [to] the contrary, payment for invention development services may not be required, made, or received before the fourth business day after the day on which the customer receives a copy of the contract for invention development services signed by the invention developer and the customer.

(e) Until the payment for invention development services is made, the parties during the contract for invention development services have the option to terminate the contract. The customer may exercise the option by refraining from making payment to the invention developer. The invention developer may exercise the option to terminate by giving to the customer written notice of its exercise of the option. The written notice becomes effective on receipt by the customer. (1989, c. 746, s. 1; c. 770, s. 62.1(1), (2); 1991, c. 235, s. 1.)

§ 66-213. Mandatory contract terms.

(a) A contract for invention development services shall set forth the information required in this section in at least 10-point type or equivalent size if handwritten.

(b) The contract shall describe fully and in detail the acts or services that the invention developer contracts to perform for the customer.

(c) The contract shall include the terms and conditions of payment and contract termination rights required by G.S. 66-212(e).

(d) The contract shall state whether the invention developer contracts to construct one or more prototypes, models, or devices embodying the customer's invention, the number of such prototypes to be constructed, and whether the invention developer contracts to sell or distribute such prototypes, models, or devices.

(e) If an oral or written estimate of projected customer sales, profits, earnings and/or royalties is made by the invention developer, the contract shall state the estimate and the data upon which it is based.

(f) The contract shall state the expected date of completion of the invention development services, whether or not time is of the essence, and whether or not the terms include provisions in case of delay past the expected date of completion.

(g) The contract shall explain that the invention developer is required to maintain all records and correspondence relating to performance of the invention development services for that customer for a period not less than three years after expiration of the term of the contract for invention development services. Further, such records and correspondence will be made available to the customer or his representative for review and copying at the customer's expense on the invention developer's premises during normal business hours upon seven days' written notice, the time period to begin from the date the notice is placed in the United States mail properly addressed and first class postage prepaid.

(h) The contract shall state the name of the person or firm contracting to perform the invention development services, all names under which said person or firm is doing or has done business as an invention developer for the previous 10 years, the names of all parent and subsidiary companies to the firm, and the names of all companies that have a contractual obligation to the firm to perform invention development services.

(i) The contract shall state the invention developer's principal business address and the name and address of its agent in this State who is authorized to receive service of process in North Carolina. (1989, c. 746, s. 1; c. 770, s. 62.1(1), (2), (4); 1991, c. 235, s. 1.)

§ 66-214. Financial requirements.

(a) Except as provided by subsection (c) of this section, each invention developer doing business in this State as defined by the North Carolina General Statutes shall maintain a bond issued by a surety company authorized to do business in this State. The principal sum of the bond must be at least five percent (5%) of the invention developer's gross income from the invention development business in this State during the invention developer's last fiscal year or twenty-five thousand dollars ($25,000), whichever is greater. The invention developer shall file a copy of the bond with the Secretary of State before the day on which the invention developer begins business in this State. The invention developer shall have 90 days after the end of each fiscal year within which to change the bond as may be necessary to conform to the requirement of this subdivision.

(b) The bond required by subsection (a) of this section must be in favor of the State of North Carolina for the benefit of any person who, after entering into a contract for invention development services with an invention developer is damaged by fraud, dishonesty, or failure to provide the services of the invention developer in performance of the contract. Any person claiming against the bond may maintain an action at law against the invention developer and surety. The aggregate liability of the surety to all persons for all breaches of conditions of the bond required by the subsection is limited to the amount of the bond.

(c) Instead of furnishing the bond required by subsection (a) of this section, the invention developer may deposit with the Secretary of State a cash deposit equal to the amount of the bond required by this section. The cash deposit may be satisfied by:

(1) Certificates of deposit payable to the Secretary of State issued by banks doing business in this State and insured by the Federal Deposit Insurance Corporation;

(2) Investment certificates of share accounts assigned to the Secretary of State and issued by a savings and loan association doing business in this State, and insured by the Federal Savings and Loan Insurance Corporation;

(3) Bearer bonds issued by the United States government or by this State; or

(4) Cash deposit with the Secretary of State. (1989, c. 746, s. 1; c. 770, s. 62.1(1), (2); 1991, c. 235, s. 1.)

§ 66-215. Remedies.

(a) Any contract for invention development services that does not substantially comply with this Article is voidable at the option of the customer. A contract for invention development services entered into in reliance on any false, fraudulent, or misleading information, representation, notice, or advertisement of the invention developer is voidable at the option of the customer. Any waiver by the customer of any provision of this act shall be deemed contrary to public policy and shall be void and unenforceable.

(b) Any customer or person who has been injured by a violation of this Article by an invention developer, by a false or fraudulent statement, representation, or omission of material fact by an invention developer, or by failure of an invention developer to make all disclosures required by this Article may recover in a civil action against the invention developer:

(1) Court costs;
(2) Attorneys['] fees; and
(3) The amount of actual damages, if any, sustained by the customer, which damages may be increased to an amount not to exceed three times the damages sustained. (1989, c. 746, s. 1; c. 770, s. 62.1(1), (2); 1991, c. 235, s. 1.)

Editor's Note. — An apostrophe has been inserted in brackets following "Attorneys" in subdivision (b)(2) for grammatical consistency.

§ 66-216. Enforcement.

The Attorney General shall enforce this Article and may recover a civil penalty not to exceed twenty-five thousand dollars ($25,000) for each violation of this Article and may seek equitable relief to restrain the violation of this Article. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1989, c. 746, s. 1; c. 770, s. 62.1(1), (2); 1991, c. 235, s. 1; 1998-215, s. 97.)

§§ 66-217 through 66-219: Reserved for future codification purposes.

ARTICLE 30.

Credit Repair Services Act.

§ 66-220. Short title and purpose.

(a) This Article shall be known and may be cited as the Credit Repair Services Act.

(b) The General Assembly recognizes that many of its citizens rely heavily on favorable credit ratings in order to obtain goods and services, and that some of these citizens are unable to secure credit because of unfavorable credit histories. The General Assembly further recognizes that consumers sometimes need assistance in obtaining credit or in correcting erroneous credit histories, and that this need has given rise to the establishment of businesses organized for the purpose of providing credit repair services. The purpose of this Article is to ensure that businesses offering credit repair services are providing these services in a manner that is fair and reasonable to the consuming public. (1991, c. 327, s. 1.)

§ 66-221. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Credit repair business" means any person who, with respect to the extension of credit by others, sells, provides, or performs, or represents that such person can or will sell, provide, or perform any of the following services in return for the payment of money or other valuable consideration:
  a. Improving, repairing, or correcting a consumer's credit record, history, or rating;
  b. Obtaining revolving charge card credit or retail installment credit;
  c. Providing advice or assistance to a consumer with regard to either sub-subdivision a. or b. above.

(2) "Credit repair business" does not include:
  a. Any bank, credit union, or savings institution organized and chartered under the laws of this State or the United States, or any consumer finance lender licensed pursuant to Article 15 of Chapter 53 of the General Statutes;
  b. Any nonprofit organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3));
  c. Any person licensed as a real estate broker or real estate salesman by this State where the person is acting within the course and scope of the license;
  d. Any person licensed to practice law in this State where the person renders services within the course and scope of that person's practice as a lawyer;
  e. Any broker-dealer registered with the Securities and Exchange Commission or the Commodities Future Trading Commission where the broker-dealer is acting within the course and scope of that regulation; or
  f. Any consumer reporting agency as defined in the Federal Fair Credit Reporting Act.

(3) "Consumer" means any individual who is solicited to purchase or who purchases the services of a credit repair business. (1991, c. 327, s. 1.)

§ 66-222. Bond or trust account required.

Every credit repair business shall obtain a surety bond issued by a surety company authorized to do business in this State, or shall establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. The amount of the bond or trust account shall be ten thousand dollars ($10,000). The bond or trust account shall be in favor of the State of North Carolina. Any person damaged by the credit repair business' breach of contract or of any obligation arising therefrom, or by any violation of this Article, may bring an action against the bond or trust account to recover damages suffered. The aggregate liability of the surety or trustee shall be only for actual damages and in no event shall exceed the amount of the bond or trust account. (1991, c. 327, s. 1.)

§ 66-223. Prohibited acts.

A credit repair business and its salespersons, agents, and representatives, and independent contractors who sell or attempt to sell the services of a credit repair business, shall not do any of the following:

(1) Charge or receive any money or other valuable consideration prior to full and complete performance of the services that the credit repair business has agreed to perform for or on behalf of the consumer;

(2) Charge or receive any money or other valuable consideration solely for referral of the consumer to a retail seller or to any other credit grantor who will or may extend credit to the consumer, if the credit that is or will be extended to the consumer is upon substantially the same terms as those available to the general public;

(3) Represent that it can directly or indirectly arrange for the removal of derogatory credit information from the consumer's credit report or otherwise improve the consumer's credit report or credit standing, provided, this shall not prevent truthful, unexaggerated statements about the consumer's rights under existing law regarding his credit history or regarding access to his credit file;

(4) Make, or counsel or advise any consumer to make, any statement that is untrue or misleading and which is known or which by the exercise

of reasonable care should be known, to be untrue or misleading, to a consumer reporting agency or to any person who has extended credit to a consumer or to whom a consumer is applying for an extension of credit, with respect to a consumer's creditworthiness, credit standing, or credit capacity; or

(5) Make or use any untrue or misleading representations in the offer or sale of the services of a credit repair business or engage, directly or indirectly, in any act, practice, or course of business which operates or would operate as a fraud or deception upon any person in connection with the offer or sale of the services of a credit repair business. (1991, c. 327, s. 1.)

§ 66-224. Contractual requirements.

(a) Effective October 1, 1991, every contract between a consumer and a credit repair business for the purchase of the services of the credit repair business shall be in writing, dated, signed by the consumer, and shall include the following:

(1) A conspicuous statement in size equal to at least 10-point boldface type, in immediate proximity to the space reserved for the signature of the consumer, as follows:
"YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THE TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT."

(2) The terms and conditions of payment, including the total of all payments to be made by the consumer, whether to the credit repair business or to some other person;

(3) A complete and detailed description of the services to be performed and the results to be achieved by the credit repair business for or on behalf of the consumer, including all guarantees and all promises of full or partial refunds and a list of the adverse information appearing on the consumer's credit report that the credit repair business expects to have modified;

(4) The principal business address of the credit repair business and the name and address of its agent in this State authorized to receive service of process; and

(5) One of the following statements, as appropriate, in substantially the following form:

a. "As required by North Carolina law, this credit repair business has secured a bond by ________ (name and address of surety company), a surety authorized to do business in this State. Before signing a contract with this business, you should check with the surety company to determine the bond's current status.", or

b. "As required by North Carolina law, this credit repair business has established an escrow account ________ (number) with ________ (name and address of bank or savings institution). Before signing a contract with this business, you should check with the bank or savings institution to determine the current status of the account."

(b) The contract shall be accompanied by a completed form in duplicate, captioned "NOTICE OF CANCELLATION", which shall be attached to the contract and easily detachable, and which shall contain in at least 10-point boldface type the following statement:

"NOTICE OF CANCELLATION

YOU MAY CANCEL THIS CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE THE CONTRACT IS SIGNED.

IF YOU CANCEL, ANY PAYMENT MADE BY YOU UNDER THIS CONTRACT WILL BE RETURNED WITHIN 10 DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE.

TO CANCEL THIS CONTRACT, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE, OR ANY OTHER WRITTEN NOTICE, TO

_________________________ (Name of Seller)
At _________________________ (Address of Seller)
_________________ (Place of Business) NOT LATER
THAN MIDNIGHT _________________ (Date).

I HEREBY CANCEL THIS TRANSACTION.

____
Date Buyer's Signature".

A copy of the fully completed contract and all other documents the credit repair business requires the consumer to sign shall be given by the credit repair business to the consumer at the time they are signed. (1991, c. 327, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 19.)

§ 66-225. Violations.

(a) If a credit repair business uses any untrue or misleading statements in connection with a credit repair contract, fails to fully comply with the requirements of this Article, or fails to comply with the terms of the contract or any obligation arising therefrom, then, upon written notice to the credit repair business, the consumer may void the contract, and shall be entitled to receive from the credit repair business all sums paid to the credit repair business, and recover any additional damages including reasonable attorneys' fees.

(b) Any waiver by a consumer of any of the provisions of this Article shall be deemed void and unenforceable by a credit repair business.

(c) Upon complaint of any person that a credit repair business has violated the provisions of this Article, the superior court shall have jurisdiction to enjoin that defendant from further such violations.

(d) In a proceeding involving this Article, the burden of proving an exemption or an exception from the definition of a credit repair business shall be borne by the person claiming the exemption or exception.

(e) The remedies provided herein shall be in addition to any other remedies provided for by law or in equity.

(f) The violation of any provision of this Article shall constitute an unfair trade practice under G.S. 75-1.1 and the violation of any provision of this Article shall constitute a Class I felony. (1991, c. 327, s. 1; 1993, c. 539, s. 1283; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 66-226. Scope.

The provisions of this Article shall apply in all circumstances in which any party to the contract conducted any contractual activity, including but not limited to solicitation, discussion, negotiation, offer, acceptance, signing, or performance in this State. (1991, c. 327, s. 1.)

§§ 66-227 through 66-229: Reserved for future codification purposes.

ARTICLE 31.

Membership Camping Act.

§ 66-230. Title.

This Article shall be known and may be cited as the "Membership Camping Act". (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 1009, s. 4, enacted this article as Article 30 of this chapter, G.S. 66-220 et seq. It has been redesignated as Article 31, G.S. 66-230 et seq., at the direction of the Revisor of Statutes.

§ 66-231. Applicability.

This Article shall apply to each membership camping contract executed at least in part in this State after January 1, 1993, regardless of the location of the membership camping operator's principal office or his campground or recreational facilities. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-232. Definitions.

For purposes of this Article the following definitions apply:

(1) "Agreement" means a membership camping agreement.

(2) "Blanket encumbrance" means any mortgage, deed of trust, option to purchase, vendor's lien or interest under a contract or agreement of sale, judgment lien, federal or State tax lien, or other material lien or encumbrance which secures or evidences the obligation to pay money or to sell or convey all or part of a campground located in this State, made available to purchasers by the membership camping operator and which authorizes, permits, or requires the foreclosure or other disposition of the campground. Blanket encumbrance shall include the lessor's interest in a lease of all or part of a campground which is located in this State and which is made available to purchasers by a membership camping operator. Blanket encumbrance shall not include a lien for taxes or assessments levied by a public body which are not yet due and payable.

(3) "Business day" means any day except Sunday or a legal holiday.

(4) "Camping site" means a space designed and promoted for the purpose of locating a trailer, tent, tent trailer, recreational vehicle, pickup camper, van or other similar device used for camping.

(5) "Campground" means any single tract or parcel of real property within the State on which there are at least 10 camping sites.

(6) "Contract" means a membership camping contract.

(7) "Contract cost" means the total consideration paid by a purchaser pursuant to a contract including but not limited to:
   a. Any initiation or nonrecurring fee charged;
   b. All periodic fees required by the contract;
   c. All dues or maintenance fees; and
   d. All finance charges, time-price differentials, interest, and other similar fees and charges.

(8) "Facility" means an amenity within a campground set aside or otherwise made available to purchasers for their use and enjoyment of the campground, and may include campsites, swimming pools, tennis courts, recreational buildings, boat docks, restrooms, showers, laundry rooms, and trading posts or grocery stores.

(9) "Membership camping contract" or "membership camping agreement" means any written agreement of more than one year's duration, executed in whole or in part within this State, which grants to a purchaser a right or license to use the campground of a membership camping operator or any portion thereof. Any agreement which constitutes a "time share instrument" as defined in G.S. 93A-41 is excluded from this definition.

(10) "Membership camping operator" means any person who owns or operates a campground and offers or sells membership camping contracts. A membership camping operator shall not include:

a. An enterprise that is exempt from federal income tax under § 501(c) of the Internal Revenue Code;

b. An enterprise that is exempt from State income tax under Article 4 of Chapter 105 of the General Statutes; or

c. Mobile home parks wherein the residents occupy the premises as their primary homes or have leased or purchased a lot for their exclusive use.

(11) "Offer," "offer to sell," "offer to execute" or "offering" means any offer, solicitation, advertisement, or inducement to execute a membership camping agreement.

(12) "Person" means any individual, corporation, partnership, company, unincorporated association, or any other legal entity other than a government or agency or a subdivision thereof.

(13) "Purchaser" means a person who enters into a membership camping contract with the membership camping operator.

(14) "Purchase money" means any money, currency, note, security, or other consideration paid by the purchaser for a membership camping agreement.

(15) "Reciprocal program" means any arrangement under which a purchaser is permitted to use camping sites or facilities at one or more campgrounds not owned or operated by the membership camping operator with whom the purchaser has entered into a membership camping contract.

(16) "Salesperson" means an individual, other than a membership camping operator, who offers to sell a membership camping contract by means of a direct sales presentation, but does not include a person who merely refers a prospective purchaser to a salesperson without making any direct sales presentation. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-233. Administration; unlawful offer or execution of membership camping contract.

(a) This Article shall be administered by the Secretary of State of North Carolina or his designee, and shall be enforced by the Attorney General of North Carolina or his designee.

(b) It shall be unlawful for any membership camping operator to offer to sell any membership camping contract in this State unless he is registered with the Secretary of State. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-234. Registration of membership camping operator.

(a) The application for registration shall be on a form prescribed by the Secretary of State and shall include the following:

(1) The applicant's name, address, and the organizational form of the business, including the date, and jurisdiction under which the busi-

ness was organized; the address of each of its offices in this State; and the name and address of each campground located in this State, which is owned or operated, in whole or in part, by the applicant;

(2) The name, address, and principal occupation for the past five years of every officer of the applicant, including its principal managers, and the extent and nature of the interest of each person at the time the application is filed;

(3) A list of all owners of ten percent (10%) or more of the capital stock of the applicant, except that this list is not required if the applicant is a company required to report under the Securities and Exchange Act of 1934;

(4) A brief description of and a certified copy of the instrument which creates the applicant's ownership of, or other right to use the campground and the facilities at the campground which are to be available for use by purchasers, and a brief description of any material encumbrance, together with a copy of any lease, license, franchise, reciprocal agreement or other agreement entitling the applicant to use such campground and facilities, and any material provision of the agreement which restricts a purchaser's use of such campground or facilities;

(5) A sample copy of each instrument which will be delivered to a purchaser to evidence his membership in the campground and a sample copy of each agreement which a purchaser will be required to execute;

(6) A list of special taxes or assessments, whether current or proposed, which affect the campground;

(7) A copy of the disclosure statement required by this Article;

(8) A narrative description of the promotional plan for the sale of the membership camping contracts;

(9) A statement of the relationship, if any, between the applicant and other parties owning, controlling or managing the campground and the expected duration of that relationship. If the relationship is a contractual one, a statement of the methods and conditions under which the relationship can be terminated prior to the expected termination of the relationship;

(10) A complete list of locations and addresses of any and all sales offices located within the State;

(11) The names of any other states or foreign countries in which an application for registration of the membership camping operator or the membership camping contract or any similar document has been filed; and

(12) A brief description of the membership camping operator's experience in the membership camping business, including the length of time such operator has been in the membership camping business; and a statement detailing whether the applicant within the past five years has been convicted of any misdemeanor or felony involving theft, fraud, dishonesty, or moral turpitude, or whether the applicant has been enjoined from, had any civil penalty assessed for, or been found to have engaged in any violation of any law designed to protect consumers. If the applicant is a corporation, this statement shall be provided for each officer of the corporation.

(b) The application shall be signed by the membership camping operator, an officer or general partner thereof or by another person holding a power of attorney for this purpose from the membership camping operator. If the application is signed pursuant to a power of attorney, a copy of the power of attorney shall be included with the application.

(c) The application shall be submitted along with the appropriate application fee.

(d) The registration of the membership camping operator shall be renewed annually with the fee required in G.S. 66-236 not later than 30 days prior to the anniversary of the current registration. The application shall include all changes which have occurred in the information included in the application previously filed.

(e) Registration with the Secretary of State shall not be deemed to be an approval or endorsement by the Secretary of State of the membership camping operator, his membership camping contract, or his campground, and any attempt by the membership camping operator to indicate that registration constitutes such approval or endorsement shall be unlawful. (1991 (Reg. Sess., 1992), c. 1009, s. 4; 1995 (Reg. Sess., 1996), c. 742, s. 34.)

§ 66-235. Time of effect of registration.

Upon receipt of the original application for registration in proper form, the Secretary of State shall, within 10 business days, issue a notice to the applicant that the Secretary of State has received the registration. Within 30 days thereafter, the Secretary of State shall notify the operator that the registration has been accepted or rejected, and if rejected, a brief statement explaining the reason. Registration shall be effective upon notice of acceptance by the Secretary of State. Renewal of registration shall be effective upon the anniversary of the current registration or 30 days after receipt, whichever date occurs last, unless otherwise rejected. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-236. Registration fees.

An applicant for registration under this Article must include the fee set out in the following table with the application for registration:

Application	Amount
Initial registration as a membership camping operator	$1,500
Renewal of registration as a membership camping operator	1,000
Initial registration as a salesperson	10
Renewal of registration as a salesperson	10

Fees collected under this section shall be applied to the cost of administering this Article. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-237. Registration of salespersons.

(a) It shall be unlawful for any salesperson to offer to sell any membership camping contract in this State unless he is registered with the Secretary of State. The application of a salesperson for registration shall be on a form prescribed by the Secretary of State and shall include the following:

(1) A statement detailing whether the applicant within the past five years has been convicted of any misdemeanor or felony involving theft, fraud, dishonesty, or moral turpitude, or whether the applicant has been enjoined from, had any civil penalty assessed for, or been found to have engaged in any violation of any law designed to protect consumers, and

(2) A statement describing the applicant's employment history for the past five years and whether any termination of employment during the last five years was occasioned by any theft, fraud, or act of dishonesty.

(b) Registration shall be effective for a period of one year. Registration shall be renewed annually by the filing of a form prescribed by the Secretary of State for such purpose. The registration application or the renewal application shall automatically become effective upon the expiration of seven business days following the filing with the Secretary of State. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-238. Membership camping operator's disclosure statement.

(a) Every membership camping operator, salesperson, or other person who is in the business of offering for sale or transfer the rights under existing membership camping contracts for a fee shall disclose the following information to a purchaser before the purchaser signs a contract or gives any money or thing of value for the purchase of a contract. The disclosures shall be delivered to the purchaser prior to the time the contract is signed and must be presented in a clear, legible format prescribed by the Secretary of State.

(b) The disclosures shall consist of the following:

(1) A cover page containing only the following in the order stated:

a. The words "MEMBERSHIP CAMPING OPERATOR'S DISCLOSURE STATEMENT": printed in boldface type of a minimum size of 10 points, followed by;

b. The name and principal business address of the membership camping operator, followed by;

c. A statement that the membership camping operator is in the business of offering for sale membership camping contracts, followed by;

d. The following, printed in boldface type of a minimum size of 10 points: IMPORTANT! READ THIS DISCLOSURE STATEMENT BEFORE YOU SIGN ANYTHING. THE LAW REQUIRES THAT YOU GET A COPY OF THIS DISCLOSURE STATEMENT BEFORE YOU SIGN. IF YOUR SALESPERSON TELLS YOU ANYTHING DIFFERENT FROM WHAT IS WRITTEN, THEN DO NOT SIGN. DO NOT BUY THIS MEMBERSHIP ASSUMING THAT YOU WILL BE ABLE TO RESELL IT, followed by;

e. The following language, printed in boldface type of a minimum size of 10 points:

YOU HAVE A 3-DAY RIGHT TO CANCEL A CAMPING MEMBERSHIP CONTRACT. THIS RIGHT OF CANCELLATION CANNOT BE WAIVED. YOUR RIGHT TO CANCEL ENDS AT MIDNIGHT ON THE 3RD BUSINESS DAY FOLLOWING THE DATE ON WHICH THE CONTRACT WAS SIGNED. IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS, CONTACT THE NORTH CAROLINA ATTORNEY GENERAL'S OFFICE.

(2) The following pages of the disclosure statement shall contain all of the following:

a. The name of the operator and the address of the operator's principal place of business in North Carolina, or if the operator has no place of business in North Carolina, the operator's principal place of business;

b. A brief description of the nature of the purchaser's right or license to use the campground and the facilities which are to be available for use by purchasers;

c. A brief description of the membership camping operator's experience in the membership camping business, including the length of time such operator has been in the membership camping business;

d. The location of each of the campgrounds which is to be available for use by purchasers, excluding campgrounds which will be available to a purchaser only if he is a member in good standing of a reciprocal program; and a description of the facilities at each campground then available for use by purchasers and those which are represented to purchasers as being planned, together with a brief description of any facilities that are or will be available to nonpurchasers or nonmembers;

e. As to all memberships offered by the membership camping operator at each campground:
  1. The form of membership offered;
  2. The types of duration of membership along with a summary of the major privileges, restrictions, and limitations applicable to each type;
  3. Provisions, if any, that have been made for public utilities at each campsite including water, electricity, telephone, and sewage facilities; and
  4. The maximum number of current memberships to be sold per site at that campground.

f. Any initial, additional, or special fee due from the purchaser together with a description of the purpose and method of calculating the fee;

g. A general description of any financing offered or available through the membership camping operator;

h. Any schedule of fees or charges that purchasers are or may be required to pay for use of the campground or any facilities or reciprocal program;

i. The extent to which financial arrangements, if any, have been provided for the completion of facilities, together with a statement of the membership camping operator's obligation to complete planned facilities. The statement shall include a description of any restrictions or limitations on the membership camping operator's obligation to begin or to complete the facilities;

j. Any services which the membership camping operator currently provides or expenses he pays which are expected to become the responsibility of the purchasers, including the projected liability which each such service or expense may impose on each purchaser;

k. A summary or copy, whether by way of supplement or otherwise, of the rules, restrictions, or covenants regulating the purchaser's use of the campground and the facilities which are to be available for use by the purchasers, including a statement of whether and how the rules, restrictions, or covenants may be changed;

l. A description of any restraints on the transfer of the membership camping contract;

m. A statement of the policies covering the availability of campsites, the availability of reservations, and the conditions under which they are made;

n. A statement of any grounds for forfeiture of a purchaser's membership camping contract;

o. A statement describing the material terms and conditions of any reciprocal program to be available to the purchaser including a statement concerning whether the purchaser's participation in any reciprocal program is dependent upon the continued affiliation of the membership camping operator with that reciprocal program and whether the membership camping operator reserves the right to terminate such affiliation.

(3) The membership camping operator shall promptly amend his membership camping operator's disclosure statement to reflect any mate-

rial change in the campground or its facilities. He shall also file within 30 days any such amendments with the Secretary of State. Each disclosure statement provided to a prospective purchaser must contain the most recent date when the statement was revised. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-239. Contract terms.

(a) The membership camping operator shall deliver to the purchaser a fully executed copy of a membership camping contract in writing, which contract shall include at least the following information:

(1) The name of the membership camping operator and the address of its principal place of business;

(2) The actual date the membership camping contract was executed by the purchaser;

(3) The total financial obligation imposed on the purchaser by the contract, including the initial purchase price and any additional charge the purchaser may be required to pay;

(4) A description of the nature and duration of the membership being purchased;

(5) A statement that the membership camping operator is required by law to provide each purchaser with a copy of the membership camping operator's disclosure statement prior to execution of the contract and that failure to do so is a violation of the law;

(6) The full name of each salesperson involved in the promotion and sale of the membership camping contract; and

(7) In immediate proximity to the space reserved in the contract for the signature of the purchaser and in boldface type of a minimum size of 10 points, a statement in substantially the following form: "You the buyer, may cancel this contract at any time prior to midnight of the third business day after the date of this contract. See the attached notice of cancellation form for an explanation of this right." (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-240. Cancellation.

In addition to any other right to revoke an offer or cancel a sale or contract, the purchaser has the right to cancel a membership camping contract sale until midnight of the third business day after the purchaser signs the contract.

(1) The membership camping operator must furnish the purchaser, at the time the purchaser signs the membership camping contract or otherwise agrees to buy services from the membership camping operator, a completed form in duplicate, captioned "NOTICE OF CANCELLATION" which shall contain in 10 point boldface type the following information and statements in the same language, e.g., Spanish, as that used in the contract:

"NOTICE OF CANCELLATION

(Enter date of transaction) ______________________________
(date)

You, the purchaser, may cancel this transaction, without any penalty or obligation, within three business days from the date above. Business days are all days other than Sundays and legal holidays. You must cancel in writing. If given by mail, notice of cancellation is given when it is deposited in the United States mail properly addressed and postage prepaid.

If you cancel, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 30 days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice to

____
(Name of membership camping operator)
at ____
(Membership camping operator's mailing and physical address)
not later than midnight of
____
(date)
I hereby cancel this transaction.
____
(date)
____
(Purchaser's signature)"

(2) The membership camping operator shall, before furnishing copies of the "Notice of Cancellation" to the purchaser, complete both copies by entering the name of the membership camping operator, the address of the membership camping operator's place of business, the date of the transaction, and the date, not earlier than the third business day following the day of the transaction, by which the purchaser may give notice of cancellation.

(3) The membership camping operator shall orally inform each purchaser, at the time he signs a contract or purchases the services, of his three-day right to cancel; provided, that no oral notice is required in any case in which the membership camping operator does not solicit the purchaser's business in person and the purchaser signs the contract outside the presence of the membership camping operator and returns the signed contract to the membership camping operator by mail.

(4) Cancellation occurs when the purchaser gives written notice of cancellation to the membership camping operator at the address stated in the contract or in the notice of cancellation.

(5) Notice of cancellation, if given by mail, is given when it is deposited in the United States mail properly addressed and postage prepaid.

(6) Notice of cancellation by the purchaser is sufficient if it indicates by any form of written expression the intention of the purchaser not to be bound by the contract.

(7) Upon cancellation, the membership camping operator shall refund to the purchaser all payments made pursuant to the canceled membership camping contract and any notes or security instruments. The refund shall be made within 30 days and where payment has been made by credit card, may be made by an appropriate credit to the purchaser's account.

(8) Failure of the membership camping operator to honor a purchaser's cancellation is a violation of this Article. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-241. Escrow account.

(a) All purchase money received from or on behalf of a purchaser in connection with the execution of a membership camping contract shall be deposited in an escrow account designated solely for that purpose, which may be the membership camping operator's own escrow or trust account or that of his attorney's, until 10 calendar days after the date the contract was executed, unless a later time is provided in the membership camping contract. If the membership camping operator has not received notice of the purchaser's cancellation within 10 calendar days after the execution of the contract, any purchase money may be released to the membership camping operator upon the conveyance, in writing, to the purchaser of the right or license to use the campground and facilities as required in the membership camping contract.

(b) A copy of the escrow agreement creating the escrow account shall be filed with the Secretary of State prior to the sale of membership camping contracts. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-242. Advertising, solicitations.

A membership camping operator shall disclose in all advertising programs which seek to induce prospective purchasers to visit the campground that the program is conducted by a membership camping operator and the purpose of any requested visit. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-243. Provision of records to the Secretary of State.

Any membership camping operator shall maintain accurate records of the escrow account. These records shall be open to inspection to the Secretary of State at any time during normal business hours. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-244. Limitation on duration of contract term.

A membership camping contract shall clearly state the duration of the contract. A contract shall either have a duration of no more than 30 years or give the purchaser the right to cancel the contract at any time after 30 years without further obligation and without a refund of any of the contract cost. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-245. Prohibited practices.

It shall be unlawful for any membership camping operator or salesperson to state or imply in attempting to sell a membership or to persuade a member to make payment that the purchaser will be able to sell the contract and thereby eliminate his obligation or recoup all or a substantial part of his purchase price. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-246. Nondisturbance provisions.

(a) With respect to any property in this State acquired and put into operation by a membership camping operator on or after January 1, 1993, the membership camping operator shall not offer or execute a membership camping contract in this State granting the right to use the property until the following requirements are met:

(1) Each person holding an interest in a voluntary blanket encumbrance has executed and delivered to the Secretary of State a nondisturbance agreement and recorded the agreement in the real estate records of the county in which the campground is located. The agreement shall include all of the following:

a. That the rights of the holder or holders of the blanket encumbrance in the affected campground are subordinate to the rights of purchasers;

b. That any person who acquires the affected campground or any portion of the campground by the exercise of any right of sale or foreclosure contained in the blanket encumbrance takes the campground subject to the rights of purchasers; and

c. That the holder or holders of the blanket encumbrance shall not use or cause the campground to be used in a manner which interferes with the right of purchasers to use the campground and its facilities in accordance with the terms and conditions of the membership camping contract; and

(2) Each hypothecation lender which has a lien on or security interest in the membership camping operator's ownership interest in the campground has executed and delivered to the Secretary of State a nondisturbance agreement and recorded the agreement in the real estate records of the county in which the campground is located. In addition, each person holding an interest in a blanket encumbrance superior to the interest held by the hypothecation lender has executed, delivered, and recorded an instrument stating that such person will give the hypothecation lender notice of, and at least 30 days to cure, any default under the blanket encumbrance before the person commences any foreclosure action affecting the campground. For the purposes of this section:

a. Hypothecation lender shall mean a financial institution which provides a major hypothecation loan to a membership camping operator;

b. Major hypothecation loan shall mean a loan or line of credit secured by substantially all of the contracts receivable arising from the membership camping operator's sale of membership camping contracts; and

c. Nondisturbance agreement shall mean an instrument by which a hypothecation lender agrees to conditions substantially the same as those set forth in subdivision (1) of this subsection.

(b) In lieu of compliance with subsection (a) of this section, a surety bond or letter of credit satisfying the requirements of this subsection may be delivered and accepted by the Secretary of State. The surety bond or letter of credit shall be issued to the Secretary of State for the benefit of purchasers and shall be in an amount which is not less than one hundred five percent (105%) of the remaining principal balance of every indebtedness secured by a blanket encumbrance affecting the campground. The bond shall be issued by a surety which is authorized to do business in this State and which has sufficient net worth to satisfy the indebtedness. The aggregate liability of the surety for all damages shall not exceed the amount of the bond. The letter of credit shall be irrevocable, shall be drawn upon an insured bank, savings and loan association, or other financial institution, and shall be in a form and content acceptable to the Secretary of State. The bond or letter of credit shall provide for payment of all amounts secured by the blanket encumbrance, including costs, expenses, and legal fees of the lienholder, if for any reason the blanket encumbrance is enforced. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§ 66-247. Remedies.

(a) Any purchaser injured by any violation of this Article may bring an action for rescission and restitution or for recovery of damages and for reasonable attorney's fees.

(b) The remedies herein shall be in addition to any other remedies provided for by law or in equity, but the damages assessed shall not exceed the largest amount of damages available by any single remedy.

(c) In addition to any other remedies provided for by law or in equity, the Secretary of State may bring an action to:

(1) Revoke the registration of a membership camping operator or a salesperson and seek an injunction to enjoin him from engaging in the business of offering for sale or selling camping membership contracts in this State, or

(2) Enforce a final court order from any state or federal jurisdiction restricting or enjoining the acts or practices of a membership camping operator or a salesperson pertaining to the business of offering or selling membership camping contracts.

(d) The violation of any provisions of this Article shall constitute an unfair practice under G.S. 75-1.1. (1991 (Reg. Sess., 1992), c. 1009, s. 4.)

§§ 66-248, 66-249: Reserved for future codification purposes.

ARTICLE 32.

Peddlers, Itinerant Merchants, and Specialty Markets.

§ 66-250. Definitions.

The following definitions apply in this Article:

(1) Itinerant merchant. — A person, other than a merchant with an established retail store in the county, who transports an inventory of goods to a building, vacant lot, or other location in a county and who, at that location, displays the goods for sale and sells the goods at retail or offers the goods for sale at retail.

(2) Peddler. — A person who travels from place to place with an inventory of goods, who sells the goods at retail or offers the goods for sale at retail, and who delivers the identical goods.

(3) Person. — An individual, a firm, an association, a partnership, a limited liability company, a corporation, a unit of government, or another group acting as a unit.

(4) Specialty market. — A location, other than a permanent retail store, where space is rented to others for the purpose of selling goods at retail or offering goods for sale at retail.

(5) Specialty market operator. — A person, other than the State or a unit of local government, who rents space, at a location other than a permanent retail store, to others for the purpose of selling goods at retail or offering goods for sale at retail.

(6) Specialty market vendor. — A person, other than a merchant with an established retail store in the county, who transports an inventory of goods to a specialty market and, at that location, displays the goods for sale and sells the goods at retail or offers the goods for sale at retail. (1996, 2nd Ex. Sess., c. 14, s. 24.)

§ 66-251. Itinerant merchant and peddler must have permission of property owner.

An itinerant merchant or a peddler who travels from place to place by vehicle must obtain a written statement signed by the owner or lessee of any property upon which the itinerant merchant or peddler offers goods for sale giving the owner's or lessee's permission to offer goods for sale upon the property of the owner or lessee. This statement must clearly state the name of the owner or lessee, the location of the premises for which the permission is granted, and the dates during which the permission is valid. The statement must be conspicuously and prominently displayed, so as to be visible for inspection by patrons of the itinerant merchant or peddler, at the places or locations at which the goods are to be sold or offered for sale. (1996, 2nd Ex. Sess., c. 14, s. 24.)

§ 66-252. Display and possession of certificate of registration.

(a) When Required. — A person who sells tangible personal property at a specialty market, other than the person's own household personal property, is considered a retailer under G.S. 105-164.4 and must obtain a certificate of registration from the Department of Revenue before the person may engage in business. An itinerant merchant must keep the merchant's certificate of registration conspicuously and prominently displayed, so as to be visible for inspection by patrons of the itinerant merchant at the places or locations at which the goods are to be sold or offered for sale. A peddler must carry the peddler's certificate of registration when the peddler offers goods for sale and must produce the certificate upon the request of any customer, State or local revenue agent, or law enforcement agent. A specialty market vendor must keep the certificate of registration conspicuously and prominently displayed, so as to be visible for inspection by patrons of the specialty market vendor at the places or locations at which the goods are to be sold or offered for sale. A specialty market operator must have its certificate of registration, if any, available for inspection during all times that the specialty market is open and must produce it upon the request of any customer, State or local revenue agent, or law enforcement agent.

(b) Compliance. — The requirement that a certificate of registration be displayed is satisfied if the vendor displays either of the following:

(1) A copy of the certificate.

(2) Evidence that the certificate has been applied for and the applicable registration fee has been paid within 30 days before the date the certificate was required to be displayed. (1996, 2nd Ex. Sess., c. 14, s. 24; 1998-121, s. 6.)

§ 66-253. Display of identification upon request.

Upon the request of any customer, State or local revenue agent, or law enforcement agent, a peddler, an itinerant merchant, a specialty market operator, or a specialty market vendor must provide its name and permanent address. A peddler, itinerant merchant, specialty market operator, or specialty market vendor who is an individual must, upon the request of any customer, State or local revenue agent, or law enforcement agent, provide a valid drivers license, a special identification card issued under G.S. 20-37.7, a military identification, or a passport bearing a physical description of the person named reasonably describing the peddler, itinerant merchant, specialty market operator, or specialty market vendor. A peddler, itinerant merchant, specialty market operator, or specialty market vendor that is a corporation must, upon the request of any customer, State or local revenue agent, or law enforcement agent, give the name and registered agent of the corporation and the address of the registered office of the corporation, as filed with the Secretary of State. (1996, 2nd Ex. Sess., c. 14, s. 24.)

§ 66-254. Records of source of new merchandise.

(a) Record Required. — Each peddler, itinerant merchant, and specialty market vendor must keep a written record of the source of new merchandise the merchant offers for sale. The record must be a receipt or an invoice from the person who sold the merchandise to the merchant. The receipt or invoice must specifically identify the product being sold by product name and quantity purchased and must contain the complete business name of the seller and a description of the type of business. If the seller was an individual, the receipt or invoice must contain the seller's drivers license number, its state of issuance and expiration date, and the seller's date of birth. The merchant must verify this information by comparing the seller's drivers license to the receipt or invoice and signing the receipt or invoice. A special identification card issued by the Division of Motor Vehicles may be used in place of the seller's drivers license for the purposes of providing and verifying information required under this section. If the seller was a corporation, the receipt or invoice must contain the corporation's federal tax identification number, the state of incorporation, the name and address of the corporation's registered agent in this State, if any, and the corporation's principal office address.

(b) Keeping the Record. — Each peddler, itinerant merchant, and specialty market vendor must keep the record required by subsection (a) of this section with the new merchandise being offered for sale. Once the new merchandise is sold, the merchant must keep the record for a period of three years after the date of the sale.

(c) Displaying Record or Affidavit. — A peddler, an itinerant merchant, or a specialty market vendor must produce either of the following upon the request of a law enforcement agent:

(1) The record required by subsection (a) of this section of the source of new merchandise the merchant offers for sale.

(2) An affidavit under oath or affirmation identifying the source of new merchandise the merchant offers for sale, including the name and address of the seller, the license number of any auctioneer seller, and the date and place of purchase of the merchandise.

A merchant's failure to produce the requested record or an affidavit within a reasonable time of request by a law enforcement agent is prima facie evidence of possession of stolen property. Pending the production of the requested record or affidavit, the agent may take the merchandise into custody as evidence at the time the request is made. Merchandise impounded under this subsection must be disposed of in accordance with G.S. 15-11.1.

(d) Posted Notice. — A specialty market operator must conspicuously post in plain view of all specialty market vendors a sign informing all vendors that failure to produce, upon the request of a law enforcement agent, either the records or affidavit required under this section is prima facie evidence of possession of stolen property. (1996, 2nd Ex. Sess., c. 14, s. 24.)

§ 66-254.1. Certain sales prohibited.

No person who is described by G.S. 66-250(1), (2), (5), or (6) shall sell or offer to sell any product that meets any of the following criteria:

(1) The product contains pseudoephedrine as the sole active ingredient or in combination with other active ingredients.

(2) The product is a drug as defined by G.S. 106-121(6).

Any person who violates this section shall be guilty of a Class 1 misdemeanor for the first offense, a Class A1 misdemeanor for a second offense, and a Class I felony for a third or subsequent offense. (2005-434, s. 5.)

Editor's Note. — Session Laws 2005-434, s. 10, makes this section effective January 15, 2006, and applicable to offenses committed on or after that date.

Session Laws 2005-434, s. 9 is a severability clause.

§ 66-255. Specialty market registration list.

A specialty market operator must maintain a daily registration list of all specialty market vendors selling or offering goods for sale at the specialty market. The registration list must clearly and legibly show each specialty market vendor's name, permanent address, and certificate of registration number. The specialty market operator must require each specialty market vendor to exhibit a valid certificate of registration for visual inspection by the specialty market operator at the time of registration, and must require each specialty market vendor to keep the certificate of registration conspicuously and prominently displayed, so as to be visible for inspection by patrons of the specialty market vendor at the places or locations at which the goods are offered for sale. Each daily registration list maintained pursuant to this section must be retained by the specialty market operator for no less than two years and must at any time be made available upon request to any law enforcement officer. (1996, 2nd Ex. Sess., c. 14, s. 24; 1998-121, s. 7.)

§ 66-256. Exemptions from Article.

This Article does not apply to the following:

(1) A peddler or an itinerant merchant who sells only one or more of the following types of merchandise:
   a. Farm or nursery products produced by the merchant.
   b. Crafts or goods made by the merchant.
   c. The merchant's own household personal property.
   d. Printed material.
   e. Wood for fuel.
   f. Ice, seafood, meat, poultry, livestock, eggs, dairy products, bread, cakes, or pies.

(2) A peddler or an itinerant merchant who is an authorized automobile dealer licensed pursuant to Chapter 20 of the General Statutes.

(3) A peddler or an itinerant merchant who is a nonprofit charitable, educational, religious, scientific, or civic organization.

(4) A peddler who maintains a fixed permanent location from which at least ninety percent (90%) of the peddler's sales are made but who sells some goods in the county of the fixed location by peddling.

(5) An itinerant merchant who meets any of the following descriptions:
   a. Locates at a farmer's market.
   b. Is part of the State Fair or an agriculture fair that is licensed by the Commissioner of Agriculture pursuant to G.S. 106-520.3.
   c. Sells goods at an auction conducted by an auctioneer licensed pursuant to Chapter 85B of the General Statutes.

(6) A peddler who complies with the requirements of G.S. 25A-38 through G.S. 25A-42, or who complies with the requirements of G.S. 14-401.13. (1996, 2nd Ex. Sess., c. 14, s. 24.)

§ 66-257. Misdemeanor violations.

(a) Class 1 Misdemeanors. — A person who does any of the following commits a Class 1 misdemeanor:

(1) Fails to keep a record of new merchandise and fails to produce a record or an affidavit pursuant to G.S. 66-254.

(2) Falsifies a record of new merchandise required by G.S. 66-254.

(b) Class 2 Misdemeanors. — A person who does any of the following commits a Class 2 misdemeanor:

(1) If the person is an itinerant merchant or a specialty market vendor, fails to display the certificate of registration as required by G.S. 66-252.

(2) If the person is a specialty market operator, fails to maintain the daily registration list as required by G.S. 66-255.

(c) Class 3 Misdemeanors. — A person who does any of the following commits a Class 3 misdemeanor:

(1) If the person is a peddler or an itinerant merchant, fails to obtain the permission of the property owner as required by G.S. 66-251.

(2) If the person is a peddler or a specialty market operator, fails to produce the certificate of registration as required by G.S. 66-252.

(3) Fails to provide name, address, or identification upon request as required by G.S. 66-253 or provides false information in response to the request.

(4) Knowingly gives false information when registering pursuant to G.S. 66-255.

(d) Defense. — Whenever satisfactory evidence is presented in any court of the fact that permission to use property was not displayed as required by G.S. 66-251 or that a certificate of registration was not displayed or produced as required by G.S. 66-252, the person charged may not be found guilty of that violation if the person produces in court a valid permission or a valid certificate of registration, respectively, that had been issued prior to the time the person was charged. (1996, 2nd Ex. Sess., c. 14, s. 24; 1998-121, s. 8.)

§ 66-258. Local regulation not affected.

This Article does not affect the authority of a county or city to impose additional requirements on peddlers, itinerant merchants, specialty market vendors, or specialty market operators by an ordinance adopted under G.S. 153A-125 or G.S. 160A-178. (1996, 2nd Ex. Sess., c. 14, s. 24.)

§ 66-259: Reserved for future codification purposes.

ARTICLE 33.

Telephonic Seller Registration and Bond Requirement.

§ 66-260. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Gift or prize" means any premium, bonus, award, or any other thing of value.

(2) "Item" means any good or any service. "Item" includes coupon books, vouchers, or certificates that are to be used with businesses other than the seller's business.

(3) "Owner" means a person who owns or controls ten percent (10%) or more of the equity of, or otherwise has a claim to ten percent (10%) or more of the net income of, a telephonic seller.

(4) "Person" includes any individual, firm, association, corporation, partnership, joint venture, or any other business entity.

(5) "Principal" means an owner, an executive officer of a corporation, a general partner of a partnership, a sole proprietor of a sole proprietorship, a trustee of a trust, or any other individual with similar supervisory functions with respect to any person.

(6) "Purchaser" or "prospective purchaser" means a person who is solicited to become obligated to a telephonic seller or to make any donation or gift to any person represented by the telephonic seller.

(7) "Room operator" means any principal, employee, or agent responsible for the operational management and supervision of facilities from which telephonic sales calls are made or received.

(8) "Salesperson" means any individual employed, appointed, or authorized by a telephonic seller, whether referred to by the telephonic seller as an agency, representative, or independent contractor, who attempts to solicit or solicits a sale on behalf of the telephonic seller.

(9) "Secretary" means the Office of the Secretary of State.

(10) "Telephone solicitation" or "attempted telephone solicitation" means any telephonic communication designed to persuade any person to purchase goods or services, to enter a contest, or to contribute to a charity or a person represented to be a charity, regardless of whether the telephone call initiating the solicitation is placed by the (i) telephonic seller or (ii) a person responding to any unsolicited notice or notices sent or provided by or on behalf of the seller, which notice or notices represent to the recipient that he or she has won a gift or prize, that the recipient may obtain or qualify for credit by contacting the seller, or that the seller has buyers interested in purchasing the recipient's property.

(11) "Telephonic seller" or "seller" means a person who, directly or through salespersons, causes a telephone solicitation or attempted telephone solicitation to occur. "Telephonic seller" and "seller" do not include any of the following:

a. A securities "dealer" within the meaning of G.S. 78A-2(2) or a person excluded from the definition of "dealer" by that provision: a "salesman" within the meaning of G.S. 78A-2(9); an "investment adviser" within the meaning of G.S. 78C-2(1) or a person excluded from the definition of "investment adviser" by that provision; or an "investment adviser representative" within the meaning of G.S. 78C-2(3); provided that such persons shall be excluded from the terms "telephonic seller" and "seller" only with respect to activities regulated by Chapters 78A and 78C.

b. Any person conducting sales or solicitations on behalf of a licensee of the Federal Communications Commission or holder of a franchise or certificate of public convenience and necessity from the North Carolina Utilities Commission.

c. Any insurance agent or broker who is properly licensed by the Department of Insurance and who is soliciting within the scope of the agent's or broker's license or any employee or independent contractor of an insurance company licensed by the Department of Insurance conducting sales or solicitations on behalf of that company.

d. Any federally chartered bank, savings institution, or credit union or any bank, savings institution, or credit union properly licensed by the State or subject to federal regulating authorities.

e. Any organization that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section, or that is organized exclusively for one or more of the purposes specified in section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section and that upon dissolution shall distribute its assets to an entity that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section, the United States, or a state; any "charitable solicitor" properly licensed under Article 2 of Chapter 131F of the General Statutes, or any person exempt from Chapter 131F of the General Statutes under G.S. 131F-3.

f. A person who periodically issues and delivers catalogs to potential purchasers and the catalog:
  1. Includes a written description or illustration and the sales price of each item offered for sale;
  2. Includes at least 24 full pages of written material or illustrations;
  3. Is distributed in more than one state; and
  4. Has an annual circulation of not less than 250,000 customers.

g. A person engaging in a commercial telephone solicitation where the solicitation is an isolated transaction and not done in the course of a pattern of repeated transactions of a like nature.

h. A person primarily soliciting the sale of a newspaper of general circulation, a publisher of a magazine or other periodical of general circulation, or an agent of such a publisher acting pursuant to a written agency agreement.

i. A person soliciting the sale of services provided by a cable television system operating under the authority of a local franchise.

j. Any passenger airline licensed by the Federal Aviation Administration.

k. Any person holding a real estate broker's or sales agent's license under Chapter 93A of the General Statutes and who is soliciting within the scope of the broker's or agent's license.

l. Any person soliciting a transaction regulated by the Commodities Futures Trading Commission, provided the person is registered or temporarily licensed by the Commodities Futures Trading Commission under the Commodity Exchange Act, 7 U.S.C. § 1, et seq.

m. Any person soliciting a purchase from a business, provided the person soliciting makes reasonable efforts to ensure that the person solicited has actual authority to bind the business to a purchase agreement.

n. A foreign corporation, limited liability company, or limited partnership that has obtained and maintained a certificate of authority to transact business or conduct affairs in this State pursuant to Chapter 55, 55A, or 57C or Article 5 of Chapter 59 of the General Statutes and that only transacts business or conducts affairs in this State using the name set forth in the certificate of authority.

o. An issuer or a subsidiary of an issuer that has a class of securities which is subject to section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781) and which is either registered or exempt from registration under paragraph (A), paragraph (B), paragraph (C), paragraph (E), paragraph (F), paragraph (G), or paragraph (H) of subsection (g)(2) of that section.

p. A person soliciting the sale of food, seeds, or plants when a sale does not involve an amount in excess of one hundred dollars ($100.00) directed to a single address.

q. A person soliciting:
  1. Without intent to complete or obtain provisional acceptance of a sale during the telephone solicitation;
  2. Who does not make the major sales presentation during the telephone solicitation but arranges for the major sales presentation to be made at a later face-to-face meeting between the salesperson and the purchaser;
  3. Who does not cause an individual to go to the prospective purchaser to collect payment for the purchase or to deliver

any item purchased directly following the telephone solicitation; or

4. Who offers to send the purchaser descriptive literature and does not require payment prior to the purchaser's review of the descriptive literature.

r. A person soliciting the purchase of contracts for the maintenance or repair of items previously purchased from the person making the solicitation or on whose behalf the solicitation is made.

s. A book, video, recording, or multimedia club or contractual plan or arrangement:

1. Under which the seller provides the consumer with a form with which the consumer can instruct the seller not to ship the offered merchandise.
2. Which is regulated by the Federal Trade Commission trade regulation concerning "use of negative option plans by sellers in commerce".
3. Which provides for the sale of books, recordings, multimedia products or goods, or videos which are not covered under paragraphs 1. or 2. of this sub-subdivision, including continuity plans, subscription arrangements, standing order arrangements, supplements, and series arrangements under which the seller periodically ships merchandise to a consumer who has consented in advance to receive such merchandise on a periodic basis.

t. A person who for at least two years has been operating under the same name as that used in connection with its telemarketing operations and retail establishment in North Carolina where consumer goods are displayed and offered for sale on a continuing basis if a majority of the person's business involves the buyers obtaining services or products at the person's retail establishment.

u. A person:

1. Who provides telephone solicitation services under contract to sellers;
2. Who has been operating continuously for at least three years under the same business name; and
3. For whom at least seventy-five percent (75%) of the person's contracts are performed on behalf of other persons exempt under this section.

v. A person soliciting political contributions in accordance with Article 22A of Chapter 163 of the General Statutes.

w. The seller of a "business opportunity" as defined in G.S. 66-94, while engaged in activities subject to regulation under Article 19 of Chapter 66 of the General Statutes, provided that such seller has complied with the provisions of G.S. 66-97.

x. A "loan broker" as defined in G.S. 66-106, while engaged in activities subject to regulation under Article 20 of Chapter 66 of the General Statutes, provided that such loan broker has complied with the provisions of G.S. 66-109.

y. A "membership camping operator" as defined in G.S. 66-232(10) or a "salesperson" as defined in G.S. 66-232(16), while engaged in activities subject to regulation under Article 31 of Chapter 66 of the General Statutes, provided that such persons have complied with the provisions of G.S. 66-234 and 66-237, as applicable. (1997-482, s. 1.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389 (1998).

§ 66-261. Registration of telephonic sellers.

(a) Not less than 10 days before commencing telephone solicitations in this State, a telephonic seller shall register with the Secretary by filing the information required in G.S. 66-262 and paying a filing fee of one hundred dollars ($100.00). A telephonic seller is doing business in this State if it solicits or attempts to solicit prospective purchasers from locations in this State or solicits or attempts to solicit prospective purchasers who are located in this State.

(b) The information required in G.S. 66-262 shall be submitted on a form provided by the Secretary and shall contain the notarized signatures of each principal of the telephonic seller.

(c) Registration of a telephonic seller shall be valid for one year from the effective date thereof and may be annually renewed by making the filing required in G.S. 66-262 and paying the filing fee of one hundred dollars ($100.00). Registration shall not be deemed effective unless all required information is provided and any deficiencies or errors noted by the Secretary have been corrected to the satisfaction of the Secretary.

(d) Whenever, prior to expiration of a seller's annual registration, there is a change in the information required by G.S. 66-262, the seller shall, within 10 days after the change, file an addendum with the Secretary updating the information. (1997-482, s. 1.)

§ 66-262. Filing information.

(a) Each filing submitted to the Secretary shall contain all of the following information:

(1) The name or names, including any assumed names, under which the telephonic seller is doing or intends to do business in this State.

(2) The telephonic seller's business form and place of organization and, if the seller is a corporation, copies of its articles of incorporation and bylaws and amendments thereto, or if a partnership, a copy of the partnership agreement.

(3) Complete street address of the telephonic seller's principal place of business.

(4) The complete street address of each location from which telephone solicitations are placed by the telephonic seller.

(5) A listing of all telephone numbers to be used by the telephonic seller, including area codes, and the complete street address of the business premises served by each number.

(6) The name and title of each principal.

(7) The complete street address of the residence, the date of birth, and the social security number of each principal.

(8) The true name, street address, date of birth, and the social security number of each room operator, together with the room operator's full employment history during the preceding two years.

(9) The name and address of all banks or savings institutions where the telephonic seller maintains deposit accounts.

(10) The name and address of each long-distance telephone carrier used by the telephonic seller.

(11) A summary of each civil or criminal proceeding brought against the telephonic seller, any of its principals, or any of its room operators during the preceding five years by federal, State, or local officials

relating to telephonic sales practices of each. The summary shall include the date each action was commenced, the criminal or civil charges alleged, the case caption, the court file number, the court venue, and the disposition of the action. For purposes of this section, a "civil proceeding includes" means assurances of voluntary compliance, assurances of discontinuance, consent judgments, and similar agreements executed with federal, State, or local officials.

(b) For purposes of this section, "street address" does not include a private mail service address. (1997-482, s. 1.)

§ 66-263. Bond requirement; prizes and gifts.

(a) At least 10 days before the commencement of any promotion offering any gift or prize with an actual or represented market value of five hundred dollars ($500.00) or more, the telephonic seller shall notify the Secretary in writing of the details of the promotion, fully describing the nature and number of all gifts or prizes and their current market value, the seller's rules and regulations governing the promotion, and the date the gifts or prizes are to be awarded. All gifts or prizes offered shall be awarded. Concurrent with notifying the Secretary under this subsection, the telephonic seller shall post a bond with the Secretary for the market value or the represented value, whichever is greater, of all gifts or prizes represented as available under the promotion. The bond must be issued by a surety company authorized to do business in this State. The bond shall be in favor of the State of North Carolina for the benefit of any person entitled to receive a gift or prize under the promotion who did not receive it within 30 days of the specified date of award. The amount recoverable by any person under the bond shall not exceed the market value, the represented value of the gift or prize, or the amount of any consideration or contribution paid by that person in response to the telephone solicitation, whichever is greatest.

(b) Within 45 days after the specified date of the award of the gift or prize, the seller shall provide, in writing, to the Secretary, proof that the gifts or prizes were awarded. The writing shall include the name, address, and telephone number of all persons receiving awards or prizes. The bond shall be maintained until the Secretary receives reliable proof that the gifts or prizes have been delivered to the intended recipients.

(c) The Attorney General, on behalf of any injured purchaser, or any purchaser who is injured by the bankruptcy of the telephonic seller or its breach of any agreement entered into in its capacity as a telephonic seller, may initiate a civil action to recover against the bond. (1997-482, s. 1.)

§ 66-264. Calls made to minors.

A telephonic seller must inquire as to whether the prospective purchaser it is contacting is under 18 years of age. If the prospective purchaser purports to be under 18 years of age, the telephonic seller must discontinue the call immediately. (1997-482, s. 1.)

§ 66-265. Offers of gifts or prizes.

(a) It shall be unlawful for any telephonic seller to make a telephone solicitation or attempted telephone solicitation involving any gift or prize when the solicitation or attempted solicitation:

(1) Requests or directs the consumer to further the transaction by calling a 900 number or a pay-per-call number.

(2) Requests or directs the consumer to send any payment or make a donation in order to collect the gift or prize.

(3) Does not comply fully with G.S. 75-30, 75-32, 75-33, or 75-34.

(b) Notwithstanding subsection (a) of this section, a telephonic seller may offer a gift or prize in connection with the bona fide sale of a product or service. (1997-482, s. 1.)

Editor's Note. — G.S. 75-30, referred to in subdivision (a)(3), was repealed by Session Laws 2003-411, s. 1, effective October 1, 2003, and applicable to telephone solicitations made on or after that date.

§ 66-266. Penalties.

(a) Any violation of this Article shall constitute an unfair and deceptive trade practice in violation of G.S. 75-1.1.

(b) In an action by the Attorney General against a telephonic seller for violation of this Article, or for any other act or practice by a telephonic seller constituting a violation of G.S. 75-1.1, the court may impose civil penalties of up to twenty-five thousand dollars ($25,000) for each violation involving North Carolina purchasers or prospective purchasers who are 65 years of age or older.

(c) The remedies and penalties available under this section shall be supplemental to others available under the law, both civil and criminal.

(d) Compliance with this Article does not satisfy or substitute for any other requirements for license, registration, or conduct imposed by law.

(e) In any civil proceeding alleging a violation of this Article, the burden of proving an exemption or an exception from a definition is upon the person claiming it, and in any criminal proceeding alleging a violation of this Article, the burden of producing evidence to support a defense based upon an exemption or an exception from a definition is upon the person claiming it. (1997-482, s. 1.)

§§ 66-267 through 66-269: Reserved for future codification purposes.

ARTICLE 34.

Certificates of Authentication.

§ 66-270. Authority of Secretary of State to authenticate documents.

The Secretary, or the Secretary's designee, may sign and issue a certificate of authentication for a document that has been executed or issued in this State so that it can be recognized in a foreign jurisdiction. The certificate may be issued under the seal of the Department of the Secretary of State or under the Great Seal of the State of North Carolina. The Secretary may adopt rules to implement this Article in accordance with Chapter 150B of the General Statutes. (1998-228, s. 14.)

§ 66-271. Definitions.

The following definitions apply in this Article:

(1) Authentication. — Certification of the genuineness of an official's signature, seal, or position within the State of North Carolina so the document can be recognized in a foreign jurisdiction.

(2) Department. — The Department of the Secretary of State.

(3) Foreign jurisdiction. — A jurisdiction outside the State of North Carolina.

(4) Foreign official. — An individual authorized by a foreign jurisdiction to attest to the genuineness of a document or to the position of an individual within that foreign jurisdiction.
(5) Notary public. — Defined in G.S. 10B-3.
(6) Official. — An individual who is a notary public, an individual who is elected or appointed to hold an office in State government, or an individual who is elected or appointed to hold an office in a local governmental unit of this State.
(7) Secretary. — The Secretary of State.
(8) Specimen. — A record of a person's signature, seal, or position as an official within the State maintained in the Department. (1998-228, s. 14; 2005-391, s. 5.)

Editor's Note. — Session Laws 2005-391, s. 12, provides: "This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction, and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to the effective date of this act shall remain valid as if this act had not been enacted."

§ 66-272. Certificate of authentication.

To authenticate a document, the Secretary must compare the official's seal and signature on the document with a specimen of the official's seal and signature on file in the Department. If no specimen is on file in the Department, the Secretary must require that the document be authenticated by an official for whom the Department does have a specimen. The Secretary must also verify the official's authority to perform a particular act when the law of a foreign jurisdiction requires it to be verified before it will recognize the authenticity of the document. When the Secretary is able to authenticate the official's seal, signature, position, and authority, the Secretary shall sign and issue a certificate of authentication. The certificate of authentication shall be appended to the document on a separate sheet. (1998-228, s. 14; 2005-391, s. 6.)

Editor's Note. — Session Laws 2005-391, s. 12, provides: "This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction, and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to the effective date of this act shall remain valid as if this act had not been enacted."

§ 66-273. Prerequisites for authentication.

All of the following conditions must be met before a document can be authenticated:
(1) All seals and signatures must be originals.
(2) All dates must follow in chronological order on all certifications.
(3) All acknowledgments to be authenticated by the Secretary shall be in English and must comply with Chapter 10B of the General Statutes.
(4) Whenever a copy is used, it must include a statement that it is a true and accurate copy.
(5) Whenever a document is to be authenticated by the United States Department of State, it must comply with all applicable statutes, rules, and regulations of that office. (1998-228, s. 14; 2000-140, s. 57; 2005-391, s. 7.)

Editor's Note. — Session Laws 2005-391, s. 12, provides: "This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction, and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to the effective date of this act shall remain valid as if this act had not been enacted."

§ 66-274. Limitations on authentication.

(a) The Secretary shall not issue a certificate of authentication for a document if the Secretary has cause to believe that the certificate is desired for an unlawful or improper purpose. The Secretary may examine not only the document for which a certificate is requested, but also any documents to which the previous seals or other certifications may have been affixed by other authorities. The Secretary may request any additional information that may be necessary to establish that the requested certificate will serve the interests of justice and is not contrary to public policy, including a certified or notarized English translation of document text in a foreign language.

(b) The Secretary shall not issue a certificate of authentication for any one or more of the following:

(1) A seal or signature that cannot be authenticated by either the Secretary or another official.
(2) A seal or signature of a foreign official.
(3) A facsimile, photostat, photographic, or other reproduction of a signature or seal.

(c) The Secretary may not include within the certificate of authentication any statement that is not within the Secretary's power or knowledge to authenticate. The Secretary may not certify that a document has been executed or certified in accordance with the law of any particular jurisdiction or that a document is a valid document in a particular jurisdiction. (1998-228, s. 14.)

§ 66-275. Other methods of authentication not precluded.

Nothing in this Article shall preclude or invalidate any other method that is provided by statute or common law for certifying or exemplifying the authenticity of a document or preclude the recognition in a foreign jurisdiction of a document whose authenticity is so certified or exemplified. (1998-228, s. 14.)

§§ 66-276 through 66-279: Reserved for future codification purposes.

ARTICLE 35.

Agreements Between North Carolina and Foreign Governments.

§ 66-280. Agreements between North Carolina and foreign governments to be filed.

(a) A copy of all executed memoranda of understanding and agreements of a noncommercial nature otherwise subject to disclosure under the public record laws of this State, entered into by the State of North Carolina, or any agency of the State, and a foreign government shall be filed by the State agency with the Secretary of State.

(b) Notwithstanding subsection (a) of this section, the validity or enforceability of any memoranda or agreement subject to this section shall not be affected by the failure to comply with subsection (a) of this section. Documents required to be filed with the Secretary of State under this section shall be indexed and made available to the public in accordance with Chapter 132 of the General Statutes.

(c) For purposes of this section, "foreign government" means a foreign country's government that is recognized and accredited by the United States Department of State, and includes governmental subdivisions of that country. For purposes of this section, "agency of the State" does not include public educational institutions with respect to their educational, research, or extension activities. (1999-260, s. 1.)

Editor's Note. — Session Laws 1999-260, s. 1, enacted this section as G.S. 66-275, it was recodified as 66-280 at the direction of the Revisor of Statutes.

§§ 66-281 through 66-284: Reserved for future codification purposes.

ARTICLE 36.

Truthful Advertisements of Costs of Servicing or Repairing Private Passenger Vehicles.

§ 66-285. Advertisements of servicing or repairing private passenger vehicles.

(a) Any business that services or repairs private passenger vehicles and advertises the cost of a specified service or repair of private passenger vehicles shall disclose in the advertisement all additional charges routinely charged for that service or repair, including shop supplies or charges, except any fees and taxes that are required by law, that a consumer will be charged.

(b) If a business that services or repairs private passenger vehicles fails to comply with the requirements of this section, then, upon written notice to that business, the consumer is required to pay only those charges disclosed in the advertisement, plus any fees and taxes that are required by law.

(c) A violation of this section shall constitute an unfair trade practice under G.S. 75-1.1.

(d) For purposes of this section, "private passenger vehicle" has the same meaning as in G.S. 20-4.01. (1999-437, s. 2.)

Editor's Note. — Session Laws 1999-437, s. 2 enacted this section as Article 35, G.S. 66-280, it has been recodified as Article 36, G.S. 66-285 at the direction of the Revisor of Statutes.

§§ 66-286 through 66-289: Reserved for future codification purposes.

ARTICLE 37.

Tobacco Reserve Fund and Escrow Compliance.

Part 1. Tobacco Reserve Fund.

§ 66-290. Definitions.

As used in this Article:

(1) "Adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the Master Settlement Agreement.

(2) "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns," "is owned," and "ownership" mean ownership of an equity interest, or the equivalent thereof, of ten percent (10%) or more, and the term "person" means an individual, partnership, committee, association, corporation, or any other organization or group of persons.

(3) "Allocable share" means Allocable Share as that term is defined in the Master Settlement Agreement.

(4) "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (i) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (ii) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (iii) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (i) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette."

(5) "Master Settlement Agreement" means the settlement agreement (and related documents) entered into on November 23, 1998, by the State and leading United States tobacco product manufacturers.

(6) "Qualified escrow fund" means an escrow arrangement with a federally or State chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least one billion dollars ($1,000,000,000) where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the funds' principal except as consistent with G.S. 66-291(b).

(7) "Released claims" means Released Claims as that term is defined in the Master Settlement Agreement.

(8) "Releasing parties" means Releasing Parties as that term is defined in the Master Settlement Agreement.

(9) "Tobacco Product Manufacturer" means an entity that after the effective date of this Article directly (and not exclusively through any affiliate):

a. Manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer, as that term is defined in the Master Settlement Agreement, that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of subsection II(mm) of the Master

Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

b. Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

c. Becomes a successor of an entity described in sub-subdivision a. or b. of this subdivision.

The term "Tobacco Product Manufacturer" shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within any of sub-subdivisions a. through c. of this subdivision.

(10) "Units sold" means the number of individual cigarettes sold in the State by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the State on packs (or "roll-your-own" tobacco containers). The Secretary of Revenue shall promulgate such rules as are necessary to ascertain the amount of State excise tax paid on the cigarettes of such tobacco product manufacturer for each year. In lieu of adopting rules, the Secretary of Revenue may issue bulletins or directives requiring taxpayers to submit to the Department of Revenue the information necessary to make the required determination under this subdivision. (1999-311, s. 1; 2002-145, s. 2.)

Editor's Note. — Session Laws 2002-145, s. 2, effective October 4, 2002, redesignated G.S. 66-290 and G.S. 66-291 as Part 1 of Article 37 of Chapter 66, designated "Tobacco Reserve Fund."

CASE NOTES

Cited in State v. Philip Morris USA, Inc., — N.C. App. —, 666 S.E.2d 783, 2008 N.C. App. LEXIS 1757 (2008).

§ 66-291. Requirements.

(a) Any tobacco product manufacturer selling cigarettes to consumers within the State (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) after the effective date of this Article shall do one of the following:

(1) Become a participating manufacturer (as that term is defined in section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or

(2) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation):

a. 1999: $.0094241 per unit sold after the effective date of this Article.

b. 2000: $.0104712 per unit sold.

c. For each of 2001 and 2002: $.0136125 per unit sold.

d. For each of 2003 through 2006: $.0167539 per unit sold.

e. For each of 2007 and each year thereafter: $.0188482 per unit sold.

(b) A tobacco product manufacturer that places funds into escrow pursuant to subdivision (2) of subsection (a) of this section shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

(1) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the State or any releasing party located or residing in the State. Funds shall be released from escrow under this subdivision (i) in the order in which they were placed into escrow and (ii) only to the extent and at the time necessary to make payments required under such judgment or settlement;

(2) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in the State in a particular year was greater than the Master Settlement Agreement payments, as determined pursuant to Section IX(i) of that agreement, including after final determination of all adjustments, that the manufacturer would have been required to make on account of the units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or

(3) To the extent not released from escrow under subdivisions (1) or (2) of this subsection, funds shall be released from escrow and revert back to such tobacco product manufacturer 25 years after the date on which they were placed into escrow.

(c) Each tobacco product manufacturer that elects to place funds into escrow pursuant to this section shall annually certify to the Attorney General that it is in compliance with this section. The Attorney General may bring a civil action on behalf of the State against any tobacco product manufacturer that fails to place into escrow the funds required under this section. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this section shall:

(1) Be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a violation either of subdivision (2) of subsection (a) of this section, of subsection (b) of this section, or of this section, may impose a civil penalty (the clear proceeds of which shall be paid to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2) in an amount not to exceed five percent (5%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent (100%) of the original amount improperly withheld from escrow;

(2) In the case of a knowing violation, be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a knowing violation either of subdivision (2) of subsection (a) of this section, of subsection (b) of this section, or of this section, may impose a civil penalty (the clear proceeds of which shall be paid to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2) in an amount not to exceed fifteen percent (15%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent (300%) of the original amount improperly withheld from escrow; and

(3) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the State (whether directly or through a distributor, retailer, or similar intermediary) for a period not to exceed two years.

Each failure to make an annual deposit required under this section shall constitute a separate violation. (1999-311, s. 1; 2000-140, s. 58; 2002-145, s. 2; 2005-276, s. 6.12(a); 2005-435, s. 59.1(a).)

Editor's Note. — Session Laws 2005-276, s. 6.12(b), as amended by Session Laws 2005-345, s. 2(a) and Session Laws 2005-435, s. 59.1(a), provides: "If this section, or any portion of the amendment made to G.S. 66-291(b)(2) by this section, is held by a court of competent jurisdiction to be unconstitutional, then G.S. 66-291(b)(2) shall be deemed to be repealed in its entirety. If G.S. 66-291(b) shall thereafter be held by a court of competent jurisdiction to be unconstitutional, then this section shall be repealed, and G.S. 66-291(b)(2) shall be restored as if no amendments had been made by this section. Neither any judicial holding of unconstitutionality nor the repeal of G.S. 66-291(b)(2) shall affect, impair, or invalidate any other portion of Part 1 of Article 37 of Chapter 66 of the General Statutes or the application of Part 1 of Article 37 of Chapter 66 of the General Statutes to any other person or circumstance, and the remaining portions of Part 1 of Article 37 of Chapter 66 of the General Statutes shall at all times continue in full force and effect."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

CASE NOTES

Instrumentality Rule. — For the purpose of a G.S. 66-291(c) claim, a shareholder was not a new party in the State's action to enforce the terms of a master settlement agreement in tobacco litigation because the shareholder was not legally a distinct entity from the corporation. Applying the instrumentality rule, the corporation was so operated that it was a mere instrumentality or alter ego of the shareholder and a shield for the shareholder's activities that violated G.S. 66-291(c). State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 362 N.C. 431, 666 S.E.2d 107, 2008 N.C. LEXIS 687 (2008).

Civil Conspiracy Cause of Action. — State sufficiently alleged a cause of action for civil conspiracy to violate G.S. 66-291 because the complaint alleged that an agreement existed between individuals to violate, pursuant to a common scheme, a tobacco manufacturing corporation's escrow obligation under G.S. 66-291, which caused injury to the state by depriving the state of a fund against which it could execute judgments; furthermore, the allegations were sufficient to support the theory that one of the individuals, who was the principal of the tobacco manufacturing corporation, had an independent personal stake in achieving the corporation's illegal objective. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 184 N.C. App. 613, 646 S.E.2d 790, 2007 N.C. App. LEXIS 1613 (2007), aff'd in part, rev'd in part, 362 N.C. 431, 666 S.E.2d 107 (2008).

State's civil conspiracy complaint should not have been dismissed for failure to state a cause of action. The complaint specifically alleged that there was an agreement of an incorporator and owners and managers of a seller to unfairly and deceptively underprice the cigarettes made by the corporation and distributed and sold by an exclusive seller so that the corporation would be unable to deposit sufficient escrow to cover sales in violation of G.S. 66-291 and would deprive the State of North Carolina of a fund against which it could execute judgments against the corporation. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 362 N.C. 431, 666 S.E.2d 107, 2008 N.C. LEXIS 687 (2008).

Personal Jurisdiction Over Foreign Corporation Not Shown. — In an action filed by the State against a foreign corporation under G.S. 66-291, the trial court properly dismissed the action for lack of personal jurisdiction, because: (1) the State's conclusory allegation was insufficient to establish an alter ego theory of liability for personal jurisdiction purposes; (2) there was no evidence of any act or omission by the foreign corporation within North Carolina in the record; and (3) the trial court specifically found that the foreign corporation was not in the State of North Carolina when it received the alleged fraudulent funds from the North Carolina corporation. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 188 N.C. App. 302, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008).

Applied in State v. Philip Morris USA, Inc., — N.C. App. —, 666 S.E.2d 783, 2008 N.C. App. LEXIS 1757 (2008).

Part 2. Tobacco Escrow Compliance.

§ 66-292. Definitions.

The following definitions apply in this Part:

(1) Brand family. — All styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers including, but not limited to, "menthol", "lights", "kings", and "100s".

(2) Escrow agreement. — An agreement by which a qualified escrow fund is created and maintained.

(3) Nonparticipating manufacturer. — A tobacco product manufacturer that is not a participating manufacturer.

(4) Participating manufacturer. — Defined in subsection II(jj) of the Master Settlement Agreement. (2002-145, s. 3.)

CASE NOTES

Applied in State v. Philip Morris USA, Inc., — N.C. App. —, 666 S.E.2d 783, 2008 N.C. App. LEXIS 1757 (2008).

§ 66-293. Sale of certain cigarettes prohibited.

(a) Civil Penalty. — It is unlawful for a person required to pay taxes pursuant to Part 2 or 3 of Article 2A of Chapter 105 of the General Statutes to sell or deliver cigarettes belonging to a brand family of a nonparticipating manufacturer if the sale of the cigarettes is subject to such taxes unless the cigarettes are included on the compliant nonparticipating manufacturer's list prepared and made public by the Office of the Attorney General under G.S. 66-294.1 as of the date the person sells or delivers the cigarettes. It is not a violation of this subsection if the brand family was on the compliant nonparticipating manufacturer's list when the person purchased the cigarettes and the person sold or delivered the cigarettes within 60 days of the purchase. The Attorney General may impose a civil penalty on a person that it finds violates this subsection. The amount of the penalty may not exceed the greater of five hundred percent (500%) of the retail value of the cigarettes sold or five thousand dollars ($5,000).

(b) Contraband. — Cigarettes described in subsection (a) of this section are contraband and may be seized by a law enforcement officer. The procedure for seizure and disposition of this contraband is the same as the procedure under G.S. 105-113.31 and G.S. 105-113.32 for non-tax-paid cigarettes. (2002-145, s. 3.)

CASE NOTES

Applied in State v. Philip Morris USA, Inc., — N.C. App. —, 666 S.E.2d 783, 2008 N.C. App. LEXIS 1757 (2008).

§ 66-294. Duties of manufacturers.

(a) Participating Manufacturers. — Unless the Office of the Attorney General provides a waiver, a participating manufacturer must submit to the Office of the Attorney General a list of all of the manufacturer's brand families by April 30th of each year. The participating manufacturer must notify the Office of the Attorney General of any changes to the list of brand families it offers for sale 30 days prior to the change.

(b) Nonparticipating Manufacturers. — A nonparticipating manufacturer must:

(1) Appoint and continuously maintain a process service agent within the State of North Carolina to accept service of any notification or enforcement of an action under this Article. The manufacturer shall file a certified copy of each instrument appointing a process service agent with the Secretary of State and the Office of the Attorney General.

(2) Submit an annual application to the Office of the Attorney General for inclusion of the nonparticipating manufacturer's products on the compliant nonparticipating manufacturer's list, in accordance with subsection (c) of this section.

(3) Notify the Office of the Attorney General of any changes to the list of brand families it offers for sale 30 days prior to the change.

(4) Have made the escrow payments required under G.S. 66-291(a)(2) for all cigarettes belonging to the brand families included in the list submitted in the application for inclusion and any brand families added to the list since it was submitted to the Office of the Attorney General.

(5) Submit an escrow agreement to the Office of the Attorney General.

(6) Not deliver cigarettes unless the cigarettes are included on the compliant nonparticipating manufacturer's list in effect on the date of delivery.

(c) Nonparticipating Manufacturer's Application. — A nonparticipating manufacturer must submit an application to the Office of the Attorney General by April 30th of each year for inclusion on the compliant nonparticipating manufacturers' list. The Attorney General may provide a waiver of the deadline for good cause. The application must include a certification that the nonparticipating manufacturer has fulfilled the duties listed in subsection (b) of this section and a list of the brand families of the manufacturer offered for sale in the State during either the current calendar year or the previous calendar year. The certification must be in the form required by the Office of the Attorney General. (2002-145, s. 3.)

§ 66-294.1. Duties of Attorney General.

(a) Annual Lists. — The Office of the Attorney General shall prepare the following lists annually and shall make those lists available for public inspection:

(1) Participating manufacturers. — A list of the participating manufacturers and all brand families of each participating manufacturer that the manufacturer has identified to the Attorney General, in accordance with G.S. 66-294.

(2) Compliant nonparticipating manufacturers. — A list of the nonparticipating manufacturers whose applications for inclusion have been found to be complete and accurate and whose escrow agreements have been approved by the Office of the Attorney General. The list must include those brand families that the manufacturer has identified to the Attorney General, in accordance with G.S. 66-294.

(b) Supplemental Lists. — The Office of the Attorney General must supplement the annual lists as necessary to reflect additions to or deletions of manufacturers and brand families. The Attorney General shall delete a nonparticipating manufacturer and its brand families from the list if it determines that the manufacturer fails to comply with the duties listed in G.S. 66-294. The Attorney General must add a nonparticipating manufacturer and its brand families to the list if it determines all of the following:

(1) The nonparticipating manufacturer has submitted an application under G.S. 66-294, and it is found to be complete and accurate.

(2) The Office of the Attorney General has approved the manufacturer's escrow agreement.
(3) The manufacturer has made any past due payments owed to its escrow account for any of its listed brand families.
(4) The manufacturer has resolved any outstanding penalty demands or adjudicated penalties for its listed brand families.

(c) Quarterly Escrow Installments. — To promote compliance with this Article, the Attorney General shall require a nonparticipating manufacturer to make the escrow deposits required by G.S. 66-291(a)(2) in quarterly installments during the year in which the sales covered by the deposits are made if one or more of the conditions in this subsection apply. A quarterly installment must be made by the last day of the month following the end of the quarter. The Attorney General must notify a nonparticipating manufacturer required to make quarterly escrow deposits under this subsection of its duty to do so by first-class mail sent to the manufacturer's last known address. The Attorney General may require production of information sufficient to enable the Attorney General to determine the adequacy of the amount of any installment escrow payment.

(1) The nonparticipating manufacturer has not previously established and funded a qualified escrow fund in North Carolina.
(2) The nonparticipating manufacturer has not made any escrow deposits for more than one year.
(3) The nonparticipating manufacturer has failed to make a timely and complete escrow deposit in any prior calendar year.
(4) The nonparticipating manufacturer has failed to pay any judgment, including any civil penalty.
(5) The Attorney General has reasonable cause to believe that the nonparticipating manufacturer may not make its full required escrow deposit by April 15 of the year following the year in which the cigarette sales are made. (2002-145, s. 3; 2007-435, s. 1.)

Editor's Note. — The number of G.S. 66-294.1 was assigned by the Revisor of Statutes, the number in Session Laws 2002-145 having been G.S. 66-295.

Effect of Amendments. — Session Laws 2007-435, s. 1, effective January 1, 2008, added subsection (c).

ARTICLE 38.

Year 2000 Liability and Damages.

(Expired December 31, 2004).

§§ 66-295 through 66-299: Expired pursuant to Session Laws 1995-295, s. 4, effective December 31, 2004.

Cross References. — As to affirmative defense based on year 2000 problems, see G.S. 1-539.25 et seq.

Editor's Note. — Session Laws 1999-295, s. 1 enacted this Article as Article 35, G.S. 66-280 to 66-283, these sections were recodified as Article 38, G.S. 66-295 to 66-297 at the direction of the Revisor of Statutes.

Session Laws 1999-295, s. 3 provided that if Senate Bill 192, 1999 Regular Session, became law, then Article 35 of Chapter 66 of the General Statutes, as enacted by this act, would be recodified as Article 36 of Chapter 66 of the General Statutes. Senate Bill 192 was enacted as Session Laws 1999-260; however, this Article was enacted as Article 38 at the direction of the Revisor of Statutes.

ARTICLE 39.

Self-Service Storage Rental Contracts.

§ 66-305. Contract requirements.

A rental contract for the storage of personal property in a self-service storage business shall state, in bold type of a minimum size of 14 points and conspicuously placed, the terms regarding the imposition of late fees, the terms regarding any consequences of a late payment, and the terms, if any, that pertain to the payment of court costs, attorneys' fees, and any other costs associated with the payment of late fees or with judgment against the consumer for late rental payments or late fees. (1999-416, s. 1.)

Editor's Note. — Session Laws 1999-416, s. 1, enacted this Article as Article 35, G.S. 66-280 to 66-282, these sections have been recodified as Article 39, G.S. 66-305 to 66-307, at the direction of the Revisor of Statutes.

§ 66-306. Late fees.

(a) In all rental contracts in which a definite time for the payment of the rent is fixed, the late fee for each rental unit shall not exceed fifteen percent (15%) of the rental payment and shall not be imposed by the self-service storage business until the rental payment for that rental unit is five days or more late.

(b) A late fee under this section may be imposed only one time for each late rental payment. A late fee for a specific late rental payment shall not be deducted from a subsequent rental payment so as to cause the subsequent rental payment to be in default. (1999-416, s. 1.)

Editor's Note. — Session Laws 1999-416, s. 1, enacted this section as G.S. 66-281, it has been recodified as G.S. 66-306, at the direction of the Revisor of Statutes.

§ 66-307. Violations.

(a) Late fees and attorney fees are not recoverable if a self-service storage business violates the provisions of G.S. 66-306.

(b) Any waiver of any of the provisions of this Article shall be deemed void and unenforceable.

(c) The remedies provided in this section are in addition to any other remedies provided for by law or in equity. (1999-416, s. 1.)

Editor's Note. — Session Laws 1999-416, s. 1, enacted this section as G.S. 66-282, it has been recodified as G.S. 66-307, at the direction of the Revisor of Statutes.

§§ 66-308 through 66-310: Reserved for future codification purposes.

ARTICLE 40.

Uniform Electronic Transactions Act.

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§ 66-311. Short title.

This Article may be cited as the Uniform Electronic Transactions Act. (2000-152, s. 1.)

Editor's Note. — The numbers of G.S. 66-311 to 66-330 were assigned by the Revisor of Statutes, the numbers in Session Laws 2000-152, s. 1 having been G.S. 66-308 et seq. Session Laws 2000-152, s. 3, made this Article effective October 1, 2000.

Session Laws 2000-152, s. 2, directs the Revisor of Statutes to cause to be printed along with the act all relevant portions of the official comments to the Uniform Electronic Transactions Act, as the Revisor deems appropriate.

§ 66-312. Definitions.

As used in this Article, unless the context clearly requires otherwise, the term:

(1) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

(2) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(3) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(4) "Consumer transaction" means a transaction involving a natural person with respect to or affecting primarily personal, household, or family purposes.

(5) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this Article and other applicable law.

(6) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(7) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

(8) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(9) "Electronic signature" means an electronic sound, symbol, or process attached to, or logically associated with, a record and executed or adopted by a person with the intent to sign the record.

(10) "Governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.

(11) "Information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(12) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(13) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(14) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(15) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(16) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

(17) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of consumer, business, commercial, or governmental affairs. (2000-152, s. 1; 2001-295, s. 1.)

OFFICIAL COMMENT

1. **"Agreement."** Whether the parties have reached an agreement is determined by their express language and all surrounding circumstances. The Restatement 2d Contracts § 3 provides that, "An agreement is a manifestation of mutual assent on the part of two or more persons." See also Restatement 2d Contracts, Section 2, Comment b. The Uniform Commercial Code specifically includes in the circumstances from which an agreement may be inferred "course of performance, course of dealing and usage of trade..." as defined in the UCC. Although the definition of agreement in this Act does not make specific reference to usage of trade and other party conduct, this definition is not intended to affect the construction of the parties' agreement under the substantive law applicable to a particular transaction. Where that law takes account of usage and conduct in informing the terms of the parties' agreement, the usage or conduct would be relevant as "other circumstances" included in the definition under this Act.

Where the law applicable to a given transaction provides that system rules and the like constitute part of the agreement of the parties, such rules will have the same effect in determining the parties agreement under this Act. For example, UCC Article 4 (Section 4-103(b)) provides that Federal Reserve regulations and operating circulars and clearinghouse rules have the effect of agreements. Such agreements by law properly would be included in the definition of agreement in this Act.

The parties' agreement is relevant in determining whether the provisions of this Act have been varied by agreement. In addition, the parties' agreement may establish the parameters of the parties' use of electronic records and signatures, security procedures and similar aspects of the transaction. See Model Trading Partner Agreement, 45 Business Lawyer Supp. Issue (June 1990). See Section 5(b) [G.S. 66-315(b)] and comments thereto.

2. **"Automated Transaction."** An automated transaction is a transaction performed or conducted by electronic means in which machines are used without human intervention to form contracts and perform obligations under existing contracts. Such broad coverage is necessary because of the diversity of transactions to which this Act may apply.

As with electronic agents, this definition addresses the circumstance where electronic records may result in action or performance by a party although no human review of the electronic records is anticipated. Section 14 [G.S. 66-324] provides specific rules to assure that where one or both parties do not review the electronic records, the resulting agreement will be effective.

The critical element in this definition is the lack of a human actor on one or both sides of a transaction. For example, if one orders books from Bookseller.com through Bookseller's website, the transaction would be an automated transaction because Bookseller took and confirmed the order via its machine. Similarly, if Automaker and supplier do business through Electronic Data Interchange, Automaker's computer, upon receiving information within certain pre-programmed parameters, will send an electronic order to supplier's computer. If Supplier's computer confirms the order and processes the shipment because the order falls within pre-programmed parameters in Supplier's computer, this would be a fully automated transaction. If, instead, the Supplier relies on a human employee to review, accept, and process the Buyer's order, then only the Automaker's side of the transaction would be automated. In either case, the entire transaction falls within this definition.

3. **"Computer program."** This definition refers to the functional and operating aspects of an electronic, digital system. It relates to operating instructions used in an electronic system such as an electronic agent. (See definition of "Electronic Agent").

4. **"Electronic."** The basic nature of most current technologies and the need for a recognized, single term warrants the use of "electronic" as the defined term. The definition is intended to assure that the Act will be applied broadly as new technologies develop. The term must be construed broadly in light of developing technologies in order to fulfill the purpose of this Act to validate commercial transactions regardless of the medium used by the parties. Current legal requirements for "writings" can be satisfied by most any tangible media, whether paper, other fibers, or even stone. The purpose and applicability of this Act covers intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form, but which lack the tangible aspect of paper, papyrus or stone.

While not all technologies listed are technically "electronic" in nature (e.g., optical fiber technology), the term "electronic" is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. However, whether a particular technology may be characterized as technically "electronic," i.e., operates on electromagnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered by this Act. This act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form.

5. **"Electronic agent."** This definition establishes that an electronic agent is a machine. As the term "electronic agent" has come to be recognized, it is limited to a tool function. The effect on the party using the agent is addressed in the operative provisions of the Act (e.g., Section 14 [G.S. 66-324]).

An electronic agent, such as a computer program or other automated means employed by a person, is a tool of that person. As a general rule, the employer of a tool is responsible for the results obtained by the use of that tool since the tool has no independent volition of its own. However, an electronic agent, by definition, is capable within the parameters of its programming, of initiating, responding or interacting with other parties or their electronic agents once it has been activated by a party, without further attention of that party.

While this Act proceeds on the paradigm that an electronic agent is capable of performing only within the technical strictures of its preset programming, it is conceivable that, within the useful life of this Act, electronic agents may be created with the ability to act autonomously, and not just automatically. That is, through developments in artificial intelligence, a computer may be able to "learn through experience, modify the instructions in their own programs, and even devise new instructions." Allen and Widdison, "Can Computers Make Contracts?" *9 Harv. J.L.&Tech 25* (Winter, 1996). If such developments occur, courts may construe the definition of electronic agent accordingly, in order to recognize such new capabilities.

The examples involving Bookseller.com and Automaker in the comment to the definition of Automated Transaction are equally applicable here. Bookseller acts through an electronic agent in processing an order for books. Automaker and the supplier each act through electronic agents in facilitating and effectuating the just-in-time inventory process through EDI.

6. **"Electronic record."** An electronic record is a subset of the broader defined term "record." It is any record created, used or stored in a medium other than paper (see definition of electronic). The defined term is also used in this Act as a limiting definition in those provisions in which it is used.

Information processing systems, computer equipment and programs, electronic data interchange, electronic mail, voice mail, facsimile, telex, telecopying, scanning, and similar technologies all qualify as electronic under this act. Accordingly information stored on a computer hard drive or floppy disc, facsimiles, voice mail messages, messages on a telephone answering machine, audio and video tape recordings, among other records, all would be electronic records under this Act.

7. **"Electronic signature."** The idea of a signature is broad and not specifically defined. Whether any particular record is "signed" is a question of fact. Proof of that fact must be made under other applicable law. This act simply assures that the signature may be accomplished through an electronic means. No specific technology need be used in order to create a valid signature. One's voice on an answering machine may suffice if the requisite intention is present. Similarly, including one's name as part

of an electronic mail communication also may suffice, as may the firm name on a facsimile. It also may be shown that the requisite intent was not present and accordingly the symbol, sound or process did not amount to a signature. One may use a digital signature with the requisite intention, or one may use the private key solely as an access device with no intention to sign, or otherwise accomplish a legally binding act. In any case the critical element is the intention to execute or adopt the sound or symbol or process for the purpose of signing the related record.

The definition requires that the signer execute or adopt the sound, symbol, or process with the intent to sign the record. The act of applying a sound, symbol or process to an electronic record could have differing meanings and effects. The consequence of the act and the effect of the act as a signature are determined under other applicable law. However, the essential attribute of a signature involves applying a sound, symbol or process with an intent to do a legally significant act. It is that intention that is understood in the law as a part of the word "sign", without the need for a definition.

This Act establishes, to the greatest extent possible, the equivalency of electronic signatures and manual signatures. Therefore the term "signature" has been used to connote and convey that equivalency. The purpose is to overcome unwarranted biases against electronic methods of signing and authenticating records. The term "authentication," used in other laws, often has a narrower meaning and purpose than an electronic signature as used in this Act. However, an authentication under any of those other laws constitutes an electronic signature under this Act.

The precise effect of an electronic signature will be determined based on the surrounding circumstances under section 9(b) [G.S. 66-319(b)].

This definition includes as an electronic signature the standard webpage click through process. For example, when a person orders goods or services through a vendor's website, the person will be required to provide information as part of a process which will result in receipt of the goods or services. When the customer ultimately gets to the last step and clicks "I agree," the person has adopted the process and has done so with the intent to associate the person with the record of that process. The actual effect of the electronic signature will be determined from all the surrounding circumstances, however, the person adopted a process which the circumstances indicate s/he intended to have the effect of getting the goods/services and being bound to pay for them. The adoption of the process carried the intent to do a legally significant act, the hallmark of a signature.

Another important aspect of this definition lies in the necessity that the electronic signature be linked or logically associated with the record. In the paper world, it is assumed that the symbol adopted by a party is attached to or located somewhere in the same paper that is intended to be authenticated, e.g., an allonge firmly attached to a promissory note, or the classic signature at the end of a long contract. These tangible manifestations do not exist in the electronic environment, and accordingly, this definition expressly provides that the symbol must in some way be linked to, or connected with, the electronic record being signed. This linkage is consistent with the regulations promulgated by the Food and Drug Administration. 21 CFR Part 11 (March 20, 1997).

A digital signature using public key encryption technology would qualify as an electronic signature, as would the mere inclusion of one's name as a part of an e-mail message — so long as in each case the signer executed or adopted the symbol with the intent to sign.

8. **"Governmental agency."** This definition is important in the context of optional Sections 17-19.

9. **"Information processing system."** This definition is consistent with the UNCITRAL Model Law on Electronic Commerce. The term includes computers and other information systems. It is principally used in Section 15 [G.S. 66-325] in connection with the sending and receiving of information. In that context, the key aspect is that the information enter a system from which a person can access it.

10. **"Record."** This is a standard definition designed to embrace all means of communicating or storing information except human memory. It includes any method for storing or communicating information, including "writings." A record need not be indestructible or permanent, but the term does not include oral or other communications which are not stored or preserved by some means. Information that has not been retained other than through human memory does not qualify as a record. As in the case of the terms "writing" or "written," the term "record" does not establish the purposes, permitted uses or legal effect which a record may have under any particular provision of substantive law. ABA Report on Use of the Term "Record," October 1, 1996.

11. **"Security procedure."** A security procedure may be applied to verify an electronic signature, verify the identity of the sender, or assure the informational integrity of an electronic record. The definition does not identify any particular technology. This permits the use of procedures which the parties select or which are established by law. It permits the greatest flexibility among the parties and allows for future technological development.

The definition in this Act is broad and is used to illustrate one way of establishing attribution or content integrity of an electronic record or signature. The use of a security procedure is not accorded operative legal effect, through the use of presumptions or otherwise, by this Act. In this Act, the use of security procedures is simply one method for proving the source or content of an electronic record or signature.

A security procedure may be technologically very sophisticated, such as an asymetric cryptographic system. At the other extreme the security procedure may be as simple as a telephone call to confirm the identity of the sender through another channel of communication. It may include the use of a mother's maiden name or a personal identification number (PIN). Each of these examples is a method for confirming the identity of a person or accuracy of a message.

12. **"Transaction."** The definition has been limited to actions between people taken in the context of business, commercial or governmental activities. The term includes all interactions between people for business, commercial, including specifically consumer, or governmental purposes. However, the term does not include unilateral or non-transactional actions. As such it provides a structural limitation on the Scope of the Act as stated in the next section.

It is essential that the term commerce and business be understood and construed broadly to include commercial and business transactions involving individuals who may qualify as "consumers" under other applicable law. If Alice and Bob agree to the sale of Alice's car to Bob for $2000 using an internet auction site, that transaction is fully covered by this Act. Even if Alice and Bob each qualify as typical "consumers," under other applicable law, their interaction is a transaction in commerce. Accordingly their actions would be related to commercial affairs, and fully qualify as a transaction governed by this Act.

Other transaction types include:

1. A single purchase by an individual from a retail merchant, which may be accomplished by an order from a printed catalog sent by facsimile, or by exchange of electronic mail.

2. Recurring orders on a weekly or monthly basis between large companies which have entered into a master trading partner agreement to govern the methods and manner of their transaction parameters.

3. A purchase by an individual from an online internet retail vendor. Such an arrangement may develop into an ongoing series of individual purchases, with security procedures and the like, as a part of doing ongoing business.

4. The closing of a business purchase transaction via facsimile transmission of documents or even electronic mail. In such a transaction, all parties may participate through electronic conferencing technologies. At the appointed time all electronic records are executed electronically and transmitted to the other party. In such a case, the electronic records and electronic signatures are validated under this Act, obviating the need for "in person" closings.

A transaction must include interaction between two or more persons. Consequently, to the extent that the execution of a will, trust, or a health care power of attorney or similar health care designation does not involve another person and is a unilateral act, it would not be covered by this Act because not occurring as a part of a transaction as defined in this Act. However, this Act *does* apply to all electronic records and signatures *related* to a transaction, and so does cover, for example, internal auditing and accounting records related to a transaction.

§ 66-313. Scope.

(a) Except as otherwise provided in subsections (b), (c), and (e) of this section, this Article applies to electronic records and electronic signatures relating to a transaction.

(b) This Article does not apply to a transaction to the extent it is governed by:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts.

(2) Chapter 25 of the General Statutes other than G.S. 25-1-306, Article 2, and Article 2A.

(3) Article 11A of Chapter 66 of the General Statutes.

(c) This Article applies to an electronic record or electronic signature otherwise excluded from the application of this Article under subsection (b) of this section to the extent it is governed by a law other than those specified in subsection (b) of this section.

(d) A transaction subject to this Article is also subject to other applicable substantive law.

(e) This Article shall not apply to:

(1) Any notice of the cancellation or termination of utility services, including water, heat, and power.

(2) Any notice of default, acceleration, repossession, foreclosure or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual.

(3) Any notice of the cancellation or termination of health insurance or benefits, or life insurance or benefits, excluding annuities.

(4) Any notice of the recall of a product, or material failure of a product that risks endangering health or safety.

(5) Any document required to accompany the transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials. (2000-152, s. 1; 2001-295, s. 2; 2006-112, s. 23.)

OFFICIAL COMMENT

1. The Scope of this Act is inherently limited by the fact that it only applies to transactions related to business, commercial (including consumer) and governmental matters. Consequently, transactions with no relation to business, commercial or governmental transactions would not be subject to this Act. Unilaterally generated electronic records and signatures which are not part of a transaction also are not covered by this Act. See Section 2 [G.S. 66-312], Comment 12.

2. This act affects the medium in which information, records and signatures may be presented and retained under current legal requirements. While this Act covers all electronic records and signatures which are used in a business, commercial (including consumer) or governmental transaction, the operative provisions of the act relate to requirements for writings and signatures under other laws. Accordingly, the exclusions in subsection (b) focus on those legal rules imposing certain writing and signature requirements which will **not** be affected by this act.

3. The exclusions listed in subsection (b) provide clarity and certainty regarding the laws which are and are not affected by this Act. This section provides that transactions subject to specific laws are unaffected by this Act and leaves the balance subject to this Act.

4. Paragraph (1) excludes wills, codicils and testamentary trusts. This exclusion is largely salutary given the unilateral context in which such records are generally created and the unlikely use of such records in a transaction as defined in this Act (i.e., actions taken by two or more persons in the context of business, commercial or governmental affairs). Paragraph (2) excludes all of the Uniform Commercial Code other than UCC Sections 1-107 and 1-206, and Articles 2 and 2A. This Act does not apply to the excluded UCC articles, whether in "current" or "revised" form. The Act does apply to UCC Articles 2 and 2A and to UCC Sections 1-107 and 1-206.

5. Articles 3, 4 and 4A of the UCC impact payment systems and have specifically been removed from the coverage of this Act. The check collection and electronic fund transfer systems governed by Articles 3, 4 and 4A involve systems and relationships involving numerous parties beyond the parties to the underlying contract. The impact of validating electronic media in such systems involves considerations beyond the scope of this Act. Articles 5, 8 and 9 have been excluded because the revision process relating to those Articles included significant consideration of electronic practices. Paragraph 4 provides for exclusion from this Act of the Uniform Computer Information Transactions Act (UCITA) because the drafting process of that Act also included significant consideration of electronic contracting provisions.

6. The very limited application of this Act to Transferable Records in Section 16 [G.S. 66-326] does not affect payment systems, and the Section is designed to apply to a transaction through express agreement of the parties. The exclusion of Articles 3 and 4 will not affect the Act's coverage of Transferable Records. Section 16 [G.S. 66-326] is designed to allow for the development of systems which will provide "control" as defined in Section 16 [G.S. 66-326]. Such control is necessary as a substitute for the idea of possession which undergirds negotiable instrument law. The technology has yet to be developed which will allow for the possession of a unique electronic token embodying the rights associated with a negotiable promissory note. Section 16's [G.S. 66-326's] concept of control is intended as a substitute for possession.

The provisions in Section 16 [G.S. 66-326] operate as free standing rules, establishing the rights of parties using Transferable Records *under this Act.* The references in Section 16 [G.S. 66-326] to UCC Section 3-302, 7-501 and 9-308 (R9-330(d)) are designed to incorporate the substance of those provisions into this act for the limited purposes noted in section 16(c) [G.S. 66-326(c)]. Accordingly, an electronic record which is also a Transferable Record, would not be used for purposes of a transaction governed by Articles 3, 4, or 9, but would be an electronic record used for purposes of a transaction governed by Section 16 [G.S. 66-326]. However, it is important to remember that those UCC Articles will still apply to the transferable record in their own right. Accordingly any other substantive requirements, e.g., method and manner of perfection under Article 9, must be complied with under those other laws. See Comments to Section 16 [G.S. 66-326].

7. This Act does apply, *in toto*, to transactions under unrevised Articles 2 and 2A. There is every reason to validate electronic contracting in these situations. Sale and lease transactions do not implicate broad systems beyond the parties to the underlying transaction, such as are present in check collection and electronic funds transfers. Further sales and leases generally do not have a far reaching effect on the rights of parties beyond the contracting parties, such as exists in the secured transactions system. Finally, it is in the area of sales, licenses and leases that electronic commerce is occurring to its greatest extent today. To exclude these transactions would largely gut the purpose of this Act.

In the event that Articles 2 and 2A are revised and adopted in the future, UETA will only apply to the extent provided in those Acts.

8. An electronic record/signature may be used for purposes of more than one legal requirement, or may be covered by more than one law. Consequently, it is important to make clear, despite any apparent redundancy, in subsection (c) that an electronic record used for purposes of a law which is not affected by this act under subsection (b) may nonetheless be used and validated for purposes of other laws not excluded by subsection (b). For example, this Act does not apply to an electronic record of a check when used for purposes of a transaction governed by Article 4 of the Uniform Commercial Code, i.e., the Act does not validate so-called electronic checks. However, for purposes of check retention statutes, the same electronic record of the check is covered by this Act, so that retention of an electronic image/record of a check will satisfy such retention statutes, so long as the requirements of Section 12 [G.S. 66-322] are fulfilled.

In another context, subsection (c) would operate to allow this Act to apply to what would appear to be an excluded transaction under subsection (b). For example, Article 9 of the Uniform Commercial Code applies generally to any transaction that creates a security interest in personal property. However, Article 9 excludes landlord's liens. Accordingly, although this Act excludes from its application transactions subject to Article 9, this Act would apply to the creation of a landlord lien if the law otherwise applicable to landlord's liens did not provide otherwise, because the landlord's lien transaction is excluded from Article 9.

9. Additional exclusions under subparagraph (b)(4) should be limited to laws which govern electronic records and signatures which may be used in transactions as defined in Section 2(16) [G.S. 66-312(16)]. Records used unilaterally, or which do not relate to business, commercial (including consumer), or governmental affairs are not governed by this Act in any event, and exclusion of laws relating to such records may create unintended inferences about whether other records and signatures are covered by this Act.

It is also important that additional exclusions, if any, be incorporated under subsection (b)(4). As noted in Comment 8 above, an electronic record used in a transaction excluded under subsection (b), e.g., a check used to pay one's taxes, will nonetheless be validated for purposes of other, non-excluded laws under subsection (c), e.g., the check when used as proof of payment. It is critical that additional exclusions, if any, be incorporated into subsection (b) so that the salutary effect of subsection (c) apply to validate those records in other, non-excluded transactions. While a legislature may determine that a particular notice, such as a utility shutoff notice, be provided to a person in writing on paper, it is difficult to see why the utility should not be entitled to use electronic media for storage and evidentiary purposes.

Editor's Note. — Session Laws 2006-112, s. 60, provides that: "A document of title issued or a bailment that arises before October 1, 2006, and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

§ 66-314. Prospective application.

This Article applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after the effective date of this Article. (2000-152, s. 1.)

OFFICIAL COMMENT

This section makes clear that the Act only applies to validate electronic records and signatures which arise subsequent to the effective date of the Act. Whether electronic records and electronic signatures arising before the effective date of this Act are valid is left to other law.

§ 66-315. Use of electronic records and electronic signatures; variation by agreement.

(a) This Article does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This Article applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

(d) Except as otherwise provided in this Article, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this Article of the words "unless otherwise agreed", or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this Article and other applicable law. (2000-152, s. 1.)

OFFICIAL COMMENT

This Section limits the applicability of this Act to transactions which parties have agreed to conduct electronically. Broad interpretation of the term agreement is necessary to assure that this Act has the widest possible application consistent with its purpose of removing barriers to electronic commerce.

1. This section makes clear that this Act is intended to facilitate the use of electronic means, but does not require the use of electronic records and signatures. This fundamental principle is set forth in subsection (a) and elaborated by subsections (b) and (c), which require an intention to conduct transactions electronically and preserve the right of a party to refuse to use electronics in any subsequent transaction.

2. The paradigm of this Act is two willing parties doing transactions electronically. It is therefore appropriate that the Act is voluntary and preserves the greatest possible party autonomy to refuse electronic transactions. The requirement that party agreement be found from all the surrounding circumstances is a limitation on the scope of this Act.

3. If this Act is to serve to facilitate electronic transactions, it must be applicable under circumstances not rising to a full fledged contract to use electronics. While absolute certainty can be accomplished by obtaining an explicit contract before relying on electronic transactions, such an explicit contract should not be necessary before one may feel safe in conducting transactions electronically. Indeed, such a requirement would itself be an unreasonable barrier to electronic commerce, at odds with the fundamental purpose of this Act. Accordingly, the requisite agreement, express or implied, must be determined from all available circumstances and evidence.

4. Subsection (b) provides that the Act applies to transactions in which the parties have agreed to conduct the transaction electronically. In this context it is essential that the parties' actions and words be broadly construed in determining whether the requisite agreement exists. Accordingly, the Act expressly provides that the party's agreement is to be found from all circumstances, including the parties' conduct. The critical element is the intent of a party to conduct a transaction electronically. Once that intent is established, this Act applies. See Restatement 2d Contracts, Sections 2, 3 and 19.

Examples of circumstances from which it may be found that parties have reached an agreement to conduct transactions electronically include the following:

A. Automaker and supplier enter into a Trading Partner Agreement setting forth the terms, conditions and methods for the conduct of business between them electronically.

B. Joe gives out his business card with his business e-mail address. It may be reasonable, under the circumstances, for a recipient of the card to infer that Joe has agreed to communicate electronically for business purposes. However, in the absence of additional facts, it would not necessarily be reasonable to infer Joe's agreement to communicate electronically for purposes outside the scope of the business indicated by use of the business card.

C. Sally may have several e-mail addresses — home, main office, office of a non-profit organization on whose board Sally sits. In each case, it may be reasonable to infer that Sally is willing to communicate electronically with respect to business related to the business/purpose associated with the respective e-mail addresses. However, depending on the circumstances, it may not be reasonable to communicate with Sally for purposes other than those related to the purpose for which she maintained a particular e-mail account.

D. Among the circumstances to be considered in finding an agreement would be the time when the assent occurred relative to the timing of the use of electronic communications. If one order books from an on-line vendor, such as Bookseller.com the intention to conduct that transaction and to receive any correspondence related to the transaction, electronically can be inferred from the conduct. Accordingly, as to information related to that transaction it is reasonable for Bookseller to deal with the individual electronically.

The examples noted above are intended to focus the inquiry on the party's agreement to conduct a transaction electronically. Similarly, if two people are at a meeting and one tells the other to send an e-mail to confirm a transaction — the requisite agreement under subsection (b) would exist. In each case, the use of a business card, statement at a meeting, or other evidence of willingness to conduct a transaction electronically must be viewed in light of all the surrounding circumstances with a view toward broad validation of electronic transactions.

5. Just as circumstances may indicate the existence of agreement, express or implied from surrounding circumstances, circumstances may also demonstrate the absence of true agreement. For example:

A. If Automaker, Inc. were to issue a recall of automobiles via its Internet website, it would not be able to rely on this Act to validate that notice in the case of a person who never logged on to the website, or indeed, had no ability to do so, notwithstanding a clause in a paper purchase contract by which the buyer agreed to receive such notices in such a manner.

B. Buyer executes a standard form contract in which an agreement to receive all notices electronically in [is] set forth on page 3 in the midst of other fine print. Buyer has never communicated with Seller electronically, and has not provided any other information in the contract to suggest a willingness to deal electronically. Not only is it unlikely that any but the most formalistic of agreements may be found, but nothing in this Act prevents courts from policing such form contracts under common law doctrines relating to contract formation, unconscionability and the like.

6. Subsection (c) has been added to make clear the ability of a party to refuse to conduct a transaction electronically, even if the person has conducted transactions electronically in the past. The effectiveness of a party's refusal to conduct a transaction electronically will be determined under other applicable law in light of all surrounding circumstances. Such circumstances must include an assessment of the transaction involved.

A party's right to decline to act electronically under a specific contract, on the ground that each action under that contract amounts to a separate "transaction," must be considered in light of the purpose of the contract and the action to be taken electronically. For example, under a contract for the purchase of goods, the giving and receipt of notices electronically, as provided in the contract, should not be viewed as discreet transactions. Rather such notices amount to separate actions which are part of the "transaction" of purchase evidenced by the contract. Allowing one party to require a change of medium in the middle of the transaction evidenced by that contract is not the purpose of this subsection. Rather this subsection is intended to preserve the party's right to conduct the next purchase in a non-electronic medium.

7. Subsection (e) is an essential provision in the overall scheme of this Act. While this Act validates and effectuates electronic records and electronic signatures, the legal effect of such records and signatures is left to existing substantive law outside this Act except in very narrow circumstances. See, e.g., Section 16 [G.S. 66-326]. Even when this Act operates to validate records and signatures in an electronic medium, it expressly preserves the substantive rules of other law applicable to such records. See, e.g., Section 11 [G.S. 66-321].

For example, beyond validation of records, signatures and contracts based on the medium used, Sections 7 (a) and (b) [G.S. 66-317(a) and (b)] should not be interpreted as establishing the legal effectiveness of any given record, signature or contract. Where a rule of law requires that the record contain minimum substantive content, the legal effect of such a record will depend on whether the record meets the substantive requirements of other applicable law.

Section 8 [G.S. 66-318] expressly preserves a number of legal requirements in currently existing law relating to the presentation of information in writing. Although this Act now would allow such information to be presented in an electronic record, Section 8 [G.S. 66-318] provides that the other substantive requirements of law must be satisfied in the electronic medium as well.

§ 66-316. Construction and application.

This Article must be construed and applied:

(1) To facilitate electronic transactions consistent with other applicable law;

(2) To be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) To effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it. (2000-152, s. 1.)

OFFICIAL COMMENT

1. The purposes and policies of this Act are

a) to facilitate and promote commerce and governmental transactions by validating and authorizing the use of electronic records and electronic signatures;

b) to eliminate barriers to electronic commerce and governmental transactions resulting from uncertainties relating to writing and signature requirements;

c) to simplify, clarify and modernize the law governing commerce and governmental transactions through the use of electronic means;

d) to permit the continued expansion of commercial and governmental electronic practices through custom, usage and agreement of the parties;

e) to promote uniformity of the law among the states (and worldwide) relating to the use of electronic and similar technological means of effecting and performing commercial and governmental transactions;

f) to promote public confidence in the validity, integrity and reliability of electronic commerce and governmental transactions; and

g) to promote the development of the legal and business infrastructure necessary to implement electronic commerce and governmental transactions.

2. This Act has been drafted to permit flexible application consistent with its purpose to validate electronic transactions. The provisions of this Act validating and effectuating the employ of electronic media allow the courts to apply them to new and unforeseen technologies and practices. As time progresses, it is anticipated that what is new and unforeseen today will be commonplace tomorrow. Accordingly, this legislation is intended to set a framework for the validation of media which may be developed in the future and which demonstrate the same qualities as the electronic media contemplated and validated under this Act.

§ 66-317. Legal recognition of electronic records, electronic signatures, and electronic contracts.

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law provided it complies with the provisions of this Article.

(d) If a law requires a signature, an electronic signature satisfies the law provided it complies with the provisions of this Article. (2000-152, s. 1.)

OFFICIAL COMMENT

1. This section sets forth the fundamental premise of this Act: namely, that the medium in which a record, signature, or contract is created, presented or retained does not affect its legal significance. Subsections (a) and (b) are designed to eliminate the single element of medium as a reason to deny effect or enforceability to a record, signature, or contract. The

fact that the information is set forth in an electronic, as opposed to paper, record is irrelevant.

2. Under Restatement 2d Contracts Section 8, a contract may have legal effect and yet be unenforceable. Indeed, one circumstance where a record or contract may have effect but be unenforceable is in the context of the Statute of Frauds. Though a contract may be unenforceable, the records may have collateral effects, as in the case of a buyer that insures goods purchased under a contract unenforceable under the Statute of Frauds. The insurance company may not deny a claim on the ground that the buyer is not the owner, though the buyer may have no direct remedy against seller for failure to deliver. See Restatement 2d Contracts, Section 8, Illustration 4.

While this section would validate an electronic record for purposes of a statute of frauds, if an agreement to conduct the transaction electronically cannot reasonably be found (See Section 5(b)) [G.S. 66-315(b)] then a necessary predicate to the applicability of this Act would be absent and this Act would not validate the electronic record. Whether the electronic record might be valid under other law is not addressed by this Act.

3. Subsections (c) and (d) provide the positive assertion that electronic records and signatures satisfy legal requirements for writings and signatures. The provisions are limited to requirements in laws that a record be in writing or be signed. This section does not address requirements imposed by other law in addition to requirements for writings and signatures See, e.g., Section 8 [G.S. 66-318].

Subsections (c and d) are particularized applications of subsection (a). The purpose is to validate and effectuate electronic records and signatures as the equivalent of writings, subject to all of the rules applicable to the efficacy of a writing, except as such other rules are modified by the more specific provisions of this Act.

Illustration 1: A sends the following e-mail to B: "I hereby offer to buy widgets from you, delivery next Tuesday. /s/A." B responds with the following e-mail: "I accept your offer to buy widgets for delivery next Tuesday. /s/B." The e-mails may not be denied effect solely because they are electronic. In addition, the e-mails do qualify as records under the Statute of Frauds. However, because there is no quantity stated in either record, the parties' agreement would be unenforceable under existing UCC Section 2-201(1).

Illustration 2: A sends the following e-mail to B: "I hereby offer to buy 100 widgets for $1000, delivery next Tuesday. /s/A." B responds with the following e-mail: "I accept your offer to purchase 100 widgets for $1000, delivery next Tuesday. /s/B." In this case the analysis is the same as in Illustration 1 except that here the records otherwise satisfy the requirements of UCC Section 2-201(1). The transaction may not be denied legal effect solely because there is not a pen and ink "writing" or "signature".

4. Section 8 [G.S. 66-318] addresses additional requirements imposed by other law which may affect the legal effect or enforceability of an electronic record in a particular case. For example, in section 8(a) [G.S. 66-318(a)] the legal requirement addressed is the *provision of information* in writing. The section then sets forth the standards to be applied in determining whether the provision of information by an electronic record is the equivalent of the provision of information in writing. The requirements in section 8 are in addition to the bare validation that occurs under this section.

5. Under the substantive law applicable to a particular transaction within this Act, the legal effect of an electronic record may be separate from the issue of whether the record contains a signature. For example, where notice must be given as part of a contractual obligation, the effectiveness of the notice will turn on whether the party provided the notice regardless of whether the notice was signed (See Section 15 [G.S. 66-325]). An electronic record attributed to a party under Section 9 [G.S. 66-319] and complying with the requirements of Section 15 [G.S. 66-325], would suffice in that case, notwithstanding that it may not contain an electronic signature.

§ 66-318. Provision of information in writing; presentation of records.

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if:

(1) The sender or its information processing system inhibits the ability of the recipient to print or store the electronic record; or

(2) It is not capable of being accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.

(b) If a law other than this Article requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) The record must be posted or displayed in the manner specified in the other law.

(2) Except as otherwise provided in subdivision (d)(2) of this section, the record must be sent, communicated, or transmitted by the method specified in the other law.

(3) The record must contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, but:

(1) To the extent a law other than this act requires information to be provided, sent, or delivered in writing, but permits that requirement to be varied by agreement, the requirement under subsection (a) of this section that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) A requirement under a law other than this Article to send, communicate, or transmit a record by regular United States mail may be varied by agreement to the extent permitted by the other law. (2000-152, s. 1; 2001-295, s. 3.)

OFFICIAL COMMENT

1. This section is a savings provision, designed to assure, consistent with the fundamental purpose of this act, that otherwise applicable substantive law will not be overridden by this Act. The section makes clear that while the pen and ink provisions of such other law may be satisfied electronically, nothing in this Act vitiates the other requirements of such laws. The section addresses a number of issues related to disclosures and notice provisions in other laws.

2. This section is independent of the prior section. Section 7 [G.S. 66-317] refers to legal requirements for a writing. This section refers to legal requirements for the provision of information in writing or relating to the method or manner of presentation or delivery of information. The section addresses more specific legal requirements of other laws, provides standards for satisfying the more particular legal requirements, and defers to other law for satisfaction of requirements under those laws.

3. Under subsection (a), to meet a requirement of other law that information be provided in writing, the recipient of an electronic record of the information must be able to get to the electronic record and read it, and must have the ability to get back to the information in some way at a later date. Accordingly, the section requires that the electronic record be capable of retention for later review.

The section specifically provides that any inhibition on retention imposed by the sender or the sender's system will preclude satisfaction of this section. Use of technological means now existing or later developed which prevents the recipient from retaining a copy the information would result in a determination that information has not been provided under subsection (a). The policies underlying laws requiring the provision of information in writing warrant the imposition of an additional burden on the sender to make the information available in a manner which will permit subsequent reference. A difficulty does exist for senders of information because of the disparate systems of their recipients and the capabilities of those systems. However, in order to satisfy the *legal requirement* of other law to make information available, the sender must assure that the recipient receives an can retain the information. However, it is left for the courts to determine whether the sender has complied with this section if evidence demonstrates that it is the recipient's system which precludes subsequent reference to the information.

4. Subsection (b) is a savings provision for laws which provide for the means of delivering or displaying information and which are not affected by the Act. For example, if a law requires delivery of notice by first class US

mail, that means of delivery would not be affected by this Act. The information to be delivered may be provided on a disc, i.e., in electronic form, but the particular means of delivery must still be via the US postal service. Display, delivery and formatting requirements will continue to be applicable to electronic records and signatures. If those legal requirements can be satisfied in an electronic medium, e.g., the information can be presented in the equivalent of 20 point bold type as required by other law, this Act will validate the use of the medium, leaving to the other applicable law the question of whether the particular electronic record meets the other legal requirements. If a law requires that particular records be delivered together, or attached to other records, this Act does not preclude the delivery of the records together in an electronic communication, so long as the records are connected or associated with each other in a way determined to satisfy the other law.

5. Subsection (c) provides incentives for senders of information to use systems which will not inhibit the other party from retaining the information. However, there are circumstances where a party providing certain information may wish to inhibit retention in order to protect intellectual property rights or prevent the other party from retaining confidential information about the sender. In such cases inhibition is understandable, but if the sender wishes to enforce the record in which the information is contained, the sender may not inhibit its retention by the recipient. Unlike subsection (a), subsection (c) applies in all transactions and simply provides for unenforceability against the recipient. Subsection (a) applies only where another law imposes the writing requirement, and subsection (a) imposes a broader responsibility on the sender to assure retention capability by the recipient.

6. The protective purposes of this section justify the non-waivability provided by subsection (d). However, since the requirements for sending and formatting and the like are imposed by other law, to the extent other law permits waiver of such protections, there is no justification for imposing a more severe burden in an electronic environment.

§ 66-319. Attribution and effect of electronic record and electronic signature.

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subsection (a) of this section is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law. (2000-152, s. 1.)

OFFICIAL COMMENT

1. Under subsection (a), so long as the electronic record or electronic signature resulted from a person's action it will be attributed to that person — the legal effect of that attribution is addressed in subsection (b). This section does not alter existing rules of law regarding attribution. The section assures that such rules will be applied in the electronic environment. A person's actions include actions taken by human agents of the person, as well as actions taken by an electronic agent, i.e., the tool, of the person. Although the rule may appear to state the obvious, it assures that the record or signature is not ascribed to a machine, as opposed to the person operating or programing the machine.

In each of the following cases, both the electronic record and electronic signature would be attributable to a person under subsection (a):

A. The person types his/her name as part of an e-mail purchase order;

B. The person's employee, pursuant to authority, types the person's name as part of an e-mail purchase order;

C. The person's computer, programmed to order goods upon receipt of inventory information within particular parameters, issues a purchase order which includes the person's name, or other identifying information, as part of the order.

In each of the above cases, law other than this Act would ascribe both the signature and the action to the person if done in a paper medium. Subsection (a) expressly provides that the same result will occur when an electronic medium is used.

2. Nothing in this section affects the use of a signature as a device for attributing a record to

a person. Indeed, a signature is often the primary method for attributing a record to a person. In the foregoing examples, once the electronic signature is attributed to the person, the electronic record would also be attributed to the person, unless the person established fraud, forgery, or other invalidating cause. However, a signature is not the only method for attribution.

3. The use of facsimile transmissions provides a number of examples of attribution using information other than a signature. A facsimile may be attributed to a person because of the information printed across the top of the page that indicates the machine from which it was sent. Similarly, the transmission may contain a letterhead which identifies the sender. Some cases have held that the letterhead actually constituted a signature because it was a symbol adopted by the sender with intent to authenticate the facsimile. However, the signature determination resulted from the necessary finding of intention in that case. Other cases have found facsimile letterheads NOT to be signatures because the requisite intention was not present. The critical point is that with or without a signature, information within the electronic record may well suffice to provide the facts resulting in attribution of an electronic record to a particular party.

In the context of attribution of records, normally the content of the record will provide the necessary information for a finding of attribution. It is also possible that an established course of dealing between parties may result in a finding of attribution. Just as with a paper record, evidence of forgery or counterfeiting may be introduced to rebut the evidence of attribution.

4. Certain information may be present in an electronic environment that does not appear to attribute but which clearly links a person to a particular record. Numerical codes, personal identification numbers, public and private key combinations, all serve to establish the party to whom an electronic record should be attributed. Of course security procedures will be another piece of evidence available to establish attribution.

The inclusion of a specific reference to security procedures as a means of proving attribution is salutary because of the unique importance of security procedures in the electronic environment. In certain processes, a technical and technological security procedure may be the best way to convince a trier of fact that a particular electronic record or signature was that of a particular person. In certain circumstances, the use of a security procedure to establish that the record, and related signature came from the person's business might be necessary to overcome a claim that a hacker intervened. The reference to security procedures is not intended to suggest that other forms of proof of attribution should be accorded less persuasive effect. It is also important to recall that the particular strength of a given procedure does not affect the procedure's status as a security procedure, but only affects the weight to be accorded the evidence of the security procedure as tending to establish attribution.

5. This section does apply in determining the effect of a "click-through" transaction. A "click-through" transaction involves a process which, if executed with an intent to "sign," will be an electronic signature directly covered. See definition of Electronic Signature. In the context of an anonymous "click-through" issues of proof will be paramount. This section will be relevant to establish that the resulting electronic record is attributable to a particular person upon the requisite proof, including security procedures which may track the source of the click-through.

6. Once it is established that a record or signature is attributable to a particular party, the effect of a record or signature must be determined in light of the context and surrounding circumstances, including the parties' agreement, if any. Also informing the effect of any attribution will be other legal requirements considered in light of the context. Subsection (b) addresses the effect of the record or signature once attributed to a person.

§ 66-320. Effect of change or error.

If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if, at the time the individual learns of the error, the individual:

a. Promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

b. Takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

c. Has not used or received any benefit or value from the consideration, if any, received from the other person.

(3) If neither subdivision (1) nor subdivision (2) of this section applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(4) Subdivisions (2) and (3) of this section may not be varied by agreement. (2000-152, s. 1.)

OFFICIAL COMMENT

1. This section is limited to changes and errors occurring in transmissions between parties — whether person-person (paragraph 1) or in an automated transaction involving an individual and a machine (paragraphs 1 and 2). The section focuses on the effect of changes and errors occurring when records are exchanged between parties. In cases where changes and errors occur in contexts other than transmission, the law of mistake is expressly made applicable to resolve the conflict.

The section covers both changes and errors. For example, if Buyer sends a message to Seller ordering 100 widgets, but Buyer's information processing system changes the order to 1000 widgets, a "change" has occurred between what Buyer transmitted and what Seller received. If on the other hand, Buyer typed in 1000 intending to order only 100, but sent the message before noting the mistake, an error would have occurred which would also be covered by this section.

2. Paragraph (1) deals with any transmission where the parties have agreed to use a security procedure to detect changes and errors. It operates against the non-conforming party, i.e., the party in the best position to have avoided the change or error, regardless of whether that person is the sender or recipient. The source of the error/change is not indicated, and so both human and machine errors/changes would be covered. With respect to errors or changes that would not be detected by the security procedure even if applied, the parties are left to the general law of mistake to resolve the dispute.

3. Paragraph (1) applies only in the situation where a security procedure would detect the error/change but one party fails to use the procedure and does not detect the error/change. In such a case, consistent with the law of mistake generally, the record is made avoidable at the instance of the party who took all available steps to avoid the mistake. See Restatement 2d Contracts Section 152-154.

Making the erroneous record avoidable by the conforming party is consistent with Sections 153 and 154 of the Restatement 2d Contracts because the non-conforming party was in the best position to avoid the problem, and would bear the risk of mistake. Such a case would constitute mistake by one party. The mistaken party (the conforming party) would be entitled to avoid any resulting contract under Section 153 because s/he does not have the risk of mistake and the non-conforming party had reason to know of the mistake.

4. As with paragraph (1), paragraph (2), when applicable, allows the mistaken party to avoid the effect of the erroneous electronic record. However, the subsection is limited to human error on the part of an individual when dealing with the electronic agent of the other party. In a transaction between individuals there is a greater ability to correct the error before parties have acted on it. However, when an individual makes an error while dealing with the electronic agent of the other party, it may not be possible to correct the error before the other party has shipped or taken other action in reliance on the erroneous record.

Paragraph (2) applies only to errors made by individuals. If the error results from the electronic agent it would constitute a system error. In such a case the effect of that error would be resolved under paragraph (1) if applicable, otherwise under paragraph (3) and the general law of mistake.

5. The party acting through the electronic agent/machine is given incentives by this section to build in safeguards which enable the individual to prevent the sending of an erroneous record, or correct the error once sent. For example, the electronic agent may be programed to provide a "confirmation screen" to the individual setting forth all the information the individual initially approved. This would

provide the individual with the ability to prevent the erroneous record from ever being sent. Similarly, the electronic agent might receive the record sent by the individual and then send back a confirmation which the individual must again accept before the transaction is completed. This would allow for correction of an erroneous record. In either case, the electronic agent would "provide an opportunity for prevention or correction of the error," *and the subsection would not apply.* Rather, the effect of any error is governed by other law.

6. Paragraph (2) also places additional requirements on the mistaken individual before the paragraph may be invoked to avoid an erroneous electronic record. The individual must take prompt action to advise the other party of the error and the fact that the individual did not intend the electronic record. Whether the action is prompt must be determined from all the circumstances including the individual's ability to contact the other party. The individual should advise the other party both of the error and of the lack of intention to be bound (i.e., avoidance) by the electronic record received. Since this provision allows avoidance by the mistaken party, that party should also be required to expressly note that it is seeking to avoid the electronic record, i.e., lacked the intention to be bound.

Second, restitution is normally required in order to undo a mistaken transaction. Accordingly, the individual must also return or destroy any consideration received, adhering to instructions from the other party in any case. This is to assure that the other party retains control over the consideration sent in error.

Finally, and most importantly in regard to transactions involving intermediaries which may be harmed because transactions cannot be unwound, the individual cannot have received any benefit from the transaction. This section prevents a party from unwinding a transaction after the delivery of value and consideration which cannot be returned or destroyed. For example, if the consideration received is information, it may not be possible to avoid the benefit conferred. While the information itself could be returned, mere access to the information, or the ability to redistribute the information would constitute a benefit precluding the mistaken party from unwinding the transaction. It may also occur that the mistaken party receives consideration which changes in value between the time of receipt and the first opportunity to return. In such a case restitution cannot be made adequately, and the transaction would not be avoidable. In each of the foregoing cases, under subparagraph (2)(c), the individual would have received the benefit of the consideration and would NOT be able to avoid the erroneous electronic record under this section.

7. In all cases not covered by paragraphs (1) or (2), where error or change to a record occur, the parties contract, or other law, specifically including the law of mistake, applies to resolve any dispute. In the event that the parties' contract and other law would achieve different results, the construction of the parties' contract is left to the other law. If the error occurs in the context of record retention, Section 12 [G.S. 66-322] will apply. In that case the standard is one of accuracy and retrievability of the information.

8. Paragraph (4) makes the error correction provision in paragraph (2) and the application of the law of mistake in paragraph (3) nonvariable. Paragraph (2) provides incentives for parties using electronic agents to establish safeguards for individuals dealing with them. It also avoids unjustified windfalls to the individual by erecting stringent requirements before the individual may exercise the right of avoidance under the paragraph. Therefore, there is no reason to permit parties to avoid the paragraph by agreement. Rather, parties should satisfy the paragraph's requirements.

§ 66-321. Notarization and acknowledgment.

If a law requires a signature or record relating to a transaction to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record. (2000-152, s. 1.)

OFFICIAL COMMENT

This Section permits a notary public and other authorized officers to act electronically, effectively removing the stamp/seal requirements. However, the section does not eliminate any of the other requirements of notarial laws, and consistent with the entire thrust of this Act, simply allows the signing and information to be accomplished in an electronic medium.

For example, Buyer wishes to send a notarized Real Estate Purchase Agreement to Seller via e-mail. The notary must appear in the room with the Buyer, satisfy him/herself as to the identity of the Buyer, and swear to that identification. All that activity must be reflected as part of the electronic Purchase Agreement and the notary's electronic signature must appear as a part of the electronic real estate purchase contract.

As another example, Buyer seeks to send Seller an affidavit averring defects in the products received. A court clerk, authorized under state law to administer oaths, is present with Buyer in a room. The Clerk administers the oath and includes the statement of the oath, together with any other requisite information, in the electronic record to be sent to the Seller. Upon administering the oath and witnessing the application of Buyer's electronic signature to the electronic record, the Clerk also applies his electronic signature to the electronic record. So long as all substantive requirements of other applicable law have been fulfilled and are reflected in the electronic record, the sworn electronic record of Buyer is as effective as if it had been transcribed on paper.

§ 66-322. Retention of electronic records; originals.

(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

(1) Accurately reflects the information set forth in the record at the time it was first generated in its final form as an electronic record or otherwise; and

(2) Remains accessible for later reference.

(b) A requirement to retain a record in accordance with subsection (a) of this section does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy subsection (a) of this section by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a) of this section.

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subsection (a) of this section.

(f) A record retained as an electronic record in accordance with subsection (a) of this section satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this Article specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of this State from specifying additional requirements for the retention of a record subject to the agency's jurisdiction. (2000-152, s. 1.)

OFFICIAL COMMENT

1. This section deals with the serviceability of electronic records as retained records and originals. So long as there exists reliable assurance that the electronic record accurately reproduces the information, this section continues the theme of establishing the functional equivalence of electronic and paper-based records. This is consistent with Fed.R.Evid. 1001(3) and Unif.R.Evid. 1001(3) (1974). This section assures that information stored electronically will remain effective for all audit, evidentiary, archival and similar purposes.

2. In an electronic medium, the concept of an original document is problematic. For example, as one drafts a document on a computer the "original" is either on a disc or the hard drive to which the document has been initially saved. If one periodically saves the draft, the fact is that at times a document may be first saved to disc then to hard drive, and at others vice versa. In such a case the "original" may change from the information on the disc to the information on the hard drive. Indeed, it may be argued that the "original" exists solely in RAM and, in a sense, the original is destroyed when a "copy" is saved to a disc or to the hard drive. In any event, in the context of record retention, the concern focuses on the integrity of the informa-

tion, and not with its "originality."

3. Subsection (a) requires accuracy and the ability to access at a later time. The requirement of accuracy is derived from the Uniform and Federal Rules of Evidence. The requirement of continuing accessibility addresses the issue of technology obsolescence and the need to update and migrate information to developing systems. It is not unlikely that within the span of 5-10 years (a period during which retention of much information is required) a corporation may evolve through one or more generations of technology. More to the point, this technology may be incompatible with each other necessitating the reconversion of information from one system to the other.

For example, certain operating systems from the early 1980's, e.g., memory typewriters, became obsolete with the development of personal computers. The information originally stored on the memory typewriter would need to be converted to the personal computer system in a way meeting the standards for accuracy contemplated by this section. It is also possible that the medium on which the information is stored is less stable. For example, information stored on floppy discs is generally less stable, and subject to a greater threat of disintegration, that information stored on a computer hard drive. In either case, the continuing accessibility issue must be satisfied to validate information stored by electronic means under this section.

This section permits parties to convert original written records to electronic records for retention so long as the requirements of subsection (a) are satisfied. Accordingly, in the absence of specific requirements to retain written records, written records may be destroyed once saved as electronic records satisfying the requirements of this section.

The subsection refers to the information contained in an electronic record, rather than relying on the term electronic record, as a matter of clarity that the critical aspect in retention is the information itself. What information must be retained is determined by the purpose for which the information is needed. If the addressing and pathway information regarding an e-mail is relevant, then that information should also be retained. However if it is the substance of the e-mail that is relevant, only that information need be retained. Of course, wise record retention would include all such information since what information will be relevant at a later time will not be known.

4. Subsections (b) and (c) simply make clear that certain ancillary information or the use of third parties, does not affect the serviceability of records and information retained electronically. Again, the relevance of particular information will not be known until that information is required at a subsequent time.

5. Subsection (d) continues the theme of the Act as validating electronic records as originals where the law requires retention of an original. The validation of electronic records and electronic information as originals is consistent with the Uniform Rules of Evidence. See Uniform Rules of Evidence 1001(3), 1002, 1003 and 1004.

6. Subsection (e) specifically addresses particular concerns regarding check retention statutes in many jurisdictions. A Report compiled by the Federal Reserve Bank of Boston identifies hundreds of state laws which require the retention or production of original canceled checks. Such requirements preclude banks and their customers from realizing the benefits and efficiencies related to truncation processes otherwise validated under current law. The benefits to banks and their customers from electronic check retention are effectuated by this provision.

7. Subsections (f) and (g) generally address other record retention statutes. As with check retention, all businesses and individuals may realize significant savings from electronic record retention. So long as the standards in Section 12 [G.S. 66-322] are satisfied, this section permits all parties to obtain those benefits. As always the government may require records in any medium, however, these subsections require a governmental agency to specifically identify the types of records and requirements that will be imposed.

§ 66-323. Admissibility in evidence.

In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form. (2000-152, s. 1.)

OFFICIAL COMMENT

Like section 7 [G.S. 66-317], this Section prevents the nonrecognition of electronic records and signatures solely on the ground of the media in which information is presented.

Nothing in this section relieves a party from establishing the necessary foundation for the admission of an electronic record. See Uniform Rules of Evidence 1001(3), 1002,1003 and 1004.

§ 66-324. Automated transaction.

In an automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(3) The terms of the contract are determined by the substantive law applicable to it. (2000-152, s. 1.)

OFFICIAL COMMENT

1. This section confirms that contracts can be formed by machines functioning as electronic agents for parties to a transaction. It negates any claim that lack of human intent, at the time of contract formation, prevents contract formation. When machines are involved, the requisite intention flows from the programing and use of the machine. As in other cases, these are salutary provisions consistent with the fundamental purpose of the Act to remove barriers to electronic transactions while leaving the substantive law, e.g., law of mistake, law of contract formation, unaffected to the greatest extent possible.

2. The process in paragraph (2) validates an anonymous click-through transaction. It is possible that an anonymous click-through process may simply result in no recognizable legal relationship, e.g., A goes to a person's website and acquires access without in any way identifying herself, or otherwise indicating agreement or assent to any limitation or obligation, and the owner's site grants A access. In such a case no legal relationship has been created.

On the other hand it may be possible that A's actions indicate agreement to a particular term. For example, A goes to a website and is confronted by an initial screen which advises her that the information at this site is proprietary, that A may use the information for her own personal purposes, but that, by clicking below, A agrees that any other use without the site owner's permission is prohibited. If A clicks "agree" and downloads the information and then uses the information for other, prohibited purposes, should not A be bound by the click? It seems the answer properly should be, and would be, yes.

If the owner can show that the only way A could have obtained the information was from his website, and that the process to access the subject information required that A must have clicked the "I agree" button after having the ability to see the conditions on use, A has performed actions which A was free to refuse, which A knew would cause the site to grant her access, i.e., "complete the transaction." The terms of the resulting contract will be determined under general contract principles, but will include the limitation on A's use of the information, as a condition precedent to granting her access to the information.

3. In the transaction set forth in Comment 2, the record of the transaction also will include an electronic signature. By clicking "I agree" A adopted a process with the intent to "sign," i.e., bind herself to a legal obligation, the resulting record of the transaction. If a "signed writing" were required under otherwise applicable law, this transaction would be enforceable. If a "signed writing" were not required, it may be sufficient to establish that the electronic record is attributable to A under section 9. Attribution may be shown in any manner reasonable including showing that, of necessity, A could only have gotten the information through the process at the website.

§ 66-325. Time and place of sending and receipt.

(a) Unless otherwise agreed between a sender and a recipient, which in a consumer transaction must be reasonable under the circumstances, an electronic record is sent when it:

(1) Is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the

purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) Is in a form capable of being processed by that system; and

(3) Enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between a sender and a recipient, which in a consumer transaction must be reasonable under the circumstances, an electronic record is received when:

(1) It enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) It is in a form capable of being processed by that system.

(c) Subsection (b) of this section applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under subsection (d) of this section.

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:

(1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction.

(2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) An electronic record is received under subsection (b) of this section even if no individual is aware of its receipt; provided, however, in a consumer transaction, a record has not been received unless it is received by the intended recipient in a manner in which the sender has a reasonable basis to believe that the record can be opened and read by the recipient.

(f) Receipt of an electronic acknowledgment from an information processing system described in subsection (b) of this section establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under subsection (a) of this section, or purportedly received under subsection (b) of this section, was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement. (2000-152, s. 1; 2001-295, s. 4.)

OFFICIAL COMMENT

1. This section provides default rules regarding when and from where an electronic record is sent and when and where an electronic record is received. This section does not address the efficacy of the record that is sent or received. That is, whether a record is unintelligible or unusable by a recipient is a separate issue from whether that record was sent or received. The effectiveness of an illegible record, whether it binds any party, are questions left to other law.

2. Subsection (a) furnishes rules for determining when an electronic record is sent. The effect of the sending and its import are determined by other law once it is determined that a sending has occurred.

In order to have a proper sending, the subsection requires that information be properly addressed or otherwise directed to the recipient. In order to send within the meaning of this section, there must be specific information which will direct the record to the intended recipient. Although mass electronic sending is not precluded, a general broadcast message, sent to systems rather than individuals, would not suffice as a sending.

The record will be considered sent once it leaves the control of the sender, or comes under the control of the recipient. Records sent through e-mail or the internet will pass through many different server systems. Accordingly, the critical element when more than one system is involved is the loss of control by the sender.

However, the structure of many message delivery systems is such that electronic records may actually never leave the control of the sender. For example, within a university or corporate setting, e-mail sent within the system to another faculty member is technically not out of the sender's control since it never leaves the organization's server. Accordingly, to qualify as a sending, the e-mail must arrive at a point where the recipient has control. This section does not address the effect of an electronic record that is thereafter "pulled back," e.g., removed from a mailbox. The analog in the paper world would be removing a letter from a person's mailbox. As in the case of providing information electronically under Section 8, the recipient's ability to receive a message should be judged from the perspective of whether the sender has done any action which would preclude retrieval. This is especially the case in regard to sending, since the sender must direct the record to a system designated or used by the recipient.

3. Subsection (b) provides simply that when a record enters the system which the recipient has designated or uses and to which it has access, in a form capable of being processed by that system, it is received. Keying receipt to a system accessible by the recipient removes the potential for a recipient leaving messages with a server or other service in order to avoid receipt. However, the section does not resolve the issue of how the sender proves the time of receipt.

To assure that the recipient retains control of the place of receipt, subsection (b) requires that the system be specified or used by the recipient, and that the system be used or designated for the type of record being sent. Many people have multiple e-mails for different purposes. Subsection (b) assures that recipients can designate the e-mail address or system to be used in a particular transaction. For example, the recipient retains the ability to designate a home e-mail for personal matters, work e-mail for official business, or a separate organizational e-mail solely for the business purposes of that organization. If A sends B a notice at his home which relates to business, it may not be deemed received if B designated his business address as the sole address for business purposes. Whether actual knowledge upon seeing it at home would qualify as receipt is determined under the otherwise applicable substantive law.

4. Subsections (c) and (d) provide default rules for determining where a record will be considered to have been sent or received. The focus is on the place of business of the recipient and not the physical location of the information processing system, which may bear absolutely no relation to the transaction between the parties. It is not uncommon for users of electronic commerce to communicate from one State to another without knowing the location of information systems through which communication is operated. In addition, the location of certain communication systems may change without either of the parties being aware of the change. Accordingly, where the place of sending or receipt is an issue under other applicable law, e.g., conflict of laws issues, tax issues, the relevant location should be the location of the sender or recipient and not the location of the information processing system.

Subsection (d) assures individual flexibility in designating the place from which a record will be considered sent or at which a record will be considered received. Under subsection (d) a person may designate the place of sending or receipt unilaterally in an electronic record. This ability, as with the ability to designate by agreement, may be limited by otherwise applicable law to places having a reasonable relationship to the transaction.

5. Subsection (e) makes clear that receipt is not dependent on a person having notice that the record is in the person's system. Receipt occurs when the record reaches the designated system whether or not the recipient ever retrieves the record. The paper analog is the recipient who never reads a mail notice.

6. Subsection (f) provides legal certainty regarding the effect of an electronic acknowledgment. It only addresses the fact of receipt, not the quality of the content, nor whether the electronic record was read or "opened."

7. Subsection (g) limits the parties' ability to vary the method for sending and receipt provided in subsections (a) and (b), when there is a legal requirement for the sending or receipt. As in other circumstances where legal requirements derive from other substantive law, to the extent that the other law permits variation by agreement, this Act does not impose any additional requirements, and provisions of this Act may be varied to the extent provided in the other law.

§ 66-326. Transferable records.

(a) In this section, "transferable record" means an electronic record that:

(1) Would be a note under Article 3 of Chapter 25 of the General Statutes or a document under Article 7 of Chapter 25 of the General Statutes if the electronic record were in writing; and

(2) The issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies subsection (b) of this section, and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in subdivisions (4), (5), and (6) of this subsection, unalterable;

(2) The authoritative copy identifies the person asserting control as:

a. The person to which the transferable record was issued; or

b. If the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in G.S. 25-1-201(21), of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under Chapter 25 of the General Statutes, including, if the applicable statutory requirements under G.S. 25-3-302(a), 25-7-501, or 25-9-330 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under Chapter 25 of the General Statutes.

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record. (2000-152, s. 1; 2000-140, s. 97; 2006-112, s. 24.)

OFFICIAL COMMENT

1. Paper negotiable instruments and documents are unique in the fact that a tangible token — a piece of paper — actually embodies intangible rights and obligations. The extreme difficulty of creating a unique electronic token which embodies the singular attributes of a

paper negotiable document or instrument, dictates that the rules relating to negotiable documents and instruments not be simply amended to allow the use of an electronic record for the requisite paper writing. However, the desirability of establishing rules by which business parties might be able to acquire some of the benefits of negotiability in an electronic environment is recognized by the inclusion of this Section on Transferable Records.

This section provides legal support for the creation, transferability and enforceability of electronic note and document equivalents, as against the issuer/obligor. The certainty created by the section provides the requisite incentive for industry to develop the systems and processes, which involve significant expenditures of time and resources, to enable the use of such electronic documents.

The importance of facilitating the development of systems which will permit electronic equivalents is a function of cost, efficiency and safety for the records. The storage cost and space needed for the billions of paper notes and documents is phenomenal. Further, natural disasters can wreak havoc on the ability to meet legal requirements for retaining, retrieving and delivering paper instruments. The development of electronic systems meeting the rigorous standards of this Section will permit retention of copies which reflect the same integrity as the original. As a result storage, transmission and other costs will be reduced, while security and the ability to satisfy legal requirements governing such paper records will be enhanced.

Section 16 [G.S. 66-326] provides for the creation of an electronic record which may be controlled by the holder who in turn may obtain the benefits of holder in due course and good faith purchaser status. If the benefits and efficiencies of electronic media are to be realized in this industry it is essential to establish a mean by which transactions involving paper promissory notes may be accomplished completely electronically. Particularly as other aspects of such transactions are accomplished electronically, the drag on the transaction of requiring a paper note becomes evident. In addition to alleviating the logistical problems of generating and storing and retrieving paper, the mailing and transmission costs associated with such transactions will also be reduced.

2. The definition of transferable record is limited in two significant ways. First, only the equivalent of paper promissory notes and paper documents of title can be created as transferable records. Notes and Documents of Title do not impact the broad systems that relate to the broader payments mechanisms related, for example, to checks. Impacting the check collection system by allowing for "electronic checks" has ramifications well beyond the ability of this Act. Accordingly, this Act excludes from its scope, transactions governed by UCC Articles 3 and 4. The limitation to promissory note equivalents in Section 16 [G.S. 66-326] is quite important in that regard because of the ability to deal with many enforcement issues by contract without affecting such systemic concerns.

Second, not only is Section 16 [G.S. 66-326] limited to electronic records which would qualify as negotiable promissory notes or documents if they were in writing, but the issuer of the electronic record must expressly agree that the electronic record is to be considered a transferable record. The definition of transferable record as "an electronic record that ... the issuer of the electronic record expressly has agreed is a transferable record" indicates that the electronic record itself will likely set forth the issuer's agreement, though it may be argued that a contemporaneous electronic or written record might set forth the issuer's agreement. However, conversion of a paper note issued as such would not be possible because the issuer would not be the issuer, in such a case, of an electronic record. The purpose of such a restriction is to assure that transferable records can only be created at the time of issuance by the obligor. The possibility that a paper note might be converted to an electronic record and then intentionally destroyed, and the effect of such action, was not intended to be covered by Section 16 [G.S. 66-326].

The requirement that the obligor expressly agree in the electronic record to its treatment as a transferable record does not otherwise affect the characterization of a transferable record (i.e., does not affect what would be a paper note) because it is a statutory condition. Further, it does not obligate the issuer to undertake to do any other act than the payment of the obligation evidenced by the transferable record. Therefore, it does not make the transferable record "conditional" within the meaning of Section 104(a)(3) of the Uniform Commercial Code.

3. Under Section 16 [G.S. 66-326] acquisition of "control" over an electronic record serves as a substitute for "possession" in the paper analog. More precisely, "control" under Section 16 [G.S. 66-326] serves as the substitute for delivery, indorsement and possession of a negotiable promissory note or negotiable document of title. Section 16(b) [G.S. 66-326(b)] allows control to be found so long as "a system employed for evidencing the transfer of interests in the transferable record reliably establishes [the person claiming control] as the person to which the transferable record was issued or transferred." The key point is that a system, whether involving third party registry or technological safeguards, must be shown to reliably establish the identity of *the* person entitled to payment. Section 16(c) [G.S. 66-326(c)] then sets forth a

safe harbor list of very strict requirements for such a system. The specific provisions listed in Section 16(c) [G.S. 66-326(c)] are derived from Section 105 of Revised Article 9 of the Uniform Commercial Code. Generally, the transferable record must be unique, identifiable, and except as specifically permitted, unalterable. That "authoritative copy" must (i) identify the person claiming control as the person to whom the record was issued or most recently transferred, (ii) be maintained by the person claiming control or its designee, and (iii) be unalterable except with the permission of the person claiming control. In addition any copy of the authoritative copy must be readily identifiable as a copy and all revisions must be readily identifiable as authorized or unauthorized.

The control requirements may be satisfied through the use of a trusted third party registry system. Such systems are currently in place with regard to the transfer of securities entitlements under Article 8 of the UCC, and in the transfer of cotton warehouse receipts under the program sponsored by the United States Department of Agriculture. This Act would recognize the use of such a system so long as the standards of subsection (c) were satisfied. In addition, a technological system which met such exacting standards would also be permitted under Section 16 [G.S. 66-326].

For example, a borrower signs an electronic record which would be a promissory note or document if it were paper. The borrower specifically agrees in the electronic record that it will qualify as a transferable record under this section. The lender implements a newly developed technological system which dates, encrypts, and stores all the electronic information in the transferable record in a manner which lender can demonstrate reliably establishes lender as the person to which the transferable record was issued. In the alternative, the lender may contract with a third party to act as a registry for all such transferable records, retaining records establishing the party to whom the record was issued and all subsequent transfers of the record. An example of this latter method for assuring control is the system established for the issuance and transfer of electronic cotton warehouse receipts under 7 C.F.R. section 735 et seq.

Of greatest importance in the system used is the ability to securely and demonstrably be able to transfer the record to others in a manner which assures that only one "holder" exists. The need for such certainty and security resulted in the very stringent standards for a system outlined in subsection (c). A system relying on a third party registry is likely the most effective way to satisfy the requirements of subsection (c) that the transferable record remain unique, identifiable and unalterable, while also providing the means to assure that the transferee is clearly noted and identified.

It must be remembered that Section 16 [G.S. 66-326] was drafted in order to provide sufficient legal certainty regarding the rights of those in control of such electronic records, that legal incentives would exist to warrant the development of systems which would establish the requisite control. During the drafting of Section 16 [G.S. 66-326], representatives from the Federal Reserve carefully scrutinized the impact of any electronicization of any aspect of the national payment system. Section 16 [G.S. 66-326] represents a compromise position which, as noted, serves as a bridge pending more detailed study and consideration of what legal changes, if any, are necessary or appropriate in the context of the payment systems impacted. Accordingly, Section 16 [G.S. 66-326] provides limited scope for the attainment of important rights derived from the concept of negotiability, in order to permit the development of systems which will satisfy its strict requirements for control.

4. It is important to note what the Section does not provide. Issues related to enforceability against intermediate transferees and transferors (i.e., indorser liability under a paper note), warranty liability that would attach in a paper note, and issues of the effect of taking a transferable record on the underlying obligation, are NOT addressed by this section. Such matters must be addressed, if at all, by contract between and among the parties in the chain of transmission and transfer of the transferable record. In the event that such matters are not addressed by the contract, the issues would need to be resolved under otherwise applicable law. Other law may include general contract principles of assignment and assumption, or may include rules from Article 3 applied by analogy.

For example, Issuer agrees to pay a debt by means of a transferable record issued to A. Unless there is agreement between issuer and A that the transferable record "suspends" the underlying obligation (see Section 3-310 of the Uniform Commercial Code), A would not be prevented from enforcing the underlying obligation without the transferable record. Similarly, if A transfers the transferable record to B by means granting B control, B may obtain holder in due course rights against the obligor/issuer, but B's recourse against A would not be clear unless A agreed to remain liable under the transferable record. Although the rules of Article 3 may be applied by analogy in an appropriate context, in the absence of an express agreement in the transferable record or included by applicable system rules, the liability of the transferor would not be clear.

5. Current business models exist which rely for their efficacy on the benefits of negotiability. A principal example, and one which informed

much of the development of Section 16 [G.S. 66-326], involves the mortgage backed securities industry. Aggregators of commercial paper acquire mortgage secured promissory notes following a chain of transfers beginning with the origination of the mortgage loan by a mortgage broker. In the course of the transfers of this paper, buyers of the notes and lenders/secured parties for these buyers will intervene. For the ultimate purchaser, the ability to rely on holder in due course and a good faith purchaser status creates the legal security necessary to issue its own investment securities which are backed by the obligations evidenced by the notes purchased. Only through their HIDC status can these purchasers be assured that third party claims will be barred. Only through their HIDC status can the end purchaser avoid the incredible burden of requiring and assuring that each person in the chain of transfer has waived any and all defenses to performance which may be created during the chain of transfer.

6. This Section is a stand-alone provision. Although references are made to specific provisions in Article 3, Article 7, and Article 9 of the Uniform Commercial Code, these provisions are incorporated into this Act and made the applicable rules for purposes of this Act. The rights of parties to transferable records are established under subsections (d) and (e). Subsection (d) provides rules for determining the rights of a party in control of a transferable record. The subsection makes clear that the rights are determined under this section, and not under other law, by incorporating the rules on the manner of acquisition into this statute. The last sentence of subsection (d) is intended to assure that requirements related to notions of possession, which are inherently inconsistent with the idea of an electronic record, are not incorporated into this statute.

If a person establishes control, Section 16(d) [G.S. 66-326(d)] provides that that person is the "holder" of the transferable record which is equivalent to a holder of an analogous paper negotiable instrument. More importantly, if the person acquired control in a manner which would make it a holder in due course of an equivalent paper record, the person acquires the rights of a HIDC. The person in control would therefore be able to enforce the transferable record against the obligor regardless of intervening claims and defenses. However, by pulling these rights into Section 16 [G.S. 66-326], this Act does NOT validate the wholesale electrification of promissory notes under Article 3 of the Uniform Commercial Code.

Further, it is important to understand that a transferable record under Section 16 [G.S. 66-326], while having no counterpart under Article 3 of the Uniform Commercial Code, would be an "account," "general intangible," or "payment intangible" under Article 9 of the Uniform Commercial Code. Accordingly, two separate bodies of law would apply to that asset of the obligee. A taker of the transferable record under Section 16 [G.S. 66-326] may acquire purchaser rights under Article 9 of the Uniform Commercial Code, however, those rights may be defeated by a trustee in bankruptcy of a prior person in control unless perfection under Article 9 of the Uniform Commercial Code by filing is achieved. If the person in control also takes control in a manner granting it holder in due course status, of course that person would take free of any claim by a bankruptcy trustee or lien creditor.

7. Subsection (e) accords to the obligor of the transferable record rights equal to those of an obligor under an equivalent paper record. Accordingly, unless a waiver of defense clause is obtained in the electronic record, or the transferee obtains HDC rights under subsection (d), the obligor has all the rights and defenses available to it under a contract assignment. Additionally, the obligor has the right to have the payment noted or otherwise included as part of the electronic record.

8. Subsection (f) grants the obligor the right to have the transferable record and other information made available for purposes of assuring the correct person to pay. This will allow the obligor to protect its interest and obtain the defense of discharge by payment or performance. This is particularly important because a person receiving subsequent control under the appropriate circumstances may well qualify as a holder in course who can again enforce payment of the transferable record.

9. Section 16 [G.S. 66-326] is a singular exception to the thrust of this Act to simply validate electronic media used in commercial transactions. Section 16 [G.S. 66-326] actually provides a means for expanding electronic commerce. It provides certainty to lenders and investors regarding the enforceability of a new class of financial services. It is hoped that the legal protections afforded by Section 16 [G.S. 66-326] will engender the development of technological and business models which will permit realization of the significant cost savings and efficiencies available through electronic transacting in the financial services industry. Although only a bridge to more detailed consideration of the broad issues related to negotiability in an electronic context, Section 16 [G.S. 66-326] provides the impetus for that broader consideration while allowing continuation of developing technological and business models.

Editor's Note. — Session Laws 2006-112, s. 60, provides that: "A document of title issued or a bailment that arises before October 1, 2006, and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

§ 66-327. Consumer transactions; alternative procedures for use or acceptance of electronic records or electronic signatures.

(a), (b) Repealed by Session Laws 2001-295, s. 5, effective October 1, 2001.

(c) Consent to Electronic Records. — In a consumer transaction in which a statute, regulation, or rule of law of this State requires that information relating to a transaction or transactions in or affecting commerce be made available in writing or be disclosed to a consumer, the consumer's agreement to conduct a transaction by electronic means shall be evidenced as provided in G.S. 66-315, and shall be found only when accomplished in compliance with the following provisions:

(1) The consumer has affirmatively consented to the use of electronic means, and the consumer has not withdrawn consent.

(2) The consumer, prior to consenting to the use of electronic means, is provided with a clear and conspicuous statement:

a. Informing the consumer of any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form.

b. Informing the consumer of the right to withdraw consent to have the record provided or made available in an electronic form and of any conditions or consequences of such withdrawal. Those consequences may include termination of the parties' relationship but may not include the imposition of fees.

c. Informing the consumer of whether the consent to have the record provided or made available in an electronic form applies only to the particular transaction which gave rise to the obligation to provide the record, or to identified categories of records that may be provided or made available during the course of the parties' relationship.

d. Describing the procedures the consumer must use to withdraw consent as provided in sub-subdivision (2)b. of this subsection or to update information needed to contact the consumer electronically.

e. Informing the consumer how, after the consent to have the record provided or made available in an electronic form, the consumer may request and obtain a paper copy of an electronic record.

(3) The consumer, prior to consenting to the use of electronic means, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and the consumer consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.

(4) After the consent of a consumer in accordance with subdivision (1) of this subsection, if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the person providing the electronic record provides the consumer with a statement of the revised hardware and software requirements for access to and retention of the electronic records, provides a statement of the

right to withdraw consent without the imposition of any condition or consequence that was not disclosed under sub-subdivision (2)b. of this subsection, and again complies with subdivision (3) of this subsection.

(d) Written Copy Required. — Notwithstanding G.S. 66-315(b), in a consumer transaction in which a statute, regulation, or rule of law of this State requires that information relating to a transaction or transactions be made available in writing or be disclosed to a consumer, where the consumer conducts the transaction on electronic equipment provided by or through the seller, the consumer shall be given a written copy of the contract or disclosure which is not in electronic form. A consumer's consent to receive future notices regarding the transaction in an electronic form is valid only if the consumer confirms electronically, using equipment other than that provided by the seller, that (i) the consumer has the software specified by the seller as necessary to read future notices, and (ii) the consumer agrees to receive the notices in an electronic form.

(e) Oral Communications. — An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this section, except as other provided under applicable law.

(f) Consumer Transaction Entered Into in North Carolina. — If a consumer located in North Carolina enters into a consumer transaction which is created or documented by an electronic record, the transaction shall be deemed to have been entered into in North Carolina for purpose of G.S. 22B-3 which shall apply to the transaction. (2000-152, s. 1; 2001-295, s. 5.)

§ 66-328. Procedures consistent with federal law.

Consistent with the provisions of section 7002(a) of the Electronic Signatures in the Global and National Commerce Act, 15 U.S.C § 7002(a), this Article sets forth alternative procedures or requirements for the use of electronic records to establish the legal effect or validity of records in electronic transactions. (2001-295, s. 6.)

§ 66-329. Choice of law in computer information agreement.

A choice of law provision in a computer information agreement which provides that the contract is to be interpreted pursuant to the laws of a state that has enacted the Uniform Computer Information Transactions Act, as proposed by the National Conference of Commissioners on Uniform State Laws, or any substantially similar law, is voidable and the agreement shall be interpreted pursuant to the laws of this State if the party against whom enforcement of the choice of law provisions is sought is a resident of this State or has its principal place of business located in this State. For purposes of this section, a "computer information agreement" means an agreement that would be governed by the Uniform Computer Information Transactions Act or substantially similar law as enacted in the state specified in the choice of law provisions if that state's law were applied to the agreement. This section may not be varied by agreement of the parties. This section shall remain in force until such time as the North Carolina General Assembly enacts the Uniform Computer Information Transactions Act or any substantially similar law and that law becomes effective. (2001-295, s. 7.)

§ 66-330. Severability clause.

If any provision of this Article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable. (2000-152, s. 1.)

§§ 66-331 through 66-339: Reserved for future codification purposes.

ARTICLE 41.

Manufacturing Redevelopment Districts.

§§ 66-340 through 66-346: Expired pursuant to Session Laws 2005-462, s. 8, as amended by Session Laws 2006-264, s. 99.5(g), effective September 1, 2008. (2005-462, s. 1.)

ARTICLE 42.

State Franchise for Cable Television Service.

§ 66-350. Definitions.

The following definitions apply in this Article:

(1) Cable service. — Defined in G.S. 105-164.3.
(2) Cable system. — Defined in 47 U.S.C. § 522.
(3) Channel. — A portion of the electromagnetic frequency spectrum that is used in a cable system and is capable of delivering a television channel.
(4) Existing agreement. — A local franchise agreement that was awarded under G.S. 153A-137 or G.S. 160A-319 and meets either of the following:
  a. Is in effect on January 1, 2007.
  b. Expired before January 1, 2007, and the cable service provider under the agreement provides cable service to subscribers in the franchise area on January 1, 2007.
(5) Pass a household. — Make service available to a household, regardless of whether the household subscribes to the service.
(6) PEG channel. — A public, educational, or governmental access channel provided to a county or city.
(7) Secretary. — The Secretary of State.
(8) Video programming. — Defined in G.S. 105-164.3. (2006-151, s. 1.)

Editor's Note. — G.S. 153A-137, referred to in subdivision (4), was repealed by Session Laws 2006-151, s. 10, effective January 1, 2007. Session Laws 2006-151, s. 22, makes this Article effective January 1, 2007.

§ 66-351. State franchising authority.

(a) Authority. — The Secretary of State is designated the exclusive franchising authority in this State for cable service provided over a cable system. This designation replaces the authorization to counties and cities in former G.S. 153A-137 and G.S. 160A-319 to award a franchise for cable service. This designation is effective January 1, 2007. After this date, a county or city may not award or renew a franchise for cable service.

(b) Award and Scope. — The Secretary is considered to have awarded a franchise to a person who files a notice of franchise under G.S. 66-352. A franchise for cable service authorizes the holder of the franchise to construct and operate a cable system over public rights-of-way within the area to be served. Chapter 160A of the General Statutes governs the regulation of public rights-of-way by a city. (2006-151, s. 1.)

Editor's Note. — G.S. 153A-137, referred to in subsection (a), was repealed by Session Laws 2006-151, s. 10, effective January 1, 2007.

Session Laws 2006-151, s. 19, provides that: "The Secretary of State has no authority to determine whether a person who is providing video programming is providing cable service over a cable system. An award of a State-issued franchise under Article 42 of Chapter 66 of the General Statutes, as enacted by this act, does not affect a determination of whether video programming provided by the holder of the franchise is considered cable service provided over a cable system under federal law or under a state law that applies substantially the same definitions of "cable service" and "cable system" as federal law. A person who provides video programming may obtain a State-issued franchise under Article 42 of Chapter 66 of the General Statutes, as enacted by this act, and thereby become subject to that Article, regardless of whether the video programming the person provides is considered cable service provided under a cable system under that Article or under federal law."

CASE NOTES

Comity Principles Prevented Federal Court from Granting Declaratory Relief. — In a 42 U.S.C.S. § 1983 action in which direct broadcast satellite providers sought a declaratory judgment that 2006 N.C. Sess. Laws 2006-151, which revoked the authority of local governments to charge franchise taxes to cable providers and vested the state with franchising authority, violated the Dormant Commerce Clause of U.S. Const., Art. I, § 8, cl. 3, comity principles prevented the court from granting the relief sought because (1) the franchise charges levied on cable providers by North Carolina's political subdivisions prior to 2006 N.C. Sess. Laws 2006-151 were taxes; (2) court-ordered redistribution of intrastate taxation authority would have been an inappropriate intrusion by the federal courts into North Carolina's tax laws, and (3) state courts provided a plain, adequate, and complete remedy for the alleged constitutional violations. DIRECTV, Inc. v. Tolson, 513 F.3d 119, 2008 U.S. App. LEXIS 450 (4th Cir. 2008).

§ 66-352. Award of franchise and commencement of service.

(a) Notice of Franchise. — A person who intends to provide cable service over a cable system in an area must file a notice of franchise with the Secretary before providing the service. A person who files a notice of franchise must pay a fee in the amount set in G.S. 57C-1-22 for filing articles of organization.

A notice of franchise is effective when it is filed with the Secretary. The notice of franchise must include all of the following:

(1) The applicant's name, principal place of business, mailing address, physical address, telephone number, and e-mail address.

(2) A description and map of the area to be served. If the description includes the area within the boundaries of a city, the area to be served is considered to include any area that is subsequently annexed to the city unless the notice limits the area to be served to the boundaries of the city on the effective date of the notice.

(3) A list of each county and city in which the described service area is located, in whole or in part.

(4) A schedule indicating when service is expected to be offered in the service area.

(b) Commencement of Service. — A person who files a notice of franchise under subsection (a) of this section must begin providing cable service in the service area described in the notice within 120 days after the notice is filed. If cable service does not begin within this period, the notice of franchise terminates 130 days after it was filed. If cable service begins within this period, the holder of the State-issued franchise must file a notice of service with the Secretary within 10 days after the cable service begins. Cable service begins when it passes one or more households in the described service area. This subsection does not apply to a cable service provider who terminates an existing agreement whose franchise area includes all of the service area described in a notice of franchise filed by the provider under subsection (a) of this section.

A notice of service for a service area must include all of the following:

(1) The effective date of a notice of franchise for that area.

(2) A description and map of the service area.

(3) A statement that cable service has begun in the service area.

(c) Extension. — A person who intends to provide cable service over a cable system in an area that is contiguous with but outside the service area described in a notice of franchise on file with the Secretary must file a notice of franchise under subsection (a) of this section that includes the proposed area. The initial service requirements in subsection (b) of this section apply to the proposed area. If the map of the area to be served includes any area that is part of the service area of another State-issued franchise, the termination of a notice of franchise for the proposed area for failure to begin service within the required time does not affect the status of the other State-issued franchise.

(d) Withdrawal. — A person may withdraw a notice of franchise by filing a notice of withdrawal with the Secretary. The notice of withdrawal must be filed at least 90 days before the service is withdrawn. (2006-151, s. 1; 2008-148, s. 5.)

Effect of Amendments. — Session Laws 2008-148. s. 5, effective August 2, 2008, and applicable to notices of franchise that are in effect on August 2, 2008, or become effective on or after that date, added the second sentence to subdivision (a)(2).

§ 66-353. Annual service report.

A holder of a State-issued franchise must file an annual service report with the Secretary. The report must be filed on or before July 31 of each year. The report must be accompanied by a fee in the amount set in G.S. 57C-1-22 for filing an annual report. The report must include all of the following:

(1) The effective date of a notice of franchise for that area.

(2) A description and map of the service area.

(3) The approximate number of households in the service area.

(4) A description and a map of the households passed in the service area as of July 1.

(5) The percentage of households passed in the service area as of July 1.

(6) The percentage of households passed in the service area as of July 1 of any preceding year for which a report was required under this section.

(7) A report indicating the extent to which the holder has met the customer service requirements under G.S. 66-356(b).

(8) A schedule indicating when service is expected to be offered in the service area, to the extent the schedule differs from one included in the notice of franchise or in a report previously submitted under this section, and an explanation of the reason for the new schedule. (2006-151, s. 1.)

§ 66-354. General filing and report requirements.

(a) General. — A document filed with the Secretary under this Article must be signed by an officer or general partner of the person submitting the document. Within five days after a person files a document with the Secretary under this Article, the person must send a copy of the document to any county or city included in the service area described in the document and to the registered agent of any cable service provider that is providing cable service under an existing agreement in the service area described in the document.

The provisions of Article 2 of Chapter 55D of the General Statutes apply to the submission of a document under this Article. A document filed under this Article is a public record as defined in G.S. 132-1. The Secretary must post a document filed under this Article on its Internet Web site or indicate on its Internet Web site that the document has been filed and is available for inspection.

A successor in interest to a person who has filed a notice of franchise is not required to file another notice of franchise. When a change in ownership occurs, the owner must file a notice of change in ownership with the Secretary within 14 days after the change becomes effective.

(b) Forfeiture. — A person who offers cable service over a cable system without filing a notice of franchise or a notice of service as required by this Article is subject to forfeiture of the revenue received during the period of noncompliance from subscribers to the cable service in the area of noncompliance. Forfeiture does not apply to revenue received from cable service provided over a cable system in an area that is adjacent to a service area described in a notice of franchise and notice of service filed by that cable service provider under G.S. 66-352 if the provider obtains a State-issued franchise and files a notice of service that includes this area within 20 days after a civil action for forfeiture is filed. A forfeiture does not affect the liability of the cable service provider for sales tax due under G.S. 105-164.4 on cable service.

A cable service provider whose area includes the area in which a person is providing cable service without complying with the notice of franchise and notice of service requirements may bring a civil action for forfeiture. The amount required to be forfeited in the action must be remitted to the Civil Penalty and Forfeiture Fund established in G.S. 115C-457.2. (2006-151, s. 1.)

§ 66-355. Effect on existing local franchise agreement.

(a) Existing Agreement. — This Article does not affect an existing agreement except as follows:

(1) Effective January 1, 2007, gross revenue used to calculate the payment of the franchise tax imposed by G.S. 153A-154 or G.S. 160A-214 does not include gross receipts from cable service subject to sales tax under G.S. 105-164.4. This exclusion does not otherwise affect the calculation of gross revenue and the payment to counties and cities of franchise tax revenue under existing agreements that have not been terminated under subsection (b) of this section.

(2) A cable service provider under an existing agreement that is in effect on January 1, 2007, may terminate the agreement in accordance with subsection (b) of this section in any of the following circumstances:

a. A notice of service filed under G.S. 66-352 indicates that one or more households in the franchise area of the existing agreement are passed by both the cable service provider under the existing agreement and the holder of a State-issued franchise.

b. As of January 1, 2007, a county or city has an existing agreement with more than one cable service provider for substantially the same franchise area and at least twenty-five percent (25%) of the households in the franchise areas of the existing agreements are passed by more than one cable service provider.

c. A person provides wireline competition in the franchise area of the existing agreement by offering video programming over wireline facilities to single family households by a method that does not require a franchise under this Article. A notice of termination filed on the basis of wireline competition must include evidence of the competition in providing video programming service, such as an advertisement announcing the availability of the service, the acceptance of an order for the service, and information on the provider's Web site about the availability of the service. A county or city is allowed 60 days to review the evidence. The effective date of the termination is tolled during this review period. At the end of this period, the termination proceeds unless the county or city has obtained an order enjoining the termination based on the cable service provider's failure to establish the existence of wireline competition in its franchise area.

(3) A cable service provider under an existing agreement that expired before January 1, 2007, may obtain a State-issued franchise. The provider does not have to terminate the agreement in accordance with subsection (b) of this section because the agreement has expired.

(b) Termination. — To terminate an existing agreement, a cable service provider must file a notice of termination with the affected county or city and file a notice of franchise with the Secretary. A termination of an existing agreement becomes effective at the end of the month in which the notice of termination is filed with the affected county or city. A termination of an existing agreement ends the obligations under the agreement and under any local cable regulatory ordinance that specifically authorizes the agreement as of the effective date of the termination but does not affect the rights or liabilities of the county or city, a taxpayer, or another person arising under the existing agreement or local ordinance before the effective date of the termination. (2006-151, s. 1.)

Editor's Note. — G.S. 160A-214, referred to in subdivision (a)(1), was repealed by Session Laws 2006-151, s. 13, effective January 1, 2007. G.S. 153A-154, referred to in subdivision (a)(1), was repealed by Session Laws 2006-151, s. 11, effective January 1, 2007.

§ 66-356. Service standards and requirements.

(a) Discrimination Prohibited. — A person who provides cable service over a cable system may not deny access to the service to any group of potential residential subscribers within the filed service area because of the race or income of the residents. A violation of this subsection is an unfair or deceptive act or practice under G.S. 75-1.1.

In determining whether a cable service provider has violated this subsection with respect to a group of potential residential subscribers in a service area, the following factors must be considered:

(1) The length of time since the provider filed the notice of service for the area. If less than a year has elapsed since the notice of service was filed, it is conclusively presumed that a violation has not occurred.

(2) The cost of providing service to the affected group due to distance from facilities, density, or other factors.

(3) Technological impediments to providing service to the affected group.

(4) Inability to obtain access to property required to provide service to the affected group.

(5) Competitive pressure to respond to service offered by another cable service provider or other provider of video programming.

(b) FCC Standards. — A person who provides cable service over a cable system must comply with the customer service requirements in 47 C.F.R. Part 76 and emergency alert requirements established by the Federal Communications Commission.

(c) Complaints. — The Consumer Protection Division of the Attorney General's Office is designated as the State agency to receive and respond to customer complaints concerning cable services. Persistent or repeated violations of the federal customer service requirements or the terms and conditions of the cable service provider's agreement with customers are unfair or deceptive acts or practices under G.S. 75-1.1.

To facilitate the resolution of customer complaints, the cable service provider must include the following statement on the customer's bill: "If you have a complaint about your cable service, you should first contact customer service at the following telephone number: (insert the cable service provider's customer service telephone number). If the cable service provider does not satisfactorily resolve your complaint, contact the Consumer Protection Division of the Attorney General's Office of the State of North Carolina (insert information on how to contact the Consumer Protection Division of the Attorney General's Office).

(d) No Build-Out. — No build-out requirements apply to a person who provides cable service under a State-issued franchise.

(e) [Report to Revenue Laws Study Committee. —] The Consumer Protection Division of the Attorney General's Office must report to the Revenue Laws Study Committee on or before April 1 of each year, beginning April 1, 2008, on the following information concerning cable service complaints the Division has received from cable customers under this section:

(1) The number of customer complaints.
(2) The types of customer complaints.
(3) The different means of resolving customer complaints. (2006-151, ss. 1, 18.)

Editor's Note. — Session Laws 2006-151, s. 17, provides that: "A primary purpose of this act is to promote consumer choice in video service providers. A premise of this goal is that increased competition will lead to improved service. Under competition, a customer who is dissatisfied with service by one cable service provider will have the option of choosing a different service provider.

"G.S. 66-356, as enacted by this act, designates the Consumer Protection Division of the Attorney General's Office as the agency to receive and respond to unresolved customer complaints about cable service provided by the holder of a State-issued franchise. The transition from local franchise agreements to State-issued franchises will occur gradually.

"Due to the expected improvement in customer service and the gradual change to State-issued franchises, the impact of the requirement in new G.S. 66-356 on the staffing needs of the Consumer Protection Division is not clear. The Office of the Attorney General is therefore requested to monitor the number and type of cable service complaints it receives from customers in areas served under a local franchise agreement and from areas served under a State-issued franchise to determine whether the Consumer Protection Division needs additional staff to fulfill the duty imposed by new G.S. 66-356 and to make a report concerning staffing to the Fiscal Research Division of the North Carolina General Assembly by April 1, 2007."

Session Laws 2006-151, s. 18, was codified as G.S. 66-356(e), at the direction of the Revisor of Statutes.

§ 66-357. Availability and use of PEG channels.

(a) Application. — This section applies to a person who provides cable service under a State-issued franchise. It does not apply to a person who provides cable service under an existing agreement.

(b) Local Request. — A county or city must make a written request to a cable service provider for PEG channel capacity. The request must include a statement describing the county's or city's plan to operate and program each channel requested. The cable service provider must provide the requested PEG channel capacity within the later of the following:

(1) 120 days after the cable service provider receives the written request.

(2) 30 days after any interconnection requested under G.S. 66-358(a)(1) is accomplished.

(c) Initial PEG Channels. — A city with a population of at least 50,000 is allowed a minimum of three initial PEG channels plus any channels in excess of this minimum that are activated, as of July 1, 2006, under the terms of an existing franchise agreement whose franchise area includes the city. A city with a population of less than 50,000 is allowed a minimum of two initial PEG channels plus any channels in excess of this minimum that are activated, as of July 1, 2006, under the terms of an existing franchise agreement whose franchise area includes the city. For a city included in the franchise area of an existing agreement, the agreement determines the service tier placement and transmission quality of the initial PEG channels. For a city that is not included in the franchise area of an existing agreement, the initial PEG channels must be on a basic service tier, and the transmission quality of the channels must be equivalent to those of the closest city covered by an existing agreement.

A county is allowed a minimum of two initial PEG channels plus any channels in excess of this minimum that are activated, as of July 1, 2006, under the terms of an existing franchise agreement whose franchise area includes the county. For a county included in the franchise area of an existing agreement, the agreement determines the service tier placement and transmission quality of the initial PEG channels. For a county that is not included in the franchise area of an existing agreement, the initial PEG channels must be on a basic service tier and the transmission quality of the channels must be equivalent to those of any city with PEG channels in the county.

The cable service provider must maintain the same channel designation for a PEG channel unless the service area of the State-issued franchise includes PEG channels that are operated by different counties or cities and those PEG channels have the same channel designation. Each county and city whose PEG channels are served by the same cable system headend must cooperate with each other and with the cable system provider in sharing the capacity needed to provide the PEG channels.

(d) Additional PEG Channels. — A county or city that does not have seven PEG channels, including the initial PEG channels, is eligible for an additional PEG channel if it meets the programming requirements in this subsection. A county or city that has seven PEG channels is not eligible for an additional channel.

A county or city that meets the programming requirements in this subsection may make a written request under subsection (b) of this section for an additional channel. The additional channel may be provided on any service tier. The transmission quality of the additional channel must be at least equivalent to the transmission quality of the other channels provided.

The PEG channels operated by a county or city must meet the following programming requirements for at least 120 continuous days in order for the county or city to obtain an additional channel:

(1) All of the PEG channels must have scheduled programming for at least eight hours a day.

(2) The programming content of each of the PEG channels must not repeat more than fifteen percent (15%) of the programming content on any of the other PEG channels.

(3) No more than fifteen percent (15%) of the programming content on any of the PEG channels may be character-generated programming.

(e) Use of Channels. — If a county or city no longer provides any programming for transmission over a PEG channel it has activated, the channel may be reprogrammed at the cable service provider's discretion. A cable service provider must give at least a 60-day notice to a county or city before it reprograms a PEG channel that is not used. The cable service provider must restore a previously lost PEG channel within 120 days of the date a county or city certifies to the provider a schedule that demonstrates the channel will be used.

(f) Operation of Channels. — A cable service provider is responsible only for the transmission of a PEG channel. The county or city to which the PEG channel is provided is responsible for the operation and content of the channel. A county or city that provides content to a cable service provider for transmission on a PEG channel is considered to have authorized the provider to transmit the content throughout the provider's service area, regardless of whether part of the service area is outside the boundaries of the county or city.

All programming on a PEG channel must be noncommercial. A cable service provider may not brand content on a PEG channel with its logo, name, or other identifying marks. A cable service provider is not required to transmit content on a PEG channel that is branded with the logo, name, or other identifying marks of another cable service provider.

(g) Compliance. — A county or city that has not received PEG channel capacity as required by this section may bring an action to compel a cable service provider to comply with this section. (2006-151, s. 1.)

§ 66-358. Transmission of PEG channels.

(a) Service. — A cable service provider operating under a State-issued franchise must transmit a PEG channel by one of the following methods:

(1) Interconnection with another cable system operated in its service area. A cable service provider operating in the same service area as a provider under a State-issued franchise must interconnect its cable system on reasonable and competitively neutral terms with the other provider's cable system within 120 days after it receives a written request for interconnection and may not refuse to interconnect on these terms. The terms include compensation for costs incurred in interconnecting. Interconnection may be accomplished by direct cable, microwave link, satellite, or another method of connection.

(2) Transmission of the signal from each PEG channel programmer's origination site, if the origination site is in the provider's service area.

(b) Signal. — All PEG channel programming provided to a cable service provider for transmission must meet the federal National Television System Committee standards or the Advanced Television Systems Committee Standards. If a PEG channel programmer complies with these standards and the cable service provider cannot transmit the programming without altering the transmission signal, then the cable service provider must do one of the following:

(1) Alter the transmission signal to make it compatible with the technology or protocol the cable service provider uses to deliver its cable service.

(2) Provide to the county or city the equipment needed to alter the transmission signal to make it compatible with the technology or protocol the cable service provider uses to deliver its cable service. (2006-151, s. 1.)

§ 66-359. PEG channel grants.

(a) PEG Channel Fund. — The PEG Channel Fund is created as an interest-bearing special revenue fund. It consists of revenue allocated to it under G.S. 105-164.44I(b) and any other revenues appropriated to it. The e-NC Authority, created under G.S. 143B-437.46, administers the Fund.

(b) Grants. — A county or city may apply to the e-NC Authority for a grant from the PEG Channel Fund. In awarding grants from the Fund, the e-NC

Authority must, to the extent possible, select applicants from all parts of the State based upon need. Grants from the Fund are subject to the following limitations:

(1) The grant may not exceed twenty-five thousand dollars ($25,000).
(2) The applicant must match the grant on a dollar-for-dollar basis.
(3) The grant may be used only for capital expenditures necessary to provide PEG channel programming.
(4) An applicant may receive no more than one grant per fiscal year.

(c) Reports. — The e-NC Authority must publish an annual report on grants awarded under this section. The report must list each grant recipient, the amount of the grant, and the purpose of the grant. (2006-151, s. 1.)

§ 66-360. Service to public building.

At the written request of a county or city, a cable service provider operating under a State-issued franchise must provide cable service without charge to a public building located within 125 feet of the provider's cable system. The required service is the basic, or lowest-priced, service the provider offers to customers. The terms and conditions that apply to service provided to a residential retail customer apply to the service provided to the public building. Only one service outlet is required for a building. The cable service provider is not required to provide inside wiring and is not required to provide service that conflicts with restrictions that apply in a program licensing agreement or another contract. A public building is a building used as a public school, a charter school, a county or city library, or a function of the county or city. (2006-151, s. 1.)

ARTICLE 43.

Service Agreements.

§ 66-370. Motor vehicle service agreement companies.

(a) This section applies to all motor vehicle service agreement companies soliciting business in this State, but it does not apply to performance guarantees, warranties, or motor vehicle service agreements made by

(1) A manufacturer,
(2) A distributor, or
(3) A subsidiary or affiliate of a manufacturer or a distributor, where fifty-one percent (51%) or more of the subsidiary or affiliate is owned directly or indirectly by
    a. The manufacturer,
    b. The distributor, or
    c. The common owner of fifty-one percent (51%) or more of the manufacturer or distributor

in connection with the sale of motor vehicles. This section does not apply to any motor vehicle dealer licensed to do business in this State (i) whose primary business is the retail sale and service of motor vehicles; (ii) who makes and administers its own service agreements with or without association with a third-party administrator or who makes its own service agreements in association with a manufacturer, distributor, or their subsidiaries or affiliates; and (iii) whose service agreements cover only vehicles sold by the dealer to its retail customer; provided that the dealer complies with G.S. 66-372 and G.S. 66-373. A motor vehicle dealer who sells a motor vehicle service agreement to a consumer, as defined in 15 U.S.C. § 2301(3), is not deemed to have made a written warranty to the consumer with respect to the motor vehicle sold or to have entered into a service contract with the consumer that applies to the motor vehicle, as provided in 15 U.S.C. § 2308(a), if: (i) the motor vehicle dealer acts as a mere agent of a third party in selling the motor vehicle service agreement; and (ii) the motor vehicle dealer would, after the sale of the motor vehicle service agreement, have no further obligation under the motor vehicle service agreement to the consumer to service or repair the vehicle sold to the consumer at or within 90 days before the dealer sold the motor vehicle service agreement to the consumer.

(b) The following definitions apply in this section and in G.S. 66-371, 66-372, and 66-373:

(1) Authorized insurer. — An insurance company authorized to write liability insurance under Articles 7, 16, 21, or 22 of Chapter 58 of the General Statutes.
(2) Distributor. — Defined in G.S. 20-286(3).
(3) Licensed insurer. — An insurance company licensed to write liability insurance under Article 7 or 16 of Chapter 58 of the General Statutes.
(4) Motor vehicle. — Defined in G.S. 20-4.01(23), but also including mopeds as defined in G.S. 20-4.01(27)d1.
(5) Motor vehicle service agreement. — Any contract or agreement indemnifying the motor vehicle service agreement holder against loss caused by failure, arising out of the ownership, operation, or use of a motor vehicle, of a mechanical or other component part of the motor vehicle that is listed in the agreement. The term does not mean a contract or agreement guaranteeing the performance of parts or lubricants manufactured by the guarantor and sold for use in connection with a motor vehicle where no additional consideration is paid or given to the guarantor for the contract or agreement beyond the price of the parts or lubricants.
(6) Motor vehicle service agreement company. — Any person that issues motor vehicle service agreements and that is not a licensed insurer.

(c) through (g) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 730, s. 3. (1991 (Reg. Sess., 1992), c. 1014, s. 1; 1993, c. 504, ss. 47, 48, 52; c. 539, s. 442; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 730, ss. 3, 4; 1995, c. 193, s. 3; 2007-95, ss. 2, 9.)

Editor's Note. — This Article is former Article 1 of Chapter 58, as rewritten and recodified by Session Laws 2007-95, s. 1. Where appropriate, the historical citations to the sections in the former Chapter have been added to corresponding sections in the Chapter as rewritten and recodified.

This section was formerly codified as G.S. 58-1-25. It was recodified as G.S. 66-370 by Session Laws 2007-95, s. 2, effective October 1, 2007.

Session Laws 2007-95, s. 14, contains a severability clause.

Session Laws 2007-95, s. 15, made this article effective October 1, 2007.

§ 66-371. Home appliance service agreement companies.

(a) This section applies to all home appliance service agreement companies soliciting business in this State, but it does not apply to performance guarantees or warranties made by manufacturers in connection with the sale of new home appliances. This section does not apply to any home appliance dealer licensed to do business in this State (i) whose primary business is the retail sale and service of home appliances; (ii) who makes and administers its own service agreements without association with any other entity; and (iii) whose service agreements cover primarily appliances sold by the dealer to its retail customers, provided that the dealer complies with G.S. 66-372 and G.S.

66-373. This section does not apply to any warranty made by a builder or seller of real property relating to home appliances that are sold along with real property. This section does not apply to any issuer of credit cards or charge cards that markets home appliance service agreements as an ancillary part of its business; provided, however, that such issuer maintains insurance in accordance with G.S. 66-373.

(b) The following definitions apply in this section:

(1) "Home appliance" means a clothes washing machine or dryer; kitchen appliance; vacuum cleaner; sewing machine; home audio or video electronic equipment; home electronic data processing equipment; home exercise and fitness equipment; home health care equipment; power tools; heater or air conditioner, other than a permanently installed unit using internal ductwork; or other personal consumer goods.

(2) "Home appliance service agreement" means any contract or agreement indemnifying the home appliance service agreement holder against loss caused by failure, arising out of the ownership, operation, or use of a home appliance, of a mechanical or other component part of the home appliance that is listed in the agreement.

(3) "Home appliance service agreement company" means any person that issues home appliance service agreements and that is not a licensed insurer.

(c) through (g) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 730, s. 3. (1991 (Reg. Sess., 1992), c. 1014, s. 1; 1993, c. 504, ss. 49, 52; c. 539, s. 443; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 730, ss. 3, 4, 6; 2003-290, s. 1(b); 2007-95, ss. 3, 10.)

Editor's Note. — This section was formerly codified as G.S. 58-1-30. It was recodified as G.S. 66-371 by Session Laws 2007-95, s. 3, effective October 1, 2007.

Session Laws 2007-95, s. 14, contains a severability clause.

§ 66-372. Miscellaneous requirements for motor vehicle and home appliance service agreement companies.

(a) The provisions of this section and G.S. 66-373 apply to companies specified in G.S. 66-370 and G.S. 66-371.

(b) The following definitions apply in this section and in G.S. 66-373:

(1) Service agreement. — Includes motor vehicle service agreements and home appliance service agreements.

(2) Service agreement company. — Includes motor vehicle service agreement companies and home appliance service agreement companies.

(c) Before the sale of any service agreement, the service agreement company shall give written notice to the customer clearly disclosing that the purchase of the agreement is not required either to purchase or to obtain financing for a motor vehicle or home appliance, as the case may be.

(d) No service agreement may be used in this State by any service agreement company if the agreement:

(1) In any respect violates, or does not comply with, the laws of this State;

(2) Contains, or incorporates by reference when incorporation is otherwise permissible, any inconsistent, ambiguous, or misleading clauses or any exceptions and conditions that deceptively affect the risk purported to be assumed in the general coverage of the agreement;

(3) Has any title, heading, or other indication of its provisions that is misleading; or

(4) Is printed or otherwise reproduced in a manner that renders any material provision of the agreement substantially illegible.

(e) All service agreements used in this State by a service agreement company shall:

(1) Not contain provisions that allow the company to cancel the agreement in its discretion other than for nonpayment of premiums or for a direct violation of the agreement by the consumer where the service agreement states that violation of the agreement would subject the agreement to cancellation;

(2) With respect to a motor vehicle service agreement as defined in G.S. 66-370(b)(1), provide for a right of assignability by the consumer to a subsequent purchaser before expiration of coverage if the subsequent purchaser meets the same criteria for motor vehicle service agreement acceptability as the original purchaser; and

(3) Contain a cancellation provision allowing the consumer to cancel at any time after purchase and receive a pro rata refund less any claims paid on the agreement and a reasonable administrative fee, not to exceed ten percent (10%) of the amount of the pro rata refund.

(f) Each service agreement company, as a minimum requirement for permanent office records, shall maintain:

(1) A complete set of accounting records, including a general ledger, cash receipts and disbursements journals, accounts receivable registers, and accounts payable registers.

(2) Memorandum journals showing the service agreement forms issued to the company salespersons and recording the delivery of the forms to dealers.

(3) Memorandum journals showing the service agreement forms received by dealers and indicating the disposition of the forms by the dealers.

(4) A detailed service agreement register, in numerical order by agreement number, of agreements in force. The register shall include the following: agreement number, date of issue, issuing dealer, name of agreement holder, description of item covered, service agreement period (and, if applicable, mileage), gross premium, total commission paid, and net premium.

(5) A detailed claims register, in numerical order by service agreement number. The register shall include the following information: agreement number, date of issue, date claim paid, and, if applicable, disposition other than payment and reason for the disposition.

(g) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 730, s. 3.

(h) No insurer or service agreement company shall act as a fronting company for any unauthorized insurer or service agreement company that is not in compliance with this section. As used in this subsection, "fronting company" means a licensed insurer or service agreement company that, by reinsurance or otherwise, generally transfers to one or more unauthorized insurers or service agreement companies that are not in compliance with this section a substantial portion of the risk of loss under agreements it writes in this State.

(i) All funds belonging to insurers, companies, or others received by a salesperson of a service agreement are trust funds received by the salesperson in a fiduciary capacity; and the salesperson, in the applicable regular course of business, shall account for and pay the funds to the person entitled to the funds. Any salesperson who, not being entitled to the funds, diverts or appropriates the funds or any portion of the funds, other than funds representing the salesperson's commission if authorized by the salesperson agreement, to his or her own use, upon conviction is guilty of embezzlement under G.S. 14-90.

(j) Any person who knowingly offers for sale or sells a service agreement for a company that has failed to comply with the provisions of this section is guilty of a Class 1 misdemeanor. All service agreement companies and individuals selling service agreements are subject to G.S. 75-1 through G.S. 75-19.

(k) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 730, s. 2.

(*l*) No service agreement company shall use in its name, contracts, literature, advertising in any medium, or any other printed matter the words "insurance", "casualty", "surety", "mutual", or any other words descriptive of the insurance business or deceptively similar to the name or description of any insurer doing business in this State, except to indicate that the obligations of the contract are insured by an insurance company.

(m) Repealed by Session Laws 2007-95, s. 11. (1991 (Reg. Sess., 1992), c. 1014, s. 1; 1993, c. 504, ss. 50, 51, 52; c. 539, s. 444; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 730, ss. 2, 3, 5; 1995, c. 193, ss. 4, 5; 2003-290, s. 2; 2007-95, ss. 4, 11.)

Editor's Note. — This section was formerly codified as G.S. 58-1-35. It was recodified as G.S. 66-372 by Session Laws 2007-95, s. 4, effective October 1, 2007.

Session Laws 2007-95, s. 14, contains a severability clause.

§ 66-373. Insurance policy requirements.

(a) Each company or person subject to this section shall maintain contractual liability insurance or service agreement reimbursement insurance with an authorized insurer for one hundred percent (100%) of claims exposure, including reported and incurred but not reported claims and claims expenses, on business written in this State unless the company or person:

(1) Maintains an audited net worth of one hundred million dollars ($100,000,000);

(2) Has offered service agreement contracts or warranties, as applicable to the respective company, its parent company, or person, for at least the preceding 10 years; and

(3) Either is required to file and has filed an SEC Form 10K or Form 20-F with the Securities and Exchange Commission (SEC) within the last calendar year or, if the company does not file with the SEC, can produce, upon request, a copy of the company's audited financial statements, which show a net worth of the company or person of at least one hundred million dollars ($100,000,000). A company or person may utilize its parent company's Form 10-K, Form 20-F, or audited financial statements to satisfy this requirement if the parent company agrees to guarantee the obligations of the company or person relating to service agreement contracts or warranties, as applicable to the respective company or person, sold by the company or person in this State.

(b) All forms relating to insurance policies written by authorized insurers under this section shall be filed with and approved by the Commissioner of Insurance before they may be used for any purpose in this State, irrespective of whether the insurers are licensed insurers.

(c) Each policy shall contain the following provisions:

(1) If the company or person does not fulfill its obligations under service agreements or warranties issued in this State for any reason, including federal bankruptcy or state receivership proceedings, the insurer will pay losses and unearned premium refunds directly to any person making the claim under the service agreement.

(2) The insurer shall assume full responsibility for the administration of claims if the company or person is unable to do so.

(3) The policy is subject to the cancellation, nonrenewal, and renewal provisions of G.S. 58-41-15, 58-41-20, 58-41-25, and 58-41-40.

(4) The policy shall insure all service agreements and warranties that were issued while the policy was in effect, regardless of whether the premium was remitted to the insurer.

(5) If the insurer is fulfilling any service agreement covered by the policy and if the service agreement holder cancels the service agreement, the insurer shall make a full refund of the unearned premium to the consumer pursuant to G.S. 66-372(e)(3). This subdivision applies only to service agreement companies.

(d) The Commissioner of Insurance may adopt rules, in addition to the requirements of this section, governing the terms and conditions of policy forms for the insurance required by this section.

(e) Persons and companies subject to G.S. 58-1-15, 58-1-20, 66-370, 66-371, and 66-374 are subject to and shall comply with this section. (1993 (Reg. Sess., 1994), c. 730, s. 1; 2003-290, s. 1(c); 2007-95, ss. 5, 12.)

Editor's Note. — This section was formerly codified as G.S. 58-1-36. It was recodified as G.S. 66-373 by Session Laws 2007-95, s. 5, effective October 1, 2007.

Session Laws 2007-95, s. 14, contains a severability clause.

§ 66-374. Mechanical breakdown service agreements.

(a) Except as provided in subsection (c) of this section, all mechanical breakdown service agreement companies soliciting business in this State shall comply with G.S. 66-372 and G.S. 66-373.

(b) As used in this section, "mechanical breakdown service agreement companies" include any person that issues mechanical breakdown service agreements and is not a licensed insurer, and "mechanical breakdown service agreements" are applicable to mechanized equipment, including automobiles, riding mowers, scooters, generators, farm implements, logging equipment, road graders, bulldozers, and power equipment not licensed for road use, whether mobile or not.

(c) This section does not apply to performance guarantees, warranties, mechanical breakdown service agreements, or motor vehicle service agreements made by:

(1) A manufacturer.

(2) A distributor.

(3) A subsidiary of a manufacturer or distributor. (2003-290, s. 4; 2007-95, ss. 6, 13.)

Editor's Note. — This section was formerly codified as G.S. 58-1-42. It was recodified as G.S. 66-374 by Session Laws 2007-95, s. 6, effective October 1, 2007.

Session Laws 2007-95, s. 14, contains a severability clause.

This section was enacted as G.S. 58-1-40. It was previously recodified as G.S. 58-1-42 at the direction of the Revisor of Statutes.

§§ 66-375 through 66-379: Reserved for future codification purposes.

ARTICLE 44.

Free Insurance.

§ 66-380. Definitions.

As used in this Article:

(1) "Consumer goods" means goods that are used primarily for personal, family, or household purposes. For the purposes of this Article, consumer goods do not include automobiles or residences.
(2) "Free insurance" means any of the following:
  a. Insurance for which no identifiable or additional charge is made to the purchaser or lessee of consumer goods or services directly or indirectly connected with the purchase of consumer goods.
  b. Insurance for which an identifiable or additional charge is made in an amount less than the cost of such insurance as to the seller, lessor, or other person other than the insurer providing the insurance. (2008-124, s. 9.1.)

Editor's Note. — Session Laws 2008-124, s. 12.1, made this Article effective October 1, 2008, and applicable to violations that occur on or after that date.

Session Laws 2008-124, s. 11.1 is a severability clause.

§ 66-381. Free insurance.

No person shall advertise, offer, or provide free insurance for damage, loss, or theft as an inducement to the purchase, sale, or rental of consumer goods or services directly or indirectly connected with the purchase of consumer goods. (2008-124, s. 9.1.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

§ 66-382. Unfair trade practice.

A violation of G.S. 66-381 constitutes an unfair trade practice under G.S. 75-1.1. (2008-124, s. 9.1.)

Editor's Note. — Session Laws 2008-124, s. 11.1 is a severability clause.

Chapter 67.
Dogs.

Article 1.
Owner's Liability.

Sec.
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67-2. Permitting bitch at large.
67-3. Sheep-killing dogs to be killed.
67-4. Failing to kill mad dog.

Article 1A.
Dangerous Dogs.

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67-19 through 67-28. [Repealed.]

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67-29. [Repealed.]

Article 5.
Protection of Livestock and Poultry from Ranging Dogs.

67-30. Appointment of animal control officers authorized; salary, etc.
67-31. Powers and duties of dog warden.
67-32 through 67-35. [Repealed.]
67-36. Article supplements existing laws.

ARTICLE 1.

Owner's Liability.

§ 67-1. Liability for injury to livestock or fowls.

If any dog, not being at the time on the premises of the owner or person having charge thereof, shall kill or injure any livestock or fowls, the owner or person having such dog in charge shall be liable for damages sustained by the injury, killing, or maiming of any livestock, and costs of suit. (1911, c. 3, s. 1; C.S., s. 1669.)

Cross References. — As to dogfighting, see G.S. 14-362. As to unlawful removal or destruction of electronic dog collars, see G.S. 14-401.17. As to admittance of pets to hotel rooms, see G.S. 72-7.1. As to assistance dogs for handicapped persons, see G.S. 168-4.2 et seq.

Legal Periodicals. — For note on liability of owner for trespass of dogs while hunting, see 33 N.C.L. Rev. 134 (1954).

CASE NOTES

As to owner's liability for personal injury by dog, see Perry v. Phipps, 32 N.C. 259 (1849); Harris v. Fisher, 115 N.C. 318, 20 S.E. 461 (1894).

As to property in dogs and liability for wrongfully killing or injuring them, see Dodson v. Mock, 20 N.C. 146 (1838); Mowery v. Town of Salisbury, 82 N.C. 175 (1880); State v. Smith, 156 N.C. 628, 72 S.E. 321 (1911); Beasley v. Byrum, 163 N.C. 3, 79 S.E. 270 (1913).

As to right to kill dog attempting to destroy animals used for food, see Parrott v. Hartsfield, 20 N.C. 110 (1838); State v. Smith, 156 N.C. 628, 72 S.E. 321 (1911).

Applied in Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

§ 67-2. Permitting bitch at large.

If any person owning or having any bitch shall knowingly permit her to run at large during the erotic stage of copulation he shall be guilty of a Class 3 misdemeanor. (1862-3, c. 41, s. 2; Code, s. 2501; Rev., s. 3303; C.S., s. 1670; 1993, c. 539, s. 529; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Pegg v. Gray, 240 N.C. 548, 82 S.E.2d 757 (1954).

§ 67-3. Sheep-killing dogs to be killed.

If any person owning or having any dog that kills sheep or other domestic animals, or that kills a human being, upon satisfactory evidence of the same being made before any judge of the district court in the county, and the owner duly notified thereof, shall refuse to kill it, and shall permit such dog to go at liberty, he shall be guilty of a Class 3 misdemeanor, and the dog may be killed by anyone if found going at large. (1862-3, c. 41, s. 1; 1874-5, c. 108, s. 2; Code, s. 2500; Rev., s. 3304; C.S., s. 1671; 1973, c. 108, s. 24; 1977, c. 597; 1993, c. 539, s. 530; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to what dogs may be killed, see G.S. 67-14.

CASE NOTES

As to right to kill dog attempting to destroy animals used for food, see Parrott v. Hartsfield, 20 N.C. 110 (1838); Smith v. State, 156 N.C. 628, 72 S.E. 321 (1911).

Applied in Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

Cited in Parrott v. Hartsfield, 20 N.C. 110 (1838); Daniels v. Homer, 139 N.C. 219, 51 S.E. 992 (1905).

§ 67-4. Failing to kill mad dog.

If the owner of any dog shall know, or have good reason to believe, that his dog, or any dog belonging to any person under his control, has been bitten by a mad dog, and shall neglect or refuse immediately to kill the same, he shall forfeit and pay the sum of fifty dollars ($50.00) to him who will sue therefor; and the offender shall be liable to pay all damages which may be sustained by anyone, in his property or person, by the bite of any such dog, and shall be guilty of a Class 3 misdemeanor. (R.C., c. 67; Code, s. 2499; Rev., s. 3305; C.S., s. 1672; 1993, c. 539, s. 531; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to killing mad dogs, see G.S. 67-14. As to rabies, vaccination, etc., generally, see G.S. 130A-184 et seq.

CASE NOTES

Actual Knowledge Unnecessary. — In an action under this section it is not necessary to prove that the biting dog was in fact mad. The words "good reason to believe" apply both to the condition of the biting dog and to the fact that the dog was bitten by a mad dog. Wallace v. Douglas, 32 N.C. 79 (1849).

Dog Can Be Destroyed. — If owner refuses to destroy a dog, which is mad or is bitten by a mad dog, he subjects himself to the possibility of a fine and imprisonment and the dog can be destroyed by order of the justice issuing the warrant under this section. Beasley v. Byrum, 163 N.C. 3, 79 S.E. 270 (1913).

As to contributory negligence of person bitten by a mad dog, see Holton v. Moore, 165 N.C. 549, 81 S.E. 779 (1914).

ARTICLE 1A.

Dangerous Dogs.

§ 67-4.1. Definitions and procedures.

(a) As used in this Article, unless the context clearly requires otherwise and except as modified in subsection (b) of this section, the term:

- (1) "Dangerous dog" means
  - a. A dog that:
    - 1. Without provocation has killed or inflicted severe injury on a person; or
    - 2. Is determined by the person or Board designated by the county or municipal authority responsible for animal control to be potentially dangerous because the dog has engaged in one or more of the behaviors listed in subdivision (2) of this subsection.
  - b. Any dog owned or harbored primarily or in part for the purpose of dog fighting, or any dog trained for dog fighting.
- (2) "Potentially dangerous dog" means a dog that the person or Board designated by the county or municipal authority responsible for animal control determines to have:
  - a. Inflicted a bite on a person that resulted in broken bones or disfiguring lacerations or required cosmetic surgery or hospitalization; or
  - b. Killed or inflicted severe injury upon a domestic animal when not on the owner's real property; or
  - c. Approached a person when not on the owner's property in a vicious or terrorizing manner in an apparent attitude of attack.
- (3) "Owner" means any person or legal entity that has a possessory property right in a dog.
- (4) "Owner's real property" means any real property owned or leased by the owner of the dog, but does not include any public right-of-way or a common area of a condominium, apartment complex, or townhouse development.
- (5) "Severe injury" means any physical injury that results in broken bones or disfiguring lacerations or required cosmetic surgery or hospitalization.

(b) The provisions of this Article do not apply to:

- (1) A dog being used by a law enforcement officer to carry out the law enforcement officer's official duties;
- (2) A dog being used in a lawful hunt;
- (3) A dog where the injury or damage inflicted by the dog was sustained by a domestic animal while the dog was working as a hunting dog,

herding dog, or predator control dog on the property of, or under the control of, its owner or keeper, and the damage or injury was to a species or type of domestic animal appropriate to the work of the dog; or

(4) A dog where the injury inflicted by the dog was sustained by a person who, at the time of the injury, was committing a willful trespass or other tort, was tormenting, abusing, or assaulting the dog, had tormented, abused, or assaulted the dog, or was committing or attempting to commit a crime.

(c) The county or municipal authority responsible for animal control shall designate a person or a Board to be responsible for determining when a dog is a "potentially dangerous dog" and shall designate a separate Board to hear any appeal. The person or Board making the determination that a dog is a "potentially dangerous dog" must notify the owner in writing, giving the reasons for the determination, before the dog may be considered potentially dangerous under this Article. The owner may appeal the determination by filing written objections with the appellate Board within three days. The appellate Board shall schedule a hearing within 10 days of the filing of the objections. Any appeal from the final decision of such appellate Board shall be taken to the superior court by filing notice of appeal and a petition for review within 10 days of the final decision of the appellate Board. Appeals from rulings of the appellate Board shall be heard in the superior court division. The appeal shall be heard de novo before a superior court judge sitting in the county in which the appellate Board whose ruling is being appealed is located. (1989 (Reg. Sess., 1990), c. 1023, s. 1.)

CASE NOTES

Potentially Dangerous Dog. — The definition of "potentially dangerous dog" as set forth in subdivision (a)(2)c is not unconstitutionally vague and overbroad. Caswell County v. Hanks, 120 N.C. App. 489, 462 S.E.2d 841 (1995).

Owner or Keeper. — Jury award to the victim of a dog bite was vacated as the trial court erred by not granting the defendants' motion for a directed verdict because the victim failed to establish that the defendants who the victim sued were the owners or the keepers of the dog that bit the victim; rather the evidence showed that it was the defendant's son and the son's girlfriend that owned the dog that bit the victim. Lee v. Rice, 154 N.C. App. 471, 572 S.E.2d 219, 2002 N.C. App. LEXIS 1446 (2002).

Appeal. — The language of the statute in this case is mandatory, providing that the appeal to superior court shall be heard de novo. Caswell County v. Hanks, 120 N.C. App. 489, 462 S.E.2d 841 (1995).

Applied in Ocean Hill Joint Venture v. Currituck County Bd. of Comm'rs, 178 N.C. App. 182, 630 S.E.2d 714, 2006 N.C. App. LEXIS 1309 (2006).

§ 67-4.2. Precautions against attacks by dangerous dogs.

(a) It is unlawful for an owner to:

(1) Leave a dangerous dog unattended on the owner's real property unless the dog is confined indoors, in a securely enclosed and locked pen, or in another structure designed to restrain the dog;

(2) Permit a dangerous dog to go beyond the owner's real property unless the dog is leashed and muzzled or is otherwise securely restrained and muzzled.

(b) If the owner of a dangerous dog transfers ownership or possession of the dog to another person (as defined in G.S. 12-3(6)), the owner shall provide written notice to:

(1) The authority that made the determination under this Article, stating the name and address of the new owner or possessor of the dog; and

(2) The person taking ownership or possession of the dog, specifying the dog's dangerous behavior and the authority's determination.

(c) Violation of this section is a Class 3 misdemeanor. (1989 (Reg. Sess., 1990), c. 1023, s. 1; 1993, c. 539, s. 532; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 67-4.3. Penalty for attacks by dangerous dogs.

The owner of a dangerous dog that attacks a person and causes physical injuries requiring medical treatment in excess of one hundred dollars ($100.00) shall be guilty of a Class 1 misdemeanor. (1989 (Reg. Sess., 1990), c. 1023, s. 1; 1993, c. 539, s. 533; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 67-4.4. Strict liability.

The owner of a dangerous dog shall be strictly liable in civil damages for any injuries or property damage the dog inflicts upon a person, his property, or another animal. (1989 (Reg. Sess., 1990), c. 1023, s. 1.)

CASE NOTES

Failure to Prove Defendant Was the Owner or Keeper of the Dog. — Jury award to the victim of a dog bite was vacated as the trial court erred by not granting the defendants' motion for a directed verdict because the victim failed to establish that the defendants who the victim sued were the owners or the keepers of the dog that bit the victim; rather the evidence showed that it was the defendant's son and the son's girlfriend that owned the dog that bit the victim. Lee v. Rice, 154 N.C. App. 471, 572 S.E.2d 219, 2002 N.C. App. LEXIS 1446 (2002).

§ 67-4.5. Local ordinances.

Nothing in this Article shall be construed to prevent a city or county from adopting or enforcing its own program for control of dangerous dogs. (1989 (Reg. Sess., 1990), c. 1023, s. 1.)

ARTICLE 2.

License Taxes on Dogs.

§§ 67-5 through 67-11: Repealed by Session Laws 1973, c. 822, s. 6.

Cross References. — As to the effect of the repeal, see the Editor's note following G.S. 153A-1.

Editor's Note. — Session Laws 1973, c. 822, s. 6(c), provided: "All local acts and clauses of local acts modifying any section of the General Statutes repealed by this section or otherwise relating to the use of the proceeds of the dog tax heretofore levied pursuant to G.S. 67-5 (herein repealed) are repealed."

§ 67-12. Permitting dogs to run at large at night; penalty; liability for damage.

No person shall allow his dog over six months old to run at large in the nighttime unaccompanied by the owner or by some member of the owner's family, or some other person by the owner's permission. Any person intentionally, knowingly, and willfully violating this section shall be guilty of a Class 3 misdemeanor, and shall also be liable in damages to any person injured or suffering loss to his property or chattels. (1919, c. 116, s. 5; C.S., s. 1680; 1993, c. 539, s. 534; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Buncombe: 1925, c. 314; Forsyth: 1967, c. 918; Gaston: 1973, c. 1327; Halifax, New Hanover, Wake: 1925, c. 314; Watauga: Pub. Loc. 1927, c. 503 (See G.S. 67-18); Yancey: 1985 (Reg. Sess., 1986), c. 897.

CASE NOTES

Valid Exercise of Police Power. — A city ordinance which prohibits the owner from allowing dogs to run at large without muzzles is a valid exercise of the police power. State v. Clifton, 152 N.C. 800, 67 S.E. 751 (1910).

§ 67-13: Repealed by Session Laws 1973, c. 822, s. 6.

§ 67-14. Mad dogs, dogs killing sheep, etc., may be killed.

Any person may kill any mad dog, and also any dog if he is killing sheep, cattle, hogs, goats, or poultry. (1919, c. 116, s. 8; C.S., s. 1682.)

Cross References. — As to liability of owner who fails to kill sheep-killing dog, see G.S. 67-3. As to liability of owner who fails to kill mad dog, see G.S. 67-4.

CASE NOTES

Applied in Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

§ 67-14.1. Dogs injuring deer or bear on wildlife management area may be killed; impounding unmuzzled dogs running at large.

(a) Any dog which trails, runs, injures or kills any deer or bear on any wildlife refuge, sanctuary or management area, now or hereafter so designated and managed by the Wildlife Resources Commission, during the closed season for hunting with dogs on such refuge or management area, is hereby declared to be a public nuisance, and any wildlife protector or other duly authorized agent or employee of the Wildlife Resources Commission may destroy, by humane method, any dog discovered trailing, running, injuring or killing any deer or bear in any such area during the closed season therein for hunting such game with dogs, without incurring liability by reason of his act in conformity with this section.

(b) Any unmuzzled dog running at large upon any wildlife refuge, sanctuary, or management area, when unaccompanied by any person having such dog in charge, shall be seized and impounded by any wildlife protector, or other duly authorized agent or employee of the Wildlife Resources Commission.

(c) The person impounding such dog shall cause a notice to be published at least once a week for two successive weeks in some newspaper published in the county wherein the dog was taken, or if none is published therein, in some newspaper having general circulation in the county. Such notice shall set forth a description of the dog, the place where it is impounded, and that the dog will be destroyed if not claimed and payment made for the advertisement, a catch fee of one dollar ($1.00) and the boarding, computed at the rate of fifty cents (50¢) per day, while impounded, by a certain date which date shall be not less than 15 days after the publication of the first notice. A similar notice shall be posted at the courthouse door.

(d) The owner of the dog, or his agent, may recover such dog upon payment of the cost of the publication of the notices hereinbefore described together with a catch fee of one dollar ($1.00) and the expense, computed at the rate of fifty cents (50¢) per day, incurred while impounding and boarding the dog.

(e) If any impounded dog is not recovered by the owner within 15 days after the publication of the first notice of the impounding, the dog may be destroyed in a humane manner by any wildlife protector or other duly authorized agent or employee of the North Carolina Wildlife Resources Commission, and no liability shall attach to any person acting in accordance with this section. (1951, c. 1021, s. 1.)

§ 67-15: Repealed by Session Laws 1983, c. 35, s. 2.

Cross References. — As to larceny of animals generally, see now G.S. 14-84.

§ 67-16. Failure to discharge duties imposed under this Article.

Any person failing to discharge any duty imposed upon him under this Article shall be guilty of a Class 3 misdemeanor. (1919, c. 116, s. 10; C.S., s. 1684; 1993, c. 539, s. 535; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 67-17: Deleted.

Editor's Note. — This section has been deleted as it appeared to be local legislation of the type contemplated by G.S. 67-18 and repealed by that section. It was held to have been so repealed in McAlister v. Yancey County, 212 N.C. 208, 193 S.E. 141 (1937).

§ 67-18. Application of Article.

This Article, G.S. 67-5 to 67-18, inclusive, is hereby made applicable to every county in the State of North Carolina, notwithstanding any provisions in local, special or private acts exempting any county or any township or municipality from the provisions of the same enacted at any General Assembly commencing at the General Assembly of 1919 and going through the General Assembly of 1929. (1929, c. 318.)

CASE NOTES

Applied in McAlister v. Yancey County, 212 N.C. 208, 193 S.E. 141 (1937).

ARTICLE 3.

Special License Tax on Dogs.

§§ 67-19 through 67-28: Repealed by Session Laws 1973, c. 822, s. 6.

Cross References. — As to the effect of the repeal, see the Editor's note under G.S. 153A-1.

Editor's Note. — Session Laws 1973, c. 822, s. 6(c), provided: "All local acts and clauses of local acts modifying any section of the General Statutes repealed by this section or otherwise relating to the use of the proceeds of the dog tax heretofore levied pursuant to G.S. 67-5 (herein repealed) are repealed."

ARTICLE 4.

Guide Dogs.

§ **67-29:** Repealed by Session Laws 1973, c. 493, s. 2.

Cross References. — For present provisions as to assistance dogs for the handicapped, see G.S. 168-4.2 et seq.

ARTICLE 5.

Protection of Livestock and Poultry from Ranging Dogs.

§ 67-30. Appointment of animal control officers authorized; salary, etc.

A county may appoint one or more animal control officers and may fix their salaries, allowances, and expenses. (1951, c. 931, s. 1; 1955, c. 1333, s. 1; 1957, cc. 81, 840; 1973, c. 822, s. 6.)

Local Modification. — Cabarrus: 1979, c. 119; Forsyth: 1967, c. 587, s. 2; Franklin: 1953, c. 1005; Granville: 1965, c. 464, s. 2; Rowan: 1985 (Reg. Sess., 1986), c. 872.

CASE NOTES

Applied in Kitchin v. Halifax County, — N.C. App. —, 665 S.E.2d 760, 2008 N.C. App. LEXIS 1624 (2008).

§ 67-31. Powers and duties of dog warden.

The powers and duties of the county dog warden shall be as follows:

(1) He shall have the power of arrest and be responsible for the enforcement within his county of all public and public-local laws pertaining to the ownership and control of dogs, and shall cooperate with all other law-enforcement officers operating within the county in fulfilling this responsibility.

(2) In those counties having a rabies control officer, the county dog warden shall act as assistant to the rabies control officer, working under the supervision of the county health department, to collect the dog tax. In those counties having no rabies control officer, the county dog warden shall serve as rabies control officer. (1951, c. 931, s. 2.)

Local Modification. — Chowan: 1983, c. 166; Cumberland: 1967, c. 814; Dare: 1983, c. 166; Edgecombe: 1983, c. 683; Orange: 1953, c. 367, ss. 1-5, 8; Pasquotank: 1983, c. 166.

§ **67-32:** Repealed by Session Laws 1983, c. 891, s. 9.

§§ **67-33 through 67-35:** Repealed by Session Laws 1973, c. 822, s. 6.

Cross References. — As to the effect of the repeal, see the Editor's note under G.S. 153A-1.

Editor's Note. — Session Laws 1973, c. 822, s. 6(c), provided: "All local acts and clauses of local acts modifying any section of the General Statutes repealed by this section or otherwise relating to the use of the proceeds of the dog tax heretofore levied pursuant to G.S. 67-5 (herein repealed) are repealed."

§ 67-36. Article supplements existing laws.

The provisions of this Article are to be construed as supplementing and not repealing existing State laws pertaining to the ownership, taxation, and control of dogs. (1951, c. 931, s. 7.)

Local Modification. — Chowan, Dare, Pasquotank: 1983, c. 166.

Chapter 68.

Fences and Stock Law.

Article 1.

Lawful Fences.

Sec.
68-1 through 68-5. [Repealed.]

Article 2.

Division Fences.

68-6 through 68-14. [Repealed.]

Article 3.

Livestock Law.

68-15. Term "livestock" defined.
68-16. Allowing livestock to run at large forbidden.
68-17. Impounding livestock at large; right to recover costs and damages.
68-18. Notice and demand when owner known.
68-18.1. Notice when owner not known.
68-19. Determination of damages by selected landowners or by referee.
68-20. Notice of sale and sale where owner fails to redeem or is unknown; application of proceeds.

Sec.
68-21. Illegally releasing or receiving impounded livestock misdemeanor.
68-22. Impounded livestock to be fed and watered.
68-23. Right to feed impounded livestock; owner liable.
68-24. Penalties for violation of this Article.
68-25. Domestic fowls running at large after notice.
68-26 through 68-41. [Repealed.]

Article 4.

Stock along the Outer Banks.

68-42. Stock running at large prohibited; certain ponies excepted.
68-43. Authority of Secretary of Environment and Natural Resources to remove or confine ponies on Ocracoke Island and Shackleford Banks.
68-44. Penalty for violation of G.S. 68-42.
68-45. Impounding stock.
68-46. "Outer banks of this State" defined.

ARTICLE 1.

Lawful Fences.

§§ 68-1, 68-2: Repealed by Session Laws 1969, c. 691.

§§ 68-3, 68-4: Repealed by Session Laws 1971, c. 741, s. 2.

§ 68-5: Repealed by Session Laws 1969, c. 619.

ARTICLE 2.

Division Fences.

§§ 68-6 through 68-14: Repealed by Session Laws 1971, c. 741, s. 2.

ARTICLE 3.

Livestock Law.

§ 68-15. Term "livestock" defined.

The word "livestock" in this Chapter shall include, but shall not be limited to, equine animals, bovine animals, sheep, goats, llamas, and swine. (Code, s. 2822; Rev., s. 1681; C.S., s. 1841; 1971, c. 741, s. 1; 1997-84, s. 2.)

Cross References. — As to the intent of the General Assembly that llamas be treated as domesticated livestock in order to promote the development and improvement of the llama industry in the State, see G.S. 106-22.4.

CASE NOTES

A dog is not "stock" within the meaning of the section, but nevertheless subject to larceny. Meekins v. Simpson, 176 N.C. 130, 96 S.E. 894 (1918), decided prior to revision of this Article by Session Laws 1971, c. 741.

Applied in Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

§ 68-16. Allowing livestock to run at large forbidden.

If any person shall allow his livestock to run at large, he shall be guilty of a Class 3 misdemeanor. (Code, s. 2811; 1889, c. 504; Rev., s. 3319; C.S., s. 1849; 1971, c. 741, s. 1; 1993, c. 539, s. 536; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Duty to Restrain Stock. — This section imposes upon all persons the statutory duty of restraining their stock from running at large. McCoy v. Tillman, 224 N.C. 201, 29 S.E.2d 683 (1944).

The person having charge of an animal is under the legal duty to exercise the ordinary care and foresight of a reasonably prudent person in keeping the animal in restraint. Sutton v. Duke, 7 N.C. App. 100, 171 S.E.2d 343 (1969), aff'd, 277 N.C. 94, 176 S.E.2d 161 (1970).

Implicit Civil Responsibility as Tort-Feasor If Section Violated. — See Kelly v. Willis, 238 N.C. 637, 78 S.E.2d 711 (1953).

This section implies knowledge, consent or willingness on the part of the owner that the animals be at large, or negligence equivalent thereto, and the mere fact that animals are at large does not raise the presumption that the owner permits them to run at large, nor does the doctrine of res ipsa loquitur apply upon the establishment of the facts that animals are found at large. Gardner v. Black, 217 N.C. 573, 9 S.E.2d 10 (1940).

Liability of Animal's Keeper Rests on Question of Negligence. — The keeper of a pony, mule or other animal is liable under this section for negligently permitting such animal to escape and go upon public highways in the event it does damage to travelers or others lawfully thereon. The liability of the keeper rests upon the question of whether the keeper is guilty of negligence in permitting such animal to escape. The same rules as to what is or is not negligence in ordinary situations apply. Sutton v. Duke, 7 N.C. App. 100, 171 S.E.2d 343 (1969), aff'd, 277 N.C. 94, 176 S.E.2d 161 (1970).

Evidence. — That an owner knowingly or negligently allowed his mule to run at large on the highway may be inferred from the fact that the mule repeatedly ran loose thereon. Kelly v. Willis, 238 N.C. 637, 78 S.E.2d 711 (1953).

Cited in Rhoads v. Bryant, 56 N.C. App. 635, 289 S.E.2d 637 (1982).

§ 68-17. Impounding livestock at large; right to recover costs and damages.

Any person may take up any livestock running at large or straying and impound the same; and such impounder may recover from the owner the reasonable costs of impounding and maintaining the livestock as well as damages to the impounder caused by such livestock, and may retain the livestock, with the right to use with proper care until such recovery is had. Reasonable costs of impounding shall include any fees paid pursuant to G.S. 68-18.1 in order to locate the owner. (Code, s. 2186; Rev., s. 1679; C.S., s. 1850; 1951, c. 569; 1971, c. 741, s. 1; 1991, c. 472, s. 3.)

Cross References. — As to pursuit or injury to livestock with intent to steal, see G.S. 14-85.

CASE NOTES

Not Applicable to Stock Under Control. — This section does not authorize the taking up and impounding of livestock unless running at large, and does not apply to cows securely tied to trees under the immediate control of the owner with the permission of the lessee of the land, and it is forcible trespass to take them away over the protest of the owner, to prevent which the owner may use all necessary force, unless the taking is by appropriate legal proceedings. Kirkpatrick v. Crutchfield, 178 N.C. 348, 100 S.E. 602 (1919). See also State v. Hunter, 118 N.C. 1196, 24 S.E. 708 (1896).

When and by Whom Stock May Be Impounded. — All persons are under the statutory duty of restraining their livestock from running at large, and when out of the pasture such stock are at large and subject to be taken up and impounded by any person, even though they are at large as a result of the negligence of the person who so impounds them, where the owner has knowledge of their being at large and neglects to restrain them. McCoy v. Tillman, 224 N.C. 201, 29 S.E.2d 683 (1944).

Liability for Killing Strays. — Under this section one has the power to take up a stray, and the law requires that he do so in preference to killing or injuring it. If he wantonly kills such a stray, he is guilty of a misdemeanor. State v. Brigman, 94 N.C. 888 (1886). See § 14-366.

§ 68-18. Notice and demand when owner known.

If the owner of impounded livestock is or becomes known to the impounder, actual notice of the whereabouts of the impounded livestock must be immediately given to the owner and the impounder must then make demand upon the owner of the livestock for the costs of impoundment and the damages to the impounder, if any, caused by such livestock. (Code, s. 2817; Rev., s. 1680; C.S., s. 1851; 1971, c. 741, s. 1.)

§ 68-18.1. Notice when owner not known.

If the owner of the impounded livestock is not known or cannot be found, the impounder shall inform the register of deeds that he has impounded the livestock and provide the register of deeds with a description of the livestock. The register of deeds shall record the information in a book kept for that purpose, and shall charge the impounder a fee of ten dollars ($10.00). The register of deeds shall immediately publish a notice of the impoundment of the animal by posting a notice on the courthouse door. The notice on the courthouse door shall be posted for 30 days, and shall contain a full description of the livestock impounded, including all marks or brands on the livestock, and shall state when and where the animal was taken up. The impounder shall publish once, in some newspaper published and distributed in the county, a notice containing the same information as the notice posted by the register of deeds. The fees for publishing the notice shall be paid by the impounder. (1874-5, c. 258, s. 2; Code, s. 3768; Rev., s. 2833; C.S., s. 3951; 1991, c. 472, s. 2.)

Cross References. — As to license to look for strays upon the lands of another, see G.S. 14-159.12 and 14-159.13. As to fences and stock law, see Chapter 68.

§ 68-19. Determination of damages by selected landowners or by referee.

If the owner and impounder cannot agree as to the cost of impounding and maintaining such livestock, as well as damages to the impounder caused by such livestock running at large, then such costs and damages shall be determined by three disinterested landowners, one to be selected by the owner of the livestock, one to be selected by the impounder and a third to be selected by the first two. If within 10 days a majority of the landowners so selected cannot agree, or if the owner of the livestock or the impounder fails to make his selection, or if the two selected fail to select a third, then the clerk of superior court of the county where the livestock is impounded shall select a referee. The determination of such costs and damages by the landowners or by the referee shall be final. (Code, s. 2186; Rev., s. 1679; C.S., s. 1850; 1951, c. 569; 1971, c. 741, s. 1.)

§ 68-20. Notice of sale and sale where owner fails to redeem or is unknown; application of proceeds.

If the owner fails to redeem his livestock within three days after the notice and demand as provided in G.S. 68-18 is received or within three days after the determination of the costs and damages as provided in G.S. 68-19, then, upon written notice fully describing the livestock, stating the place, date, and hour of sale posted at the courthouse door and three or more public places in the township where the owner resides, and after 10 days from such posting, the impounder shall sell the livestock at public auction. If the owner of the livestock remains unknown to the impounder, then, 30 days after publication of the notice required by G.S. 68-18.1, the impounder shall post at the courthouse door and three public places in the township where the livestock is impounded a written notice fully describing the livestock, and stating the place, date, and hour of sale. After 20 days from such posting, the impounder shall sell the livestock at public auction. The proceeds of any such public sale shall be applied to pay the reasonable costs of impounding and maintaining the livestock and the damages to the impounder caused by the livestock. Reasonable costs of impounding shall include any fees paid pursuant to G.S. 68-18.1 in an attempt to locate the owner of the livestock. The balance, if any, shall be paid to the owner of the livestock, if known, or, if the owner is not known, then to the school fund of the county where the livestock was impounded. (Code, s. 2817; Rev., s. 1680; C.S., s. 1851; 1971, c. 741, s. 1; 1991, c. 472, s. 4.)

CASE NOTES

When Owner May Not Complain. — Where a party lawfully impounds a sow, sells same under provisions of a recorder's judgment, and pays himself his lawful fees for impounding the sow and his damages caused by the sow, and pays to the owner the amount due him out of the purchase price, the owner may not complain. Beasley v. Edwards, 211 N.C. 393, 190 S.E. 221 (1937).

§ 68-21. Illegally releasing or receiving impounded livestock misdemeanor.

If any person willfully releases any lawfully impounded livestock without the permission of the impounder or receives such livestock knowing that it was unlawfully released, he shall be guilty of a Class 3 misdemeanor. (Code, s. 2819; 1889, c. 504; Rev., s. 3310; C.S., s. 1853; 1971, c. 741, s. 1; 1993, c. 539, s. 537; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 68-22. Impounded livestock to be fed and watered.

If any person shall impound or cause to be impounded any livestock and shall fail to supply to the livestock during the confinement a reasonably adequate quantity of good and wholesome feed and water, he shall be guilty of a Class 3 misdemeanor. (1881, c. 368, s. 3; Code, s. 2484; 1891, c. 65; Rev., s. 3311; C.S., s. 1854; 1971, c. 741, s. 1; 1993, c. 539, s. 538; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 68-23. Right to feed impounded livestock; owner liable.

When any livestock is impounded under the provisions of this Chapter and remains without reasonably adequate feed and water for more than 24 hours, any person may lawfully enter the area of impoundment to supply the livestock with feed and water. Such person shall not be liable in trespass for such entry and may recover of the owner or, if the owner is unknown, of the impounder of the livestock, the reasonable costs of the feed and water. (1881, c. 368, s. 4; Code, s. 2485; Rev., s. 1682; C.S., s. 1855; 1971, c. 741, s. 1.)

CASE NOTES

The difference between an impounding fee and a charge for food is recognized by the law. Former G.S. 68-24 (see now G.S. 68-17 and 68-19) prescribed the impounding fees for taking up stock running at large, and this section prescribes for payment for feeding such stock when taken up. The former fees go to the officer or the town or county, and the latter is a humane provision without which the stock might suffer for want of food and water. Bown v. Town of Williamston, 171 N.C. 57, 87 S.E. 959 (1916).

§ 68-24. Penalties for violation of this Article.

A violation of G.S. 68-16, 68-21 or 68-22 is a Class 3 misdemeanor. (1971, c. 741, s. 1; 1993, c. 539, s. 539; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 68-25. Domestic fowls running at large after notice.

If any person shall permit any turkeys, geese, chickens, ducks or other domestic fowls to run at large on the lands of any other person while such lands are under cultivation in any kind of grain or feedstuff or while being used for gardens or ornamental purposes, after having received actual or constructive notice of such running at large, he shall be guilty of a Class 3 misdemeanor.

If it shall appear to any magistrate that after three days' notice any person persists in allowing his fowls to run at large in violation of this section and fails or refuses to keep them upon his own premises, then the said magistrate may, in his discretion, order any sheriff or other officer to kill the fowls when they are running at large as herein provided. (C.S., s. 1864; 1971, c. 741, s. 1; 1993, c. 539, s. 540; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 68-26 through 68-41: Repealed by Session Laws 1971, c. 741, s. 2.

ARTICLE 4.

Stock along the Outer Banks.

§ 68-42. Stock running at large prohibited; certain ponies excepted.

From and after July 1, 1958, it shall be unlawful for any person, firm or corporation to allow his or its horses, cattle, goats, sheep, or hogs to run free or at large along the outer banks of this State. This Article shall not apply to horses known as marsh ponies or banks ponies on Ocracoke Island, Hyde County. This Article shall not apply to horses known as marsh ponies or banks ponies on Shackleford Banks between Beaufort Inlet and Barden's Inlet in Carteret County. Saving and excepting those animals known as "banker ponies" on the island of Ocracoke owned by the Boy Scouts and not exceeding 35 in number. (1957, c. 1057, s. 1; 1997-456, s. 9.)

Legal Periodicals. — For article on local legislation in the General Assembly, discussing Chadwick v. Salter, 254 N.C. 389, 119 S.E.2d 158 (1961), see 45 N.C.L. Rev. 340 (1967).

CASE NOTES

Constitutionality. — In an action instituted to enjoin a sheriff from removing plaintiffs' cattle from Shackleford Banks, it was held that plaintiffs were not entitled to challenge the constitutionality of this Article, since it does not purport to authorize the destruction or removal of cattle from any portion of the outer banks, but provides for enforcement of its provisions solely by criminal prosecution, and plaintiffs would be entitled to attack the constitutionality of that statute only as a defense to a criminal prosecution thereunder. Chadwick v. Salter, 254 N.C. 389, 119 S.E.2d 158 (1961).

§ 68-43. Authority of Secretary of Environment and Natural Resources to remove or confine ponies on Ocracoke Island and Shackleford Banks.

Notwithstanding any other provisions of this Article, the Secretary of Environment and Natural Resources shall have authority to remove or cause to be removed from Ocracoke Island and Shackleford Banks all ponies known as banks ponies or marsh ponies if and when he determines that such action is essential to prevent damage to the island. In the event such a determination is made, the Secretary, in lieu of removing all ponies, may require that they be restricted to a certain area or corralled so as to prevent damage to the island. In the event such action is taken, the Secretary is authorized to take such steps and act through his duly designated employees or such other persons as, in his opinion, he deems necessary and he may accept any assistance provided by or through the National Park Service. (1957, c. 1057, s. 11/2; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(10); 1997-443, s. 11A.119(a); 1997-456, s. 10.)

§ 68-44. Penalty for violation of G.S. 68-42.

Any person, firm or corporation violating the provisions of G.S. 68-42 shall be guilty of a Class 3 misdemeanor. (1957, c. 1057, s. 2; 1993, c. 539, s. 541; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 68-45. Impounding stock.

The provisions of G.S. 68-24 to 68-30, relative to the impounding of stock running at large shall apply with equal force and effect along the outer banks of this State. (1957, c. 1057, s. 3.)

Editor's Note. — The reference to G.S. 68-24 to 68-30 above is to sections existing prior to the revision of Article 3 by Session Laws 1971, c. 741. For present provisions as to the impounding of stock running at large, see G.S. 68-17 through 68-23.

§ 68-46. "Outer banks of this State" defined.

For the purposes of this Article, the terms "outer banks of this State" shall be construed to mean all of that part of North Carolina which is separated from the mainland by a body of water, such as an inlet or sound, and which is in part bounded by the Atlantic Ocean. (1957, c. 1057, s. 4.)

Chapter 69.

Fire Protection.

Article 1.

Investigation of Fires and Inspection of Premises.

Sec.
69-1 through 69-7.1. [Recodified.]

Article 2.

Fire Escapes.

69-8 through 69-13. [Repealed.]

Article 3.

State Volunteer Fire Department.

69-14 through 69-25. [Recodified.]

Article 3A.

Rural Fire Protection Districts.

69-25.1. Election to be held upon petition of voters.
69-25.2. Duties of county board of commissioners regarding conduct of elections; cost of holding.
69-25.3. Ballots.
69-25.4. Tax to be levied and used for furnishing fire protection.
69-25.5. Methods of providing fire protection.
69-25.6. Municipal corporations empowered to make contracts.
69-25.7. Administration of special fund; fire protection district commission.
69-25.8. Authority, rights, privileges and immunities of counties, etc., performing services under Article.

Sec.
69-25.9. Procedure when area lies in more than one county.
69-25.10. Means of abolishing tax district.
69-25.11. Changes in area of district.
69-25.12. Privileges and taxes where territory added to district.
69-25.13. Privileges and taxes where territory removed from district.
69-25.14. Contract with city or town to which all or part of district annexed concerning property of district and furnishing of fire protection.
69-25.15. When district or portion thereof annexed by municipality furnishing fire protection.
69-25.16. Exclusion from rural fire protection districts.
69-25.17. Validation of fire protection funds appropriated in providing rescue and ambulance services.

Article 4.

Hotels; Safety Provisions.

69-26 through 69-38. [Recodified.]

Article 5.

Authority and Liability of Firemen.

69-39, 69-39.1. [Recodified.]

Article 6.

Mutual Aid Between Fire Departments.

69-40. [Recodified.]

ARTICLE 1.

Investigation of Fires and Inspection of Premises.

§§ 69-1 through 69-7.1: Recodified as Article 79 of Chapter 58.

Editor's Note. — This Article was recodified as Article 79 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

ARTICLE 2.

Fire Escapes.

§§ 69-8 through 69-13: Repealed by Session Laws 1987, c. 864, s. 51.

ARTICLE 3.

State Volunteer Fire Department.

§§ 69-14 through 69-25: Recodified as Article 80 of Chapter 58.

Editor's Note. — This Article was recodified as Article 80 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

ARTICLE 3A.

Rural Fire Protection Districts.

§ 69-25.1. Election to be held upon petition of voters.

Upon the petition of thirty-five percent (35%) of the resident freeholders living in an area lying outside the corporate limits of any city or town, which area is described in the petition and designated as "____________________
(Here insert name)
Fire District," the board of county commissioners of the county shall call an election in said district for the purpose of submitting to the qualified voters therein the question of levying and collecting a special tax on all taxable property in said district, of not exceeding fifteen cents (15¢) on the one hundred dollars ($100.00) valuation of property, for the purpose of providing fire protection in said district. The county tax office shall be responsible for checking the freeholder status of those individuals signing the petition and confirming the location of the property owned by those individuals. Unless specifically excluded by other law, the provisions of Chapter 163 of the General Statutes concerning petitions for referenda and elections shall apply. If the voters reject the special tax under the first paragraph of this section, then no new election may be held under the first paragraph of this section within two years on the question of levying and collecting a special tax under the first paragraph of this section in that district, or in any proposed district which includes a majority of the land within the district in which the tax was rejected.

Upon the petition of thirty-five percent (35%) of the resident freeholders living in an area which has previously been established as a fire protection district and in which there has been authorized by a vote of the people a special tax not exceeding ten cents (10¢) on the one hundred dollars ($100.00) valuation of property within the area, the board of county commissioners shall call an election in said area for the purpose of submitting to the qualified voters therein the question of increasing the allowable special tax for fire protection within said district from ten cents (10¢) on the one hundred dollars ($100.00) valuation to fifteen cents (15¢) on the one hundred dollars ($100.00) valuation on all taxable property within such district. Elections on the question of increasing the allowable tax rate for fire protection shall not be held within the same district at intervals less than two years. (1951, c. 820, s. 1; 1953, c. 453, s. 1; 1959, c. 805, ss. 1, 2; 1983, c. 388, ss. 1, 1.1; 2002-159, s. 55(g).)

Local Modification. — (As to Article 3A) Alexander: 1993, c. 237, s. 1; Caldwell, Chatham: 1985, c. 502; 1985 (Reg. Sess., 1986), c. 940; 1987, c. 235; Cleveland: 1987 (Reg. Sess., 1988), c. 960; Guilford: 1973, c. 263; Harnett: 1989 (Reg. Sess., 1990), c. 932; Lee: 1985, c. 502; 1985 (Reg. Sess., 1986), c. 940; 1987, c. 235; Randolph: 1989 (Reg. Sess., 1990), c. 993; Robeson: 1987, c. 560; Scotland: 1969, c. 855 (garnishment and attachment and lien for collection of delinquent fire protection service charges); Wake: 1955, c. 169, ss. 1-3; 1987 (Reg.

Sess., 1988), c. 959; Wayne: 1985, c. 502; 1985 (Reg. Sess., 1986), c. 940; 1987, c. 235; town of Richfield: 1989 (Reg. Sess., 1990), c. 943, s. 1; Ellenboro Fire Protection District in Rutherford County: 1985, c. 254, ss. 1, 3.2.

Editor's Note. — Session Laws 1951, c. 820, which enacted this section, in s. 9, repealed all laws and clauses of laws, except public-local and private laws, in conflict with its provisions.

CASE NOTES

Cited in Tilghman v. West of New Bern Volunteer Fire Dep't, 32 N.C. App. 767, 233 S.E.2d 598 (1977).

OPINIONS OF ATTORNEY GENERAL

When Election Required. — Board of county commissioners is not required to call election for levy of fire district tax where amount of tax is less than 15 cents on the one hundred dollars valuation of property. See opinion of Attorney General to Mr. Harley B. Gaston, Jr., Gaston County Attorney, 40 N.C.A.G. 639 (1969).

§ 69-25.2. Duties of county board of commissioners regarding conduct of elections; cost of holding.

The board of county commissioners, after consulting with the county board of elections, shall set a date for the election by resolution adopted. The county board of elections shall hold and conduct the election in the district. The county board of elections shall advertise and conduct said election, in accordance with the provisions of this Article and with the procedures prescribed in Chapter 163 governing the conduct of special and general elections. No new registration of voters shall be required, but the deadline by which unregistered voters must register shall be contained in the legal advertisement to be published by the county board of elections. The cost of holding the election to establish a district shall be paid by the county, provided that if the district is established, then the county shall be reimbursed the cost of the election from the taxes levied within the district, but the cost of an election to increase the allowable tax under G.S. 69-25.1 or to abolish a fire district under G.S. 69-25.10 shall be paid from the funds of the district. (1951, c. 820, s. 2; 1975, c. 706; 1981, c. 786, s. 2.)

§ 69-25.3. Ballots.

At said election those voters who are in favor of levying a tax in said district for fire protection therein shall vote a ballot on which shall be written or printed, "In favor of tax for fire protection in ______________________
(Here insert name)
Fire Protection District." Those who are against levying said tax shall vote a ballot on which shall be written or printed the words, "Against tax for fire protection in ____
(Here insert name)
Fire Protection District."

Whenever an election is called pursuant to this Article on the question of increasing the tax limit for fire protection in any area, those voters in favor of such increase therein shall vote a ballot on which shall be printed, "In favor of tax increase for fire protection in ______________ Fire Protection District." Those who are against increasing the tax limit for fire protection therein shall vote a ballot on which shall be printed, "Against tax increase for fire protection in ______________ Fire Protection District." The failure of the election on the question of an increase in the tax for fire protection shall not be deemed to be the abolishment of the special tax for fire protection already in effect in said district. (1951, c. 820, s. 3; 1959, c. 805, s. 3.)

§ 69-25.4. Tax to be levied and used for furnishing fire protection.

(a) If a majority of the qualified voters voting at said election vote in favor of levying and collecting a tax in said district, then the board of county commissioners is authorized and directed to levy and collect a tax in said district in such amount as it may deem necessary, not exceeding ten cents (10¢) on the one hundred dollars ($100.00) valuation of property in said district from year to year, and shall keep the same as a separate and special fund, to be used only for furnishing fire protection within said district, as provided in G.S. 69-25.5.

Provided, that if a majority of the qualified voters voting at such elections vote in favor of levying and collecting a tax in such district, or vote in favor of increasing the tax limit in said district, then the board of county commissioners is authorized and directed to levy and collect a tax in such districts in such amount as it may deem necessary, not exceeding fifteen cents (15¢) on the one hundred dollars ($100.00) valuation of property in said district from year to year.

(b) For purposes of this Article, the term "fire protection" and the levy of a tax for that purpose may include the levy, appropriation, and expenditure of funds for furnishing emergency medical, rescue and ambulance services to protect persons within the district from injury or death; and the levy, appropriation, and expenditure of the tax to provide such services are proper, authorized and lawful. In providing these services the fire district shall be subject to G.S. 153A-250.

(c) For purposes of this Article, a fire protection district is a municipal corporation organized for a special purpose. Except in cases when a fire protection district commission is appointed to govern the district, the board of county commissioners, or joint boards of county commissioners when the area lies in more than one county, shall serve as the governing body. (1951, c. 820, s. 4; 1959, c. 805, s. 4; 1981, c. 217; 2001-414, s. 33.)

Local Modification. — Wake: 1955, c. 169, ss. 4-5.

§ 69-25.5. Methods of providing fire protection.

Upon the levy of such tax, the board of county commissioners shall, to the extent of the taxes collected hereunder, provide fire protection for the district —

(1) By contracting with any incorporated city or town, with any incorporated nonprofit volunteer or community fire department, or with the Department of Environment and Natural Resources to furnish fire protection, or

(2) By furnishing fire protection itself if the county maintains an organized fire department, or

(3) By establishing a fire department within the district, or

(4) By utilizing any two or more of the above listed methods of furnishing fire protection. (1951, c. 820, s. 5; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(11); 1997-443, s. 11A.119(a).)

Local Modification. — Bladen: 1977, c. 800; Rockingham: 2004-55, s. 1.

CASE NOTES

Contracting with Incorporated Nonprofit Volunteer Fire Department. — This section specifically allows county commissioners to contract with an incorporated nonprofit volunteer fire department to provide fire protection. Knotville Volunteer Fire Dep't, Inc. v. Wilkes County, 85 N.C. App. 598, 355 S.E.2d 139, cert. denied and appeal dismissed, 320 N.C. 632, 360 S.E.2d 88, 360 S.E.2d 89 (1987).

Liability of Nonprofit Fire Company in a Nonfire Related Rescue Attempt. — A nonprofit fire company employed by the county was liable for plaintiff's injuries in a nonfire related rescue attempt only to the extent of their insurance coverage, since they had governmental immunity up to their insurance coverages and were engaged in duties other than the suppression of a reported fire. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

Cited in Tilghman v. West of New Bern Volunteer Fire Dep't, 32 N.C. App. 767, 233 S.E.2d 598 (1977).

OPINIONS OF ATTORNEY GENERAL

Rural Fire District May Contract with Town Fire Department. — Rural fire department outside corporate limits of a town, once a fire district has been created, may contract with town fire department for fire protection. See opinion of Attorney General to Mr. James R. Sugg, Craven County Attorney, 40 N.C.A.G. 639 (1969).

§ 69-25.6. Municipal corporations empowered to make contracts.

Municipal corporations are hereby empowered to make contracts to carry out the purposes of this Article. (1951, c. 820, s. 6.)

§ 69-25.7. Administration of special fund; fire protection district commission.

The special fund provided by the tax herein authorized shall be administered to provide fire protection as provided in G.S. 69-25.5 by the board of county commissioners or the joint boards of county commissioners, if the area lies in more than one county, or by a fire protection district commission of three qualified voters of the area, to be known as ______________
(Here insert name)
Fire Protection District Commission, said board to be appointed by the board of county commissioners or the joint boards of county commissioners, if the area lies in more than one county, for a term of two years, said commission to serve at the discretion of and under the supervision of the board of county commissioners or boards of county commissioners if the area lies in more than one county. (1951, c. 820, s. 7; 1953, c. 453, s. 2.)

Local Modification. — Ellenboro Fire Protection District in Rutherford County: 1985, c. 254, s. 2.

§ 69-25.8. Authority, rights, privileges and immunities of counties, etc., performing services under Article.

Any county, municipal corporation or fire protection district performing any of the services authorized by this Article shall be subject to the same authority and immunities as a county would enjoy in the operation of a county fire department within the county, or a municipal corporation would enjoy in the operation of a fire department within its corporate limits.

No liability shall be incurred by any municipal corporation on account of the absence from the city or town of any or all of its fire-fighting equipment or of members of its fire department by reason of performing services authorized by this Article.

Members of any county, municipal or fire protection district fire department shall have all of the immunities, privileges and rights, including coverage by workers' compensation insurance, when performing any of the functions authorized by this Article, as members of a county fire department would have in performing their duties in and for a county, or as members of a municipal fire department would have in performing their duties for and within the corporate limits of the municipal corporation. (1951, c. 820, s. 8; 1979, c. 714, s. 2.)

Cross References. — As to firemen as traffic officers, see G.S. 20-114.1.

CASE NOTES

Immunity of Fire Departments. — This section ensures that all fire departments engaged in activities authorized by this chapter receive equivalent statutory and sovereign immunity. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

If a rural fire department was a "fire protection district fire department" subject to the requirements of G.S. 69-25.8 and G.S. 153A-435, the specific and limited immunity provided by G.S. 58-82-5 still applied to an action against the department and one of its firemen for personal injuries received from one of the department's vehicles when the department and the fireman were in the process of responding to and suppressing a fire. Luhmann v. Hoenig, 161 N.C. App. 452, 588 S.E.2d 550, 2003 N.C. App. LEXIS 2187 (2003).

Effect of Insurance Coverage. — Relationship between a county and a fire department was consistent with a fire protection district, and, therefore, the fire department was entitled to sovereign immunity, but to extent of its insurance coverage, had waived its sovereign immunity and was liable for damages to an individual injured in an accident which happened while the fire department was fighting a fire. Luhmann v. Hoenig, 358 N.C. 529, 597 S.E.2d 763, 2004 N.C. LEXIS 674 (2004).

Liability of Nonprofit Fire Company in a Nonfire Related Rescue Attempt. — A nonprofit fire company employed by the county was liable for plaintiff's injuries in a nonfire related rescue attempt only to the extent of their insurance coverage, since they had governmental immunity up to their insurance coverages and were engaged in duties other than the suppression of a reported fire. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

§ 69-25.9. Procedure when area lies in more than one county.

In the event that an area petitioning for a tax election under this Article lies in more than one county said petition shall be submitted to the board of county commissioners of all the counties in which said area lies and election shall be called which shall be conducted jointly by the county board of elections and the cost of same shall be shared equally by all counties.

Upon passage, the tax herein provided shall be levied and collected by each county on all of the taxable property in its portion of the fire protection district; the tax collected shall be paid into a special fund and used for the purpose of providing fire protection for the district. (1953, c. 453, s. 3; 1985, c. 563, s. 5.)

Local Modification. — Davidson and Forsyth: 1979, c. 290.

§ 69-25.10. Means of abolishing tax district.

Upon a petition of fifteen percent (15%) of the resident freeholders of any special fire protection district or area, at intervals of not less than two years, the board of county commissioners or the joint boards of county commissioners, if the area lies in more than one county, shall call an election to abolish the special tax for fire protection for the area, the election to be called and conducted as provided in G.S. 69-25.2; if a majority of the registered voters vote to abolish said tax, the commissioners shall cease levy and collecting same and any unused funds of the district shall be turned over to and used by the county commissioners of the county collecting same as a part of its general fund, and any property or properties of the district or the proceeds thereof shall be distributed, used or disposed of equitably by the board of county commissioners or the boards of county commissioners. (1953, c. 453, s. 4.)

Local Modification. — Wake: 1955, c. 169, s. 6; Ellenboro Fire Protection District in Rutherford County: 1985, c. 254, s. 3.1.

§ 69-25.11. Changes in area of district.

After a fire protection district has been established under the provisions of this Article and fire protection commissioners have been appointed, changes in the area may be made as follows:

(1) The area of any fire protection district may be increased by including within the boundaries of the district any adjoining territory upon the application of the owner, or a two-thirds majority of the owners, of the territory to be included, the unanimous recommendation in writing of the fire protection commissioners of said district, the approval of a majority of the members of the board of directors of the corporation furnishing fire protection to the district, and the approval of the board or boards of county commissioners in the county or counties in which said fire protection district is located. However, before said fire protection district change is approved by the county commissioners, notice shall be given once a week for two successive calendar weeks in a newspaper having general circulation in said district, and notice shall be posted at the courthouse door in each county affected, and at three public places in the area to be included, said notices inviting interested citizens to appear at a designated meeting of said county commissioners, said notice to be published the first time and posted not less than fifteen days prior to the date fixed for hearing before the county commissioners.

(2) The area of any fire protection district may be decreased by removing therefrom any territory, upon the application of the owner or owners of the territory to be removed, the unanimous recommendation in writing of the fire protection commissioners of said district, the approval of a majority of the members of the board of directors of the corporation furnishing fire protection to the district, and the approval of the board or boards of county commissioners of the county or counties in which the district is located.

(3) In the case of adjoining fire districts having in effect the same rate of tax for fire protection, the board of county commissioners, upon petition of the fire protection commissioners and the boards of directors of the corporations furnishing fire protection in the districts affected, shall have the authority to relocate the boundary lines between such fire districts in accordance with the petition or in such other manner as to the board may seem proper. Upon receipt of such

petition, the board of county commissioners shall set a date and time for a public hearing on the petition, and notice of such hearing shall be published in some newspaper having general circulation within the districts to be affected once a week for two weeks preceding the time of the hearing. Such hearings may be adjourned from time to time and no further notice is required of such adjourned hearings. In the event any boundaries of fire districts are altered or relocated under this section, the same shall take effect at the beginning of the next succeeding fiscal year after such action is taken.

(4) In the case of adjoining fire districts having in effect a different rate of tax for fire protection, the board of county commissioners, upon petition of two thirds of the owners of the territory involved and after receiving a favorable recommendation of the fire protection commissioners and the boards of directors of the corporations furnishing fire protection in the districts affected, may transfer such territory from one district to another and therefore relocate the boundary lines between such fire districts in accordance with the petition or in such other manner as the board may deem proper. Upon receipt of such petition, the board of county commissioners shall set a date and time for a public hearing on the petition, and notice of such hearing shall be published in some newspaper having general circulation within the districts to be affected once a week for two weeks preceding the time of the hearing. Such hearings may be adjourned from time to time and no further notice is required of such adjourned hearings. In the event any boundaries of fire districts are relocated under this section, the same shall take effect at the beginning of the next succeeding fiscal year after such action is taken.

(5) The area of any fire protection district may be increased by including within the boundaries of the district any adjoining territory lying within the corporate limits of the city if the territory is not already included within a fire protection district, provided both the city governing body and the county commissioners of the county or counties in which the fire protection district is located all agree by resolution to such inclusion. (1955, c. 1270; 1959, c. 805, s. 5; 1965, cc. 625, 1101; 1987, c. 711, s. 2.)

Local Modification. — Bladen: 1985, c. 256; Durham, as to subdivision (2): 1967, c. 791; Haywood: 2001-56; Henderson: 2000-4, s. 1; Orange, as to subdivision (1): 1957, c. 302; 1965, c. 447; Wake: 1985, c. 256.

CASE NOTES

Exclusive Means of Altering Established Boundaries. — After a district has been created, the only ways to alter the established boundaries are listed in this section. Knotville Volunteer Fire Dep't, Inc. v. Wilkes County, 85 N.C. App. 598, 355 S.E.2d 139, cert. denied and appeal dismissed, 320 N.C. 632, 360 S.E.2d 88, 360 S.E.2d 89 (1987).

OPINIONS OF ATTORNEY GENERAL

Property completely separated from the existing fire district is not "adjoining territory" within the meaning of the statute. See opinion of Attorney General to Mr. Paul S. Messick, Jr., Chatham County Attorney, 50 N.C.A.G. 74 (1981).

Meaning of "Owner" and "Majority of Owners". — The legislative intent was to include nonresident property owners, and the word "owner" should be construed to mean "resident and nonresident owners" of the territory to be included. "Majority of the owners" refers to persons and entities owning real estate in the territory. See opinion of Attorney General to Mr. Paul S. Messick, Jr., Chatham County Attorney, 50 N.C.A.G. 74 (1981).

§ 69-25.12. Privileges and taxes where territory added to district.

In case any territory is added to any fire protection district, from and after such addition, the taxpayers and other residents of said added territory shall have the same rights and privileges and the taxpayers shall pay taxes at the same rates as if said territory had originally been included in the said fire protection district. (1955, c. 1270.)

§ 69-25.13. Privileges and taxes where territory removed from district.

In case any territory is removed from any fire protection district from and after said removal, the taxpayers and other residents of said removed territory shall cease to be entitled to the rights and privileges vested in them by their inclusion in said fire protection district, and the taxpayers shall no longer be required to pay taxes upon their property within said district. (1955, c. 1270.)

§ 69-25.14. Contract with city or town to which all or part of district annexed concerning property of district and furnishing of fire protection.

Whenever all or any part of the area included within the territorial limits of a fire protection district is annexed to or becomes a part of a city or town, the governing body of such district may contract with the governing body of such city or town to give, grant or convey to such city or town, with or without consideration, in such manner and on such terms and conditions as the governing body of such district shall deem to be in the best interests of the inhabitants of the district, all or any part of its property, including, but without limitation, any fire-fighting equipment or facilities, and may provide in such contract for the furnishing of fire protection by the city or town or by the district. (1957, c. 526.)

Local Modification. — Ellenboro Fire Protection District in Rutherford County: 1985, c. 254, s. 3.

§ 69-25.15. When district or portion thereof annexed by municipality furnishing fire protection.

(a) When the whole or any portion of a fire protection district has been annexed by a municipality furnishing fire protection to its citizens, then such fire protection district or the portion thereof so annexed shall immediately thereupon cease to be a fire protection district or a portion of a fire protection district; and such district or portion thereof so annexed shall no longer be subject to G.S. 69-25.4 authorizing the board of county commissioners to levy and collect a tax in such district for the purpose of furnishing fire protection therein.

(b) Nothing herein shall be deemed to prevent the board of county commissioners from levying and collecting taxes for fire protection in the remaining portion of a fire protection district not annexed by a municipality, as aforesaid.

(c) When all or part of a fire protection district is annexed, and the effective date of the annexation is a date other than a date in the month of June, the amount of the fire protection district tax levied on property in the district for the fiscal year in which municipal taxes are prorated under G.S. 160A-58.10 shall be multiplied by the following fraction: the denominator shall be 12 and the numerator shall be the number of full calendar months remaining in the fiscal year following the day on which the annexation becomes effective. For each owner, the product of the multiplication is the prorated fire protection payment. The finance officer of the city shall obtain from the assessor or tax collector of the county where the annexed territory was located a list of the owners of property on which fire protection district taxes were levied in the territory being annexed, and the city shall, no later than 90 days after the effective date of the annexation, pay the amount of the prorated fire protection district payment to the owners of that property. Such payments shall come from any funds not otherwise restricted by law.

(d) Whenever a city is required to make fire protection district tax payments by subsection (c) of this section, and the city has paid or has contracted to pay to a rural fire department funds under G.S. 160A-37.1 or G.S. 160A-49.1, the county shall pay to the city from funds of the rural fire protection district an amount equal to the amount paid by the city (or to be paid by the city) to a rural fire department under G.S. 160A-37.1 or G.S. 160A-49.1 on account of annexation of territory in the rural fire protection district for the number of months in that fiscal year used in calculating the numerator under subsection (c) of this section; provided that the required payments by the county to the city shall not exceed the total of fire protection district payments made to taxpayers in the district on account of that annexation. (1957, c. 1219; 1985, c. 707, ss. 1, 2; 1987, c. 45, s. 1.)

Local Modification. — Town of Harrisburg: 1983 (Reg. Sess., 1984), c. 937; town of Hemby Bridge: 1998-143, s. 2; town of Indian Beach: 1985, c. 299, s. 2; town of Richfield: 1989 (Reg. Sess., 1990), c. 943, s. 2; Ellenboro Fire Protection District in Rutherford County: 1985, c. 254, s. 3.

§ 69-25.16. Exclusion from rural fire protection districts.

There shall be excluded from any rural fire protection district, and the provisions of this Article shall not apply to, an electric generating plant, together with associated land and facilities, which provides electricity to the public; provided that this section shall not apply to any rural fire protection district in existence on May 1, 1971. (1971, c. 297.)

§ 69-25.17. Validation of fire protection funds appropriated in providing rescue and ambulance services.

All prior appropriations and expenditures by any county board of commissioners of funds derived from taxes levied in rural fire protection districts, but used to provide rescue and ambulance services within said districts, are hereby approved, confirmed, validated, and declared to be proper, authorized, and legal. (1977, c. 131, s. 1.)

CASE NOTES

This section and G.S. 58-82-5(c) recognize that fire departments provide rescue and ambulance services. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

Liability of Nonprofit Fire Company in Nonfire Related Rescue Attempt. — A nonprofit fire company employed by the county was liable for plaintiff's injuries in a nonfire related rescue attempt only to the extent of their insurance coverage, since they had governmental immunity up to their insurance coverages and were engaged in duties other than the suppression of a reported fire. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

Nonprofit Fire Department Entitled to Same Immunity Afforded Other Fire De-

partments. — Nonprofit corporation employed by a county as a fire department engaged in statutorily authorized services is entitled to receive the same immunity normally afforded to other fire departments in North Carolina. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

ARTICLE 4.

Hotels; Safety Provisions.

§§ 69-26 through 69-38: Recodified as Article 81 of Chapter 58.

Editor's Note. — This Article was recodified as Article 81 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9, and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

G.S. 69-26 through 69-31 and G.S. 69-35 through 69-37 were repealed by Session Laws 1987, c. 864, s. 52.

ARTICLE 5.

Authority and Liability of Firemen.

§§ 69-39, 69-39.1: Recodified as Article 82 of Chapter 58.

Editor's Note. — This Article was recodified as Article 82 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9, and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

ARTICLE 6.

Mutual Aid Between Fire Departments.

§ 69-40: Recodified as Article 83 of Chapter 58.

Editor's Note. — This Article was recodified as Article 83 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9, and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

Chapter 70.

Indian Antiquities, Archaeological Resources and Unmarked Human Skeletal Remains Protection.

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ARTICLE 1.

Indian Antiquities.

§ 70-1. Private landowners urged to refrain from destruction.

Private owners of lands containing Indian relics, artifacts, mounds or burial grounds are urged to refrain from the excavation or destruction thereof and to forbid such conduct by others, without the cooperation of the director of the State Museum and the Secretary of the Department of Cultural Resources or without the assistance or supervision of some person designated by either as qualified to make scientific archaeological explorations. (1935, c. 198, s. 1; 1973, c. 476, s. 48.)

§ 70-2. Possessors of relics urged to commit them to custody of State agencies.

All persons having in their possession collections of Indian relics, artifacts, and antiquities which are in danger of being lost, destroyed or scattered are urged to commit them to the custody of the North Carolina State Museum, the Department of Cultural Resources, or some other public agency or institution within the State which is qualified to preserve and exhibit them for their historic, scientific and educational value to the people of the State. (1935, c. 198, s. 2; 1973, c. 476, s. 48.)

§ 70-3. Preservation of relics on public lands.

It shall be the duty of any person in charge of any construction or excavation on any lands owned by the State, by any public agency or institution, by any county, or by any municipal corporation, to report promptly to and preserve for the director of the State Museum or the Secretary of the Department of Cultural Resources any Indian relic, artifact, mound, or burial ground discovered in the course of such construction or excavation. (1935, c. 198, s. 3; 1973, c. 476, s. 48.)

§ 70-4. Destruction or sale of relic from public lands made misdemeanor.

Any person who shall excavate, disturb, remove, destroy or sell any Indian relic or artifact, or any of the contents of any mound or burial ground, on or from any lands owned by the State, by any public agency or institution, by any county, or by any municipal corporation, except with the written approval of the director of the State Museum or the Secretary of the Department of Cultural Resources, shall be guilty of a Class 1 misdemeanor. (1935, c. 198, s. 4; 1973, c. 476, s. 48; 1993, c. 539, s. 542; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 70-5 through 70-9: Reserved for future codification purposes.

ARTICLE 2.

Archaeological Resources Protection Act.

§ 70-10. Short title.

This Article shall be known as "The Archaeological Resources Protection Act." (1981, c. 904, s. 2.)

Legal Periodicals. — For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

§ 70-11. Findings and purpose.

(a) The General Assembly finds that:

(1) Archaeological resources on State lands are an accessible and irreplaceable part of the State's heritage;

(2) These resources are increasingly endangered because of their commercial attractiveness;

(3) Existing State laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and

(4) There is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.

(b) The purpose of this Article is to secure, for the present and future benefit of the people of North Carolina, the protection of archaeological resources and sites which are on State lands, excluding highway right-of-ways, and to foster increased cooperation and exchange of information among governmental authorities, the professional archaeological community, Indian Tribal governmental authorities and private individuals having collections of archaeological resources and data. (1981, c. 904, s. 2.)

§ 70-12. Definitions.

As used in this Article, unless the context clearly indicates otherwise:

(1) "Archaeological investigation" means any surface collection, subsurface tests, excavation, or other activity that results in the disturbance or removal of archaeological resources.

(2) "Archaeological resource" means any material remains of past human life or activities which are at least 50 years old and which are of archaeological interest, including pieces of pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, rock paintings, rock carvings, intaglios, graves or human skeletal materials. Paleontological specimens are not to be considered archaeological resources unless found in an archaeological context.

(3) "State lands" means any lands owned, occupied, or controlled by the State of North Carolina, with the exception of those lands under short term lease solely for archaeological purposes, excluding highway right-of-ways. (1981, c. 904, s. 2.)

§ 70-13. Archaeological investigations.

(a) Any person may apply to the Department of Cultural Resources for a permit to conduct archaeological investigations on State lands. The application shall contain information the Department of Cultural Resources, in consultation with the Department of Administration, deems necessary, including the time, scope, location and specific purpose of the proposed work.

(b) A permit shall be issued pursuant to an application under subsection (a) of this section if, after any notifications and consultations required by subsection (d) of this section, the Department of Cultural Resources, in consultation with the Department of Administration, finds that:

(1) The applicant is qualified to carry out the permitted activity;

(2) The proposed activity is undertaken for the purpose of furthering archaeological knowledge in the public interest;

(3) The currently available technology and the technology the applicant proposes to use are such that the significant information contained in the archaeological resource can be retrieved;

(4) The funds and the time the applicant proposes to commit are such that the significant information contained in the archaeological resources can be retrieved;

(5) The archaeological resources which are collected, excavated or removed from State lands and associated records and data will remain the property of the State of North Carolina and the resources and

copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution;

(6) The activity pursuant to the permit is not inconsistent with any management plan applicable to the State lands concerned; and

(7) The applicant shall bear the financial responsibility for the reinterment of any human burials or human skeletal remains excavated or removed as a result of the permitted activities.

(c) A permit may contain any terms, conditions or limitations the Department of Cultural Resources, in consultation with the Department of Administration, deems necessary to achieve the intent of this Article. A permit shall identify the person responsible for carrying out the archaeological investigation.

(d) If a permit issued under G.S. 70-13(a) may result in harm to, or destruction of, any religious or cultural site, as determined by the Department of Cultural Resources, in consultation with the Department of Administration, before issuing such permit, the Department of Cultural Resources, in consultation with the Department of Administration, shall notify and consult with, insofar as possible, a local representative of an appropriate religious or cultural group. If the religious or cultural site pertains to Native Americans, the Department of Cultural Resources, in consultation with the Department of Administration, shall notify the Executive Director of the North Carolina Commission of Indian Affairs. The Executive Director of the North Carolina Commission of Indian Affairs shall notify and consult with the Eastern Band of Cherokee or other appropriate tribal group or community. Such notification shall include, but not be limited to, the following:

(1) The location and schedule of the forthcoming investigation;

(2) Background data concerning the nature of the study; and

(3) The purpose of the investigation and the expected results.

(e) A permit issued under G.S. 70-13 may be suspended by the Department of Cultural Resources, in consultation with the Department of Administration, upon the determination that the permit holder has violated any provision of G.S. 70-15(a) or G.S. 70-15(b). A permit may be revoked by the Department of Cultural Resources, in consultation with the Department of Administration, upon assessment of a civil penalty under G.S. 70-16 against the permit holder or upon the permit holder's conviction under G.S. 70-15. (1981, c. 904, s. 2; 1991, c. 461, s. 1.)

§ 70-13.1. Criminal record checks of applicants for permit or license.

(a) The following definitions apply to this section:

(1) Applicant. — A person or entity applying for a permit or license under G.S. 70-13 to conduct any type of archaeological investigation on State lands.

(2) Criminal history. — A history of conviction of a state or federal crime, whether a misdemeanor or felony, that bears upon an applicant's fitness to conduct archaeological investigations under G.S. 70-13. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers and Court Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other

Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 19C, Financial Identity Fraud; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302, or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(b) All applicants shall consent to a criminal history record check. Refusal to consent to a criminal history record check or to the use of fingerprints or other identifying information may constitute grounds for the Department of Cultural Resources to deny a permit or a license to an applicant. The Department of Cultural Resources shall be responsible for providing to the North Carolina Department of Justice the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories of Criminal Histories, and any additional information required by the Department of Justice. If the applicant is not an individual, the applicant shall provide fingerprints for the principals, officers, directors, and controlling persons of the applicant. Each set of fingerprints shall be certified by an authorized law enforcement officer. The Department of Cultural Resources shall keep all information obtained under this section confidential.

(c) If an applicant's criminal history record check reveals one or more convictions listed under subdivision (a)(2) of this section, the conviction shall not automatically bar the issuance of a permit or a license. When determining whether to issue a permit or license to an applicant, the Department of Cultural Resources shall consider all of the following factors regarding the conviction:

(1) The level and seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the person's responsibilities pursuant to the application.
(6) The incarceration, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed.
(7) The subsequent commission by the person of a crime. (2005-367, s. 4.)

§ 70-14. Rule-making authority; custody of resources.

The North Carolina Historical Commission, in consultation with the Department of Administration, may promulgate regulations to implement the provisions of this Article and to provide for the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from State lands pursuant to this Article, and the ultimate disposition of those resources. (1981, c. 904, s. 2.)

§ 70-15. Prohibited acts and criminal penalties.

(a) No person may excavate, remove, damage or otherwise alter or deface any archaeological resource located on State lands unless he is acting pursuant to a permit issued under G.S. 70-13.

(b) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, exchange, transport or receive any archaeological resource excavated or removed from State lands in violation of the prohibition contained in G.S. 70-15(a).

(c) Any person who knowingly and willfully violates or employs any other person to violate any prohibition contained in G.S. 70-15(a) or G.S. 70-15(b) shall upon conviction, be fined not more than two thousand dollars ($2,000) or imprisoned not more than six months, or both, in the discretion of the court.

(d) Each day on which a violation occurs shall be a separate and distinct offense. (1981, c. 904, s. 2.)

§ 70-16. Civil penalties.

A civil penalty of not more than five thousand dollars ($5,000) may be assessed by the Department of Administration, in consultation with the Department of Cultural Resources, against any person who violates the provisions of G.S. 70-15. In determining the amount of the penalty, the Department shall consider the extent of the harm caused by the violation and the cost of rectifying the damage. Any person assessed shall be notified of the assessment by registered or certified mail. The notice shall specify the reasons for the assessment. If the person assessed fails to pay the amount of the assessment to the Department within 30 days after receipt of notice, the Department may institute a civil action in the Superior Court of Wake County to recover the amount of the assessment.

The Department may use the assessed funds to rectify the damage to archaeological resources. The clear proceeds of all assessed funds not used to rectify the damage shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1981, c. 904, s. 2; 1987, c. 827, s. 215; 1998-215, s. 2.)

§ 70-17. Forfeiture.

All archaeological resources with respect to which a violation of G.S. 70-15(a) or 70-15(b) occurred, and all vehicles and equipment which were used in connection with such violation shall be subject to forfeiture to the State of North Carolina in the same manner as vehicles and equipment subject to forfeiture under G.S. 90-112. (1981, c. 904, s. 2.)

§ 70-18. Confidentiality.

Information concerning the nature and location of any archaeological resource, regardless of the ownership of the property, may be made available to the public under Chapter 132 of the North Carolina General Statutes or under any other provision of law unless the Department of Cultural Resources determines that the disclosures would create a risk of harm to such resources or to the site at which such resources are located. (1981, c. 904, s. 2.)

§ 70-19. Cooperation with private individuals.

The Department of Cultural Resources shall take any action necessary, consistent with the purposes of this Article, to foster and improve the communication, cooperation, and exchange of information between:

(1) Private individuals having collections of archaeological resources and data which were obtained through legal means, and
(2) Professional archaeologists and associations of professional archaeologists concerned with the archaeological resources of North Carolina and of the United States. (1981, c. 904, s. 2.)

§ 70-20. Delegation of responsibilities.

If the Department of Administration and the Department of Cultural Resources agree, the responsibilities, in whole or in part, of the Department of Cultural Resources under this Article may be delegated through a memorandum of understanding to the Department of Administration. Such a memorandum of understanding will be subject to periodic review at the initiation of either party to the memorandum. (1981, c. 904, s. 2.)

§§ 70-21 through 70-25: Reserved for future codification purposes.

ARTICLE 3.

Unmarked Human Burial and Human Skeletal Remains Protection Act.

§ 70-26. Short title.

This Article shall be known as "The Unmarked Human Burial and Human Skeletal Remains Protection Act." (1981, c. 853, s. 2.)

Legal Periodicals. — For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

§ 70-27. Findings and purpose.

(a) The General Assembly finds that:
(1) Unmarked human burials and human skeletal remains are subject to vandalism and inadvertent destruction at an ever-increasing rate;
(2) Existing State laws do not provide adequate protection to prevent damage to and destruction of these remains;
(3) There is a great deal of scientific information to be gained from the proper excavation, study and analysis of human skeletal remains recovered from such burials; and
(4) There has been no procedure for descendants or other interested individuals to make known their concerns regarding disposition of these remains.

(b) The purpose of this Article is (i) to provide adequate protection from vandalism for unmarked human burials and human skeletal remains, (ii) to provide adequate protection for unmarked human burials and human skeletal remains not within the jurisdiction of the medical examiner pursuant to G.S. 130A-383 that are encountered during archaeological excavation, construction, or other ground disturbing activities, found anywhere within the State except on federal land, and (iii) to provide for adequate skeletal analysis of remains removed or excavated from unmarked human burials if the analysis would result in valuable scientific information. (1981, c. 853, s. 2; 2007-484, s. 11(a).)

§ 70-28. Definitions.

As used in this Article:

(1) "State Archaeologist" means the head of the Office of State Archaeology section of the Office of Archives and History, Department of Cultural Resources.
(2) "Executive Director" means the Executive Director of the North Carolina Commission of Indian Affairs.
(3) "Human skeletal remains" or "remains" means any part of the body of a deceased human being in any stage of decomposition.
(4) "Professional archaeologist" means a person having (i) a postgraduate degree in archaeology, anthropology, history, or another related field with a specialization in archaeology, (ii) a minimum of one year's experience in conducting basic archaeological field research, including the excavation and removal of human skeletal remains, and (iii) designed and executed an archaeological study and presented the written results and interpretations of such study.
(5) "Skeletal analyst" means any person having (i) a postgraduate degree in a field involving the study of the human skeleton such as skeletal biology, forensic osteology or other relevant aspects of physical anthropology or medicine, (ii) a minimum of one year's experience in conducting laboratory reconstruction and analysis of skeletal remains, including the differentiation of the physical characteristics denoting cultural or biological affinity, and (iii) designed and executed a skeletal analysis, and presented the written results and interpretations of such analysis.
(6) "Unmarked human burial" means any interment of human skeletal remains for which there exists no grave marker or any other historical documentation providing information as to the identity of the deceased. (1981, c. 853, s. 2; 2002-159, s. 35(a); 2007-484, s. 10(a).)

§ 70-29. Discovery of remains and notification of authorities.

(a) Any person knowing or having reasonable grounds to believe that unmarked human burials or human skeletal remains are being disturbed, destroyed, defaced, mutilated, removed, or exposed, shall notify immediately the medical examiner of the county in which the remains are encountered.

(b) If the unmarked human burials or human skeletal remains are encountered as a result of construction or agricultural activities, disturbance of the remains shall cease immediately and shall not resume without authorization from either the county medical examiner or the State Archaeologist, under the provisions of G.S. 70-30(c) or 70-30(d).

(c)(1) If the unmarked human burials or human skeletal remains are encountered by a professional archaeologist, as a result of survey or test excavations, the remains may be excavated and other activities may resume after notification, by telephone or registered letter, is provided to the State Archaeologist. The treatment, analysis and disposition of the remains shall come under the provisions of G.S. 70-34 and 70-35.

(2) If a professional archaeologist directing long-term (research designed to continue for one or more field seasons of four or more weeks' duration) systematic archaeological research sponsored by any accredited college or university in North Carolina, as a part of his research, recovers Native American skeletal remains, he may be exempted from the provisions of G.S. 70-30, 70-31, 70-32, 70-33, 70-34 and 70-35(c) of this Article so long as he:

a. Notifies the Executive Director within five working days of the initial discovery of Native American skeletal remains;

b. Reports to the Executive Director, at agreed upon intervals, the status of the project;
c. Curates the skeletal remains prior to ultimate disposition; and
d. Conducts no destructive skeletal analysis without the express permission of the Executive Director.

Upon completion of the project fieldwork, the professional archaeologist, in consultation with the skeletal analyst and the Executive Director, shall determine the schedule for the completion of the skeletal analysis. In the event of a disagreement, the time for completion of the skeletal analysis shall not exceed four years. The Executive Director shall have authority concerning the ultimate disposition of the Native American skeletal remains after analysis is completed in accordance with G.S. 70-35(a) and 70-36(b) and (c).

(d) The State Archaeologist shall notify the Chief, Medical Examiner Section, Division of Health Services, Department of Health and Human Services, of any reported human skeletal remains discovered by a professional archaeologist. (1981, c. 853, s. 2; 1997-443, s. 11A.118(a); 2007-484, s. 10(b).)

§ 70-30. Jurisdiction over remains.

(a) Subsequent to notification of the discovery of an unmarked human burial or human skeletal remains, the medical examiner of the county in which the remains were encountered shall determine as soon as possible whether the remains are subject to the provisions of G.S. 130A-383.

(b) If the county medical examiner determines that the remains are subject to the provisions of G.S. 130A-383, the county medical examiner will immediately proceed with the investigation.

(c) If the county medical examiner determines that the remains are not subject to the provisions of G.S. 130A-383, the county medical examiner shall so notify the Chief Medical Examiner. The Chief Medical Examiner shall notify the State Archaeologist of the discovery of the human skeletal remains and the findings of the county medical examiner. The State Archaeologist shall immediately take charge of the remains.

(d) Subsequent to taking charge of the human skeletal remains, the State Archaeologist shall have 48 hours to make arrangements with the landowner for the protection or removal of the unmarked human burial or human skeletal remains. The State Archaeologist shall have no authority over the remains at the end of the 48-hour period and may not prohibit the resumption of the construction or agricultural activities without the permission of the landowner. (1981, c. 853, s. 2; 2007-484, ss. 10(c), 11(b).)

Editor's Note. — Session Laws 2007-484, s. 10(c) became effective retroactively on and after October 11, 2002, and s. 11(b) became effective August 30, 2007.

§ 70-31. Archaeological investigation of human skeletal remains.

(a) If an agreement is reached with the landowner for the excavation of the human skeletal remains, the State Archaeologist shall either designate a member of his staff or authorize another professional archaeologist to excavate or supervise the excavation.

(b) The professional archaeologist excavating human skeletal remains shall report to the State Archaeologist, either in writing or by telephone, his opinion on the cultural and biological characteristics of the remains. This report shall be transmitted as soon as possible after the commencement of excavation, but no later than two full business days after the removal of a burial.

(c) The State Archaeologist, in consultation with the professional archaeologist excavating the remains, shall determine where the remains shall be held subsequent to excavation, pending other arrangements according to G.S. 70-32 or 70-33.

(d) The Department of Cultural Resources may obtain administrative inspection warrants pursuant to the provisions of Chapter 15, Article 4A of the General Statutes to enforce the provisions of this Article, provided that prior to the requesting of the administrative warrant, the Department shall contact the affected landowners and request their consent for access to their land for the purpose of gathering such information. If consent is not granted, the Department shall give reasonable notice of the time, place and before whom the administrative warrant will be requested so that the owner or owners may have an opportunity to be heard. (1981, c. 853, s. 2; 2007-484, s. 10(d).)

§ 70-32. Consultation with the Native American Community.

(a) If the professional archaeologist determines that the human skeletal remains are Native American, the State Archaeologist shall immediately notify the Executive Director of the North Carolina Commission of Indian Affairs. The Executive Director shall notify and consult with the Eastern Band of Cherokee or other appropriate tribal group or community.

(b) Within four weeks of the notification, the Executive Director shall communicate in writing to the State Archaeologist, the concerns of the Commission of Indian Affairs and an appropriate tribal group or community with regard to the treatment and ultimate disposition of the Native American skeletal remains.

(c) Within 90 days of receipt of the concerns of the Commission of Indian Affairs, the State Archaeologist and the Executive Director, with the approval of the principal tribal official of an appropriate tribe, shall prepare a written agreement concerning the treatment and ultimate disposition of the Native American skeletal remains. The written agreement shall include the following:

(1) Designation of a qualified skeletal analyst to work on the skeletal remains;
(2) The type of analysis and the specific period of time to be provided for analysis of the skeletal remains;
(3) The timetable for written progress reports and the final report concerning the skeletal analysis to be provided to the State Archaeologist and the Executive Director by the skeletal analyst; and
(4) A plan for the ultimate disposition of the Native American remains subsequent to the completion of adequate skeletal analysis.

If no agreement is reached within 90 days, the Archaeological Advisory Committee shall determine the terms of the agreement. (1981, c. 853, s. 2; 2007-484, s. 10(e).)

§ 70-33. Consultation with other individuals.

(a) If the professional archaeologist determines that the human skeletal remains are other than Native American, the State Archaeologist shall publish notice that excavation of the remains has occurred, at least once per week for four successive weeks in a newspaper of general circulation in the county where the burials or skeletal remains were situated, in an effort to determine the identity or next of kin or both of the deceased.

(b) If the next of kin are located, within 90 days the State Archaeologist in consultation with the next of kin shall prepare a written agreement concerning the treatment and ultimate disposition of the skeletal remains. The written agreement shall include:

(1) Designation of a qualified skeletal analyst to work on the skeletal remains;
(2) The type of analysis and the specific period of time to be provided for analysis of the skeletal remains;
(3) The timetable for written progress reports and the final report concerning the skeletal analysis to be provided to the State Archaeologist and the next of kin by the skeletal analyst; and
(4) A plan for the ultimate disposition of the skeletal remains subsequent to the completion of adequate skeletal analysis.

If no agreement is reached, the remains shall be handled according to the wishes of the next of kin. (1981, c. 853, s. 2; 2007-484, s. 10(f).)

§ 70-34. Skeletal analysis.

(a) Skeletal analysis conducted under the provisions of this Article shall only be accomplished by persons having those qualifications expressed in G.S. 70-28(5).

(b) Prior to the execution of the written agreements outlined in G.S. 70-32(c) and 70-33(b), the State Archaeologist shall consult with both the professional archaeologist and the skeletal analyst investigating the remains.

(c) The professional archaeologist and the skeletal analyst shall submit a proposal to the State Archaeologist within the 90-day period set forth in G.S. 70-32(c) and 70-33(b), including:
(1) Methodology and techniques to be utilized;
(2) Research objectives;
(3) Proposed time schedule for completion of the analysis; and
(4) Proposed time intervals for written progress reports and the final report to be submitted.

(d) If the terms of the written agreement are not substantially met, the Executive Director or the next of kin, after consultation with the State Archaeologist, may take possession of the skeletal remains. In such case, the State Archaeologist may ensure that appropriate skeletal analysis is conducted by another qualified skeletal analyst prior to ultimate disposition of the skeletal remains. (1981, c. 853, s. 2; 2007-484, s. 10(g).)

§ 70-35. Disposition of human skeletal remains.

(a) If the skeletal remains are Native American, the Executive Director, after consultation with an appropriate tribal group or community, shall determine the ultimate disposition of the remains after the analysis.

(b) If the skeletal remains are other than Native American and the next of kin have been identified, the next of kin shall have authority concerning the ultimate disposition of the remains after the analysis.

(c) If the State Archaeologist has received no information or communication concerning the identity or next of kin of the deceased, the skeletal remains shall be transferred to the State Archaeologist and permanently curated according to standard museum procedures after adequate skeletal analysis. (1981, c. 853, s. 2; 2007-484, s. 10(h).)

§ 70-36. Financial responsibility.

(a) The provisions of this Article shall not require that the owner of the land on which the unmarked human burials or human skeletal remains are found, bear the cost of excavation, removal, analysis or disposition.

(b) If a determination is made by the Executive Director, in consultation with an appropriate tribal group or community, that Native American skeletal remains shall be reinterred following the completion of skeletal analysis, an appropriate tribal group or community may provide a suitable burial location. If it elects not to do so, it shall be the responsibility of the North Carolina Commission of Indian Affairs to provide a suitable burial location.

(c) The expense of transportation of Native American remains to the reburial location shall be borne by the party conducting the excavation and removal of the skeletal remains. The reburial ceremony may be provided by an appropriate tribal group or community. If it elects not to do so, the reburial ceremony shall be the responsibility of the Commission of Indian Affairs. (1981, c. 853, s. 2.)

§ 70-37. Prohibited acts.

(a) No person, unless acting under the provisions of G.S. 130-198 through G.S. 130-201, shall:

(1) Knowingly acquire any human skeletal remains removed from unmarked burials in North Carolina after October 1, 1981, except in accordance with the provisions of this Article;

(2) Knowingly exhibit or sell any human skeletal remains acquired from unmarked burials in North Carolina; or

(3) Knowingly retain human skeletal remains acquired from unmarked burials in North Carolina after October 1, 1981, for scientific analysis beyond a period of time provided for such analysis pursuant to the provisions of G.S. 70-32, 70-33 and 70-34, with the exception of those skeletal remains curated under the provisions of G.S. 70-35.

(b) Other provisions of criminal law concerning vandalism of unmarked human burials or human skeletal remains may be found in G.S. 14-149. (1981, c. 853, s. 2.)

Editor's Note. — G.S. 130-198 through 130-201, referred to in subsection (a) of this section, have been repealed. For present similar provisions, see G.S. 130A-383, 130A-385, 130A-389, and 130A-393.

§ 70-38. Rule-making authority.

The North Carolina Historical Commission may promulgate rules and regulations to implement the provisions of this Article. (1981, c. 853, s. 2.)

§ 70-39. Exceptions.

(a) Human skeletal remains acquired from commercial biological supply houses or through medical means are not subject to the provisions of G.S. 70-37(a).

(b) Human skeletal remains determined to be within the jurisdiction of the medical examiner according to the provisions of G.S. 130A-383 are not subject to the prohibitions contained in this Article. (1981, c. 853, s. 2; 2007-484, s. 11(c).)

§ 70-40. Penalties.

(a) Violation of the provisions of G.S. 70-29 is a Class 1 misdemeanor.

(b) Violation of the provisions of G.S. 70-37(a) is a Class H felony. (1981, c. 853, s. 2; 1993, c. 539, s. 543; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 70-41 through 70-45: Reserved for future codification purposes.

ARTICLE 4.

North Carolina Archaeological Record Program.

§ 70-46. Short title.

This Article shall be known as "The North Carolina Archaeological Record Program". (1991, c. 461, s. 2.)

§ 70-47. Findings and purpose.

(a) The General Assembly finds that archaeological resources on private lands constitute the majority of the irreplaceable historic and prehistoric resources of the State. These resources are increasingly endangered and existing State laws do not provide private landowners with the means adequately to preserve these resources. There is currently no provision for assisting and giving recognition to a private landowner who wishes to preserve the archaeological resources located on the owner's property.

(b) The purpose of this Article is to preserve and protect for the present and future benefit of the people of North Carolina through a program of voluntary site enrollment the prehistoric and historic archaeological resources that are on private lands. (1991, c. 461, s. 2.)

§ 70-48. Definitions.

As used in this Article, unless the context clearly indicates otherwise:

(1) "Archaeological investigation" means any surface collection, subsurface tests, excavation, or other activity that results in the disturbance or removal of archaeological resources.

(2) "Archaeological resource" means any material remains of past human life or activities which are at least 50 years old and which are of archaeological interest, including pieces of pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, rock paintings, rock carvings, intaglios, graves or human skeletal materials. Paleontological specimens are not to be considered archaeological resources unless found in an archaeological context.

(3) "Program" means the North Carolina Archaeological Record Program established under this Article.

(4) "Record" means the North Carolina Archaeological Record established under this Article.

(5) "State Archaeologist" means the head of the Office of State Archaeology section of the Office of Archives and History, Department of Cultural Resources. (1991, c. 461, s. 2; c. 761, s. 12.1; 2002-159, s. 35(b); 2007-484, s. 10(i).)

§ 70-49. The North Carolina Archaeological Record Program.

(a) The Department of Cultural Resources, Office of Archives and History shall establish the North Carolina Archaeological Record Program. The purpose of the Program shall be to assist private owners of archaeological resources in the preservation and protection of those resources. Participation in the Program shall be voluntary.

(b) As part of the Program, the Department shall establish and maintain the North Carolina Archaeological Record. The North Carolina Archeological Record shall include a list of the archaeological resources owned privately by each person participating in the Program. No archaeological resource shall be enrolled in the Record without the permission of its owner.

(c) An archaeological resource that is enrolled in the North Carolina Archaeological Record shall be removed from the Record at the written request of either the State Archaeologist or the owner of the archaeological resource. The archaeological resource shall be removed from the Record 30 days after the receipt by the Department of Cultural Resources of the written request. (1991, c. 461, s. 2; 2002-159, s. 35(c).)

§ 70-50. Site Steward Program.

The Department of Cultural Resources may create and maintain a volunteer program for purposes of monitoring the condition of archaeological resources listed in the Record. This program shall be known as the Site Steward Program and will be administered through the Department in cooperation with local and statewide archaeological societies and groups. (1991, c. 461, s. 2; c. 761, s. 12.2.)

§ 70-51. Archaeological investigations.

(a) Any person wanting to conduct an archaeological investigation on private land that is the site of an archaeological resource enrolled in the Record shall apply to the Department of Cultural Resources for a permit to conduct such an investigation. The application shall contain information the Department of Cultural Resources deems necessary, including the time, scope, location and specific purpose of the proposed work.

(b) A permit shall be issued pursuant to this section if, after any notifications and consultations required by subsection (d) of this section, the Department of Cultural Resources finds that:

(1) The applicant is qualified to carry out the permitted activity;
(2) The proposed activity is undertaken for the purpose of furthering archaeological knowledge in the public interest;
(3) The currently available technology and the technology the applicant proposes to use are such that the significant information contained in the archaeological resource can be retrieved;
(4) The funds and the time the applicant proposes to commit are such that the significant information contained in the archaeological resources can be retrieved;
(5) The archaeological resources that are enrolled in the Record and that are collected, excavated or removed from the privately owned site and the associated records and data will remain the property of the private owner of the archaeological resource;
(6) Copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution;
(7) The applicant shall bear the financial responsibility for the reinterment of any human burials or human skeletal remains excavated or removed as a result of the permitted activities; and
(8) The applicant has obtained the permission of the owner of the archaeological resource to conduct the archaeological investigation.

(c) A permit may contain any terms, conditions or limitations the Department of Cultural Resources deems necessary to achieve the intent of this Article. A permit shall identify the person responsible for carrying out the archaeological investigation.

(d) If the Department of Cultural Resources determines that a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, the Department of Cultural Resources, before issuing the permit, shall notify and consult with, insofar as possible, a local representative of an appropriate religious or cultural group. If the religious or cultural site pertains to Native Americans, the Department of Cultural Resources shall notify the Executive Director of the North Carolina Commission of Indian Affairs. The Executive Director of the North Carolina Commission of Indian Affairs shall notify and consult with the Eastern Band of Cherokee or other appropriate tribal group or community. Such notification shall include, but not be limited to, the following:

(1) The location and schedule of the forthcoming investigation;
(2) Background data concerning the nature of the study; and
(3) The purpose of the investigation and the expected results.

(e) A permit issued under this section may be suspended by the Department of Cultural Resources upon the determination that the permit holder has violated any condition of the permit. (1991, c. 461, s. 2.)

§ 70-52. Rule-making authority.

The Department of Cultural Resources may adopt rules to implement this Article. (1991, c. 461, s. 2.)

or cultural site, the Department of Cultural Resources, before issuing the permit, shall notify and consult with, insofar as possible, a local representative of an appropriate religious or cultural group. If the religious or cultural site pertains to Native Americans, the Department of Cultural Resources shall notify the Executive Director of the North Carolina Commission of Indian Affairs. The Executive Director of the North Carolina Commission of Indian Affairs shall notify and consult with the Eastern Band of Cherokee or other appropriate tribal group or community. Such notification shall include, but not be limited to, the following:

(1) The location and schedule of the forthcoming investigation;
(2) Background data concerning the nature of the study; and
(3) The purposes of the investigation and the expected results.

(e) A permit issued under this section may be suspended by the Department of Cultural Resources upon the determination that the permit holder has violated any condition of the permit. (1991, c. 481, s. 2.)

§ 70-52. Rule-making authority.

The Department of Cultural Resources may adopt rules to implement this Article. (1991, c. 481, s. 2.)

Chapter 71.

Indians.

§§ 71-1 through 71-20: Repealed by Session Laws 1977, c. 849, s. 1.

Cross References. — For present statute partially covering the subject matter of repealed G.S. 71-1 to 71-12, see G.S. 71A-1 to 71A-6. For present provisions as to the North Carolina State Commission of Indian Affairs, see G.S. 143B-404 to 143B-411.

State Government Reorganization. — The Commission on Indian Affairs was transferred to the Department of Administration by a Type II transfer by Session Laws 1977, c. 849, s. 1, effective July 1, 1977.

Chapter 71A.

Indians.

Sec.
71A-1. Cherokee Indians of Robeson County; rights and privileges.
71A-2. Chapter not applicable to certain bands of Cherokees.
71A-3. Lumbee Tribe of North Carolina; rights, privileges, immunities, obligations and duties.
71A-4. Waccamaw Siouan Tribe of North Carolina; rights, privileges, immunities, obligations and duties.
71A-5. Haliwa-Saponi Indian Tribe of North Carolina; rights, privileges, immunities, obligations and duties.
71A-6. Coharie Tribe of North Carolina; rights, privileges, immunities, obligations and duties.
71A-7. The Sappony; rights, privileges, immunities, obligations, and duties.
71A-7.1. Meherrin Tribe of North Carolina; rights, privileges, immunities, obligations and duties.
71A-7.2. Occaneechi Band of Saponi Nation in North Carolina; rights, privileges, immunities, obligations and duties.
71A-8. Authorization for federally recognized Indian tribes.

§ 71A-1. Cherokee Indians of Robeson County; rights and privileges.

The persons residing in Robeson, Richmond, and Sampson counties, who have heretofore been known as “Croatan Indians” or “Indians of Robeson County,” together with their descendants, shall hereafter be known and designated as “Cherokee Indians of Robeson County,” and by that name shall be entitled to all the rights and privileges heretofore or hereafter conferred, by any law or laws of the State of North Carolina, upon the Indians heretofore known as the “Croatan Indians” or “Indians of Robeson County.” In all laws enacted by the General Assembly of North Carolina relating to said Indians subsequent to the enactment of said Chapter 51 of the Laws of 1885, the words “Croatan Indians” and “Indians of Robeson County” are stricken out and the words “Cherokee Indians of Robeson County” inserted in lieu thereof. (1885, c. 51, s. 2; Rev., s. 4168; 1911, c. 215; P.L. 1911, c. 263; 1913, c. 123; C.S., s. 6257; 1977, 2nd Sess., c. 1193, s. 1.)

Cross References. — As to the North Carolina State Commission of Indian Affairs, see G.S. 143B-404 to 143B-411.

Legal Periodicals. — For article on criminal jurisdiction on the North Carolina Cherokee Indian reservation, see 24 Wake Forest L. Rev. 335 (1989).

§ 71A-2. Chapter not applicable to certain bands of Cherokees.

Neither this Chapter nor any other act relating to said “Cherokee Indians of Robeson County” shall be construed so as to impose on said Indians any powers, privileges, rights, or immunities, or any limitations on their power to contract, heretofore enacted with reference to the Eastern Band of Cherokee Indians residing in Cherokee, Graham, Jackson, Swain and other adjoining counties in North Carolina, or any other band or tribe of Cherokee Indians other than those now residing, or who have since the Revolutionary War resided, in Robeson County, nor shall said “Cherokee Indians of Robeson County,” as herein designated, be subject to the limitations provided in the Chapter Contracts Requiring Writing, G.S. 22-3, entitled Contracts with Cherokee Indians. (1947, c. 978, s. 1; 1977, 2nd Sess., c. 1193, s. 1.)

Editor's Note. — G.S. 22-3, referred to in this section, was repealed by Session Laws, 1995, c. 379, s. 15.

§ 71A-3. Lumbee Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

The Indians now residing in Robeson and adjoining counties of North Carolina, originally found by the first white settlers on the Lumbee River in Robeson County, and claiming joint descent from remnants of early American Colonists and certain tribes of Indians originally inhabiting the coastal regions of North Carolina, who have previously been known as "Croatan Indians," "Indians of Robeson County," and "Cherokee Indians of Robeson County," shall, from and after April 20, 1953, be designated and officially recognized as Lumbee Tribe of North Carolina and shall continue to enjoy all rights, privileges and immunities enjoyed by them as citizens of the State as now provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (1953, c. 874; 1977, 2nd Sess., c. 1193, s. 1; 2003-54, s. 1.)

Legal Periodicals. — For article on criminal jurisdiction on the North Carolina Cherokee Indian reservation, see 24 Wake Forest L. Rev. 335 (1989).

CASE NOTES

Cited in In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

§ 71A-4. Waccamaw Siouan Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

The Indians now living in Bladen and Columbus and adjoining counties of North Carolina, originally found by the first white settlers in the region of the Cape Fear River, Lake Waccamaw, and the Waccamaw Indians, a Siouan Tribe which inhabited the areas surrounding the Waccamaw, Pee Dee, and Lumber Rivers in North and South Carolina, shall, from and after July 20, 1971, be designated and officially recognized as the Waccamaw Siouan Tribe of North Carolina and shall continue to enjoy all their rights, privileges and immunities as citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (1977, 2nd Sess., c. 1193, s. 1.)

§ 71A-5. Haliwa-Saponi Indian Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

The Indians now residing in Halifax, Warren and adjoining counties of North Carolina, originally found by the first permanent white settlers on the Roanoke River in Halifax and Warren Counties, and who descend from the Saponi, Nansemond, and other tribes of Indians originally inhabiting the coastal regions of North Carolina, shall, from and after April 15, 1965, be designated and officially recognized as the Haliwa-Saponi Indian Tribe, and they shall continue to enjoy all their rights, privileges and immunities as an American Indian Tribe with a recognized tribal governing body carrying out and exercising substantial governmental duties and powers similar to the

State, being recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (1965, c. 254; 1977, 2nd Sess., c. 1193, s. 1; 1997-293, s. 1; 2006-111, s. 1.)

§ 71A-6. Coharie Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

The Indians now living in Harnett and Sampson and adjoining counties of North Carolina, originally found by the first white settlers on the Coharie River in Sampson County, and claiming descent from certain tribes of Indians originally inhabiting the coastal regions of North Carolina, shall, from and after July 20, 1971, be designated and officially recognized as the Coharie Tribe of North Carolina and shall continue to enjoy all their rights, privileges and immunities as citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (1977, 2nd Sess., c. 1193, s. 1.)

§ 71A-7. The Sappony; rights, privileges, immunities, obligations, and duties.

The Indian Tribe now residing in Person County, officially recognized as the Indians of Person County by Chapter 22 of the Public-Local Laws of 1913, who are descendants of those Indians living in Person County for whom the High Plains Indian School was established, shall, from and after February 3, 1913, be designated and officially recognized as Sappony, and shall continue to enjoy all their rights, privileges, and immunities as citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (1997-147, s. 1; 2003-87, s. 1.)

§ 71A-7.1. Meherrin Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

The Indians now residing in small communities in Hertford, Bertie, Gates, and Northampton Counties, who in 1726 were granted reservational lands at the mouth of the Meherrin River in the vicinity of present-day Parker's Ferry near Winton in Hertford County, and who are of the same linguistic stock as the Cherokee, Tuscarora, and other tribes of the Iroquois Confederacy of New York and Canada, shall, from and after July 20, 1971, be designated and officially recognized as the Meherrin Tribe of North Carolina, and shall continue to enjoy all their rights, privileges, and immunities as citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (2003-54, s. 2.)

CASE NOTES

Cited in Meherrin Indian Tribe v. Lewis, — N.C. App. —, 677 S.E.2d 203, 2009 N.C. App. LEXIS 661 (2009).

§ 71A-7.2. Occaneechi Band of Saponi Nation in North Carolina; rights, privileges, immunities, obligations and duties.

The Indians now living primarily in the old settlement of Little Texas in Pleasant Grove Township, Alamance County, who are lineal descendants of the

Saponi and related Indians who occupied the Piedmont of North Carolina and Virginia in precontact times, and specifically of those Saponi and related Indians who formally became tributary to Virginia under the Treaties of Middle Plantation in 1677 and 1680, and who under the subsequent treaty of 1713 with the Colony of Virginia agreed to join together as a single community, shall, from and after July 20, 1971, be designated and officially recognized as the Occaneechi Band of the Saponi Nation of North Carolina, and shall continue to enjoy all their rights, privileges, and immunities as citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (2003-54, s. 2.)

§ 71A-8. Authorization for federally recognized Indian tribes.

In recognition of the governmental relationship between the State, federally recognized Indian tribes and the United States, a federally recognized Indian tribe may conduct games consistent with the Indian Gaming Regulatory Act, Public Law 100-497, that are in accordance with a valid Tribal-State compact executed by the Governor pursuant to G.S. 147-12(14) and approved by the U.S. Department of Interior under the Indian Gaming Regulatory Act, and such games shall not be unlawful or against the public policy of the State if the State permits such gaming for any purpose by any person, organization, or entity. (2001-513, s. 29(b).)

Chapter 72.

Inns, Hotels and Restaurants.

Article 1.

Innkeepers.

Sec.
72-1. Must furnish accommodations; contracts for termination valid.
72-2. Liability for loss of baggage.
72-3. Safekeeping of valuables.
72-4. Loss by fire.
72-5. Negligence of guest.
72-6. Copies of this Article to be posted.
72-7. [Repealed.]
72-7.1. Admittance of pets to hotel rooms.

Article 2.

Sanitary Inspection and Conduct.

72-8 through 72-29. [Repealed.]

Article 3.

Immoral Practices of Guests of Hotels and Lodging Houses.

72-30. Registration to be in true name; addresses; peace officers.

Article 4.

Licensing and Regulation of Tourist Camps and Homes, Cabin Camps, Roadhouses and Public Dance Halls.

Sec.
72-31 through 72-45. [Repealed.]

Article 5.

Sanitation of Establishments Providing Food and Lodging.

72-46 through 72-49. [Repealed.]

Article 6.

Advertisements by Motor Courts, Tourist Camps, etc.

72-50. Rate advertisements to contain additional data.
72-51. Violation a misdemeanor.
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Article 1.

Innkeepers.

§ 72-1. Must furnish accommodations; contracts for termination valid.

(a) Every innkeeper shall at all times provide suitable lodging accommodations for persons accepted as guests in his inn or hotel.

(b) A written statement setting forth the time period during which a guest may occupy an assigned room, signed or initialed by the guest, shall be deemed a valid contract, and at the expiration of such time period the lodger may be restrained from entering and any property of the guest may be removed by the innkeeper without liability, except for damages to or loss of such property attributable to its removal. (1903, c. 563; Rev., s. 1909; C.S., s. 2249; 1979, c. 532.)

Cross References. — As to obtaining entertainment at hotels and boardinghouses without paying therefor, see G.S. 14-110. As to possessory liens on personal property, see G.S. 44A-1 to 44A-6.

Legal Periodicals. — For note, "When A Hotel Is Your Home, Is There Protection?," see 15 Campbell L. Rev. 295 (1993).

CASE NOTES

This section does no more than state the common-law duty of an innkeeper. Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966).

This section does no more than state the common-law duty of an innkeeper to provide suitable lodging to guests, and carries with it no warranty of personal safety. Urbano v. Days Inn of Am., Inc., 58 N.C. App. 795, 295 S.E.2d 240 (1982).

Duty to Protect from Unreasonable Risk

of Physical Harm. — The proprietor of an inn or motel, although not an insurer of the safety of his guests, even his infant guests, is under an affirmative duty to protect his guests from an unreasonable risk of physical harm. Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966).

The duty of an innkeeper to a guest who is an infant is a greater duty than that owing to his adult guests and he is bound to consider whether his premises, although safe enough for an adult, present any reasonably avoidable dangers to his infant guest. Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966).

When a child of tender years is accepted as a guest, the inexperience and the natural tendencies of such a child become a part of the situation and must be considered by the innkeeper. This does not mean that the innkeeper becomes the nurse of the child, or assumes its control when accompanied by its parents, but only that he is bound to consider whether his premises, though safe enough for an adult, present any reasonably avoidable dangers to the child guest. Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966).

Duty to Warn Infant Guests of Hidden Perils. — An innkeeper is required to give warning of hidden perils. His duty to give such warning is increased when infant guests are present. Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966).

Innkeeper Not An Insurer of Invitees. — An innkeeper or other occupier of land is not the insurer of the personal safety of business invitees. Urbano v. Days Inn of Am., Inc., 58 N.C. App. 795, 295 S.E.2d 240 (1982).

Negligence with Respect to Glass Panel. — An innkeeper, by failure to warn an infant guest of the hidden danger of a glass panel or to place thereon such markings as would indicate the presence of the glass to infant or failure to construct guards around the panels, was negligent. Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966).

What Constitutes Inn or Hotel. — A public inn or hotel is a public house of entertainment for all who choose to visit it, and where all transient persons who may choose to come will be received as guests, for compensation; and it does not lose its character as such by reason of its being located at a summer resort or a watering place, or by taking some as boarders by a special contract or for a definite time. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Sleeping Car Not An Inn. — Though a "sleeping car" is a place for the reception of travelers, it is not an "inn." Garrett v. Southern Ry., 172 N.C. 737, 90 S.E. 903 (1916).

Boardinghouse. — A boardinghouse is as well known and as distinguishable from every other house in every city, village, and the country as an inn or tavern. It is a house where the business of keeping boarders generally is carried on, and which is held out by the owner or keeper as a place where boarders are kept. State v. McRae, 170 N.C. 712, 86 S.E. 1039 (1915).

Distinction Between Inn and Boardinghouse. — It is the publicly holding a place out as one where all transient persons who may choose to come will be received as guests for compensation that is the principal distinction between a hotel and a boardinghouse. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

What Constitutes Boardinghouse Keeper. — The keeper of a boardinghouse is one who reserves the right to select and choose his patrons and take them in only by special arrangement, and usually for a definite time. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Same — Not An Innkeeper. — One who entertains strangers only occasionally, although he receives compensation for it, is not an innkeeper. State v. Mathews, 19 N.C. 424 (1837).

Boarder and Guest Distinguished. — In 16 A. and E. Enc. (2d Ed.), it is said: "The essential difference between a boarder and a guest at an inn lies in the character in which the party comes — that is, whether he is a transient person or not, and, accordingly, one who stops at an inn as a transient or a guest, with all the rights, privileges, and liberties incident to that station. On the other hand, one who seeks accommodation with a view to permanency, as to make the place his home for the time being, is not a guest, but a boarder. The length of his stay, however, is not of itself ordinarily decisive, for he will continue to be a guest as long as he remains in the transitory condition of that relation." Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

When Guest Can Be Ejected. — Guests of a hotel, and travelers or other persons entering it with the bona fide intent of becoming guests, cannot be lawfully prevented from going in, or be put out, by force, after entrance, provided they are able to pay the charges and tender the money necessary for that purpose, if requested by the landlord, unless they be persons of bad or suspicious character, or of vulgar habits, or so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house, or unless they attempt to take advantage of the freedom of the hotel to injure the landlord's chances of profit derived either from his inn or any other business incidental to or connected with its management and constituting a part of the provision for the wants or pleasure of his patrons. State v. Steele, 106 N.C. 766, 11 S.E. 478 (1890).

Same — Breach of Rules. — A guest's right of occupancy of a hotel is dependent upon proper behavior and decent conduct and obedience to reasonable rules and regulations of the proprietors; for a breach of such implied conditions he may be summarily removed. Hutchins v. Town of Durham, 118 N.C. 457, 24 S.E. 723 (1896).

Remedy of Ejected Guest. — Guests at a hotel cannot maintain ejectment if evicted, but can only sue for damages if wrongfully turned out. Hutchins v. Town of Durham, 118 N.C. 457, 24 S.E. 723 (1896).

One Not a Guest Is a Licensee. — One who is in a hotel for social purposes, at the invitation of one of its guests, is a licensee, at the will of its management, and may be forbidden the premises for improper conduct. Money v. Travelers Hotel Co., 174 N.C. 508, 93 S.E. 964 (1917).

Same — Can Be Expelled. — When persons, unobjectionable on account of character or race, enter a hotel not as guests, but intent on pleasure or profit to be derived from intercourse with its inmates, they are there not of right, but under an implied license that the landlord may revoke at any time, because barring the limitation imposed by holding out inducements to the public to seek accommodation at his inn, the proprietor occupies it as his dwelling house, from which he may expel all who have not acquired rights growing out of the relation of guests, and must drive out all who, by their bad conduct, create a nuisance and prove an annoyance to his patrons. State v. Steele, 106 N.C. 766, 11 S.E. 478 (1890).

Force Allowable in Expelling Licensee. — The board rule laid down by Wharton (1 Cr. L., sec. 625), is that the proprietor of a public house has a right to request a person who visits it, not as a guest or on business with guest to depart, and if he refuse, the innkeeper has a right to lay his hands gently on him and lead him out, and if resistance be made, to employ sufficient force to put him out. For so doing, he can justify his conduct on a prosecution for assault and battery. State v. Steele, 106 N.C. 766, 11 S.E. 478 (1890).

Other Rights of Innkeeper. — An innkeeper has, unquestionably, the right to establish a newsstand or a barbershop in his hotel, and to exclude persons who come for the purpose of vending newspapers or books, or of soliciting employment as barbers, and, in order to render his business more lucrative, he may establish a laundry or a livery stable in connection with his hotel, or an innkeeper may contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a per centum of the proceeds or profits derived by such owner of vehicles and horses from dealing with the patrons of the public house. After concluding such contracts, the innkeeper may make, and, after personal notice to violators, enforce a rule excluding from his hotel the agents and representatives of other livery stables who enter to solicit the patronage of his guests. State v. Steele, 106 N.C. 766, 11 S.E. 478 (1890).

Applied in Connelly v. Family Inns of Am., 141 N.C. App. 583, 540 S.E.2d 38, 2000 N.C. App. LEXIS 1408 (2000).

Cited in Frockt v. Goodloe, 670 F. Supp. 163 (W.D.N.C. 1987).

§ 72-2. Liability for loss of baggage.

Innkeepers shall not be liable for loss, damage or destruction of the baggage or property of their guests except in case such loss, damage, or destruction results from the failure of the innkeeper to exercise ordinary, proper and reasonable care in the custody of such baggage and property; and in case of such loss, damage or destruction resulting from the negligence and want of care of the said innkeeper he shall be liable to the owner of the said baggage and property to an amount not exceeding one hundred dollars. Any guest may, however, at any time before a loss, damage or destruction of his property, notify the innkeeper in writing that his property exceeds in value the said sum of one hundred dollars ($100.00), and shall upon demand of the innkeeper furnish him a list or schedule of the same, with the value thereof, in which case the innkeeper shall be liable for the loss, damage or destruction of said property because of any negligence on his part for the full value of the same. Proof of the loss of any such baggage, except in case of damage or destruction by fire, shall be prima facie evidence of the negligence of said hotel or innkeeper. (1903, c. 563, s. 2; Rev., s. 1910; C.S., s. 2250.)

CASE NOTES

Boarder and Guest Distinguished. — In 16 A. and E. Enc. (2d Ed.), it is said: "The essential difference between a boarder and a guest at an inn lies in the character in which the party comes — that is, whether he is a transient person or not, and, accordingly, one who stops at an inn as a transient or a guest, with all the rights, privileges, and liberties incident to that station. On the other hand, one who seeks accommodation with a view to permanency, as to make the place his home for the time being, is not a guest, but a boarder. The length of his stay, however, is not of itself ordinarily decisive, for he will continue to be a guest as long as he remains in the transitory condition of that relation." Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Liability Extends to Guest. — When one is received at a public inn or hotel and entertained as a guest, without any prearrangement as to terms or time, but on the implied invitation held out to the public generally, he is a transient only — a guest and not a boarder — and entitled to recover of the defendant innkeeper as such. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Same — Common-Law Liability. — The decisions of this State are to the effect that, in the absence of statutory regulation, the keeper of a public inn, or hotel, which is the modern and more frequently used term, is responsible to his guest for the safety of the latter's goods, chattels, and money, when placed infra hospitum and which he has with him for the purposes of his journey. The proprietor is held to be an insurer to the extent that he must make good to the guest all loss or damage arising from any cause except the act of God or the public enemy, or the fault of the guest himself or his agents or servants. Quinton v. Courtney, 2 N.C. 40 (1794); Neal v. Wilcox, 49 N.C. 146 (1856); Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Ordinary Care Now Required. — Even at a public inn or hotel, one who holds the position of a regular boarder or lodger can only hold the proprietor to the exercise of ordinary care on the part of himself and his employees. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Failure to comply with G.S. 72-6 renders innkeeper liable as at common law. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Liability for Personal Injuries. — The innkeeper is not insurer of his guest's personal safety, but his liability does extend to injuries received by the guest from being placed in an unsafe room. This is a matter peculiarly within the innkeeper's knowledge and entirely beyond the control of the guest. In that particular he is peculiarly within the innkeeper's power and protection. Patrick v. Springs, 154 N.C. 270, 70 S.E. 395 (1911).

Same — Negligence of Guest. — The guest must use reasonable care on his part to protect himself, and if he is himself negligent and could have avoided the injury by due care, he cannot recover. Patrick v. Springs, 154 N.C. 270, 70 S.E. 395 (1911).

§ 72-3. Safekeeping of valuables.

It is the duty of innkeepers, upon the request of any guest, to receive from said guest and safely keep money, jewelry and valuables to an amount not exceeding five hundred dollars ($500.00); and no innkeeper shall be required to receive and take care of any money, jewelry or other valuables to a greater amount than five hundred dollars ($500.00): Provided, the receipt given by said innkeeper to said guest shall have plainly printed upon it a copy of this section. No innkeeper shall be liable for the loss, damage or destruction of any money or jewels not so deposited. (1903, c. 563, s. 3; Rev., s. 1911; C.S., s. 2251.)

CASE NOTES

Cited in Frockt v. Goodloe, 670 F. Supp. 163 (W.D.N.C. 1987).

§ 72-4. Loss by fire.

No innkeeper shall be liable for loss, damage or destruction of any baggage or property caused by fire not resulting from the negligence of the innkeeper or by any other force over which the innkeeper had no control. Nothing herein contained shall enlarge the limit of the amount to which the innkeeper shall be liable as provided in preceding sections. (1903, c. 563, s. 4; Rev., s. 1912; C.S., s. 2252.)

§ 72-5. Negligence of guest.

Any innkeeper against whom claim is made for loss sustained by a guest may show that such loss resulted from the negligence of such guest or of his failure to comply with the reasonable and proper regulations of the inn. (1903, c. 563, s. 7; Rev., s. 1914; C.S., s. 2253.)

Cross References. — As to possessory lien on personal property, see G.S. 44A-1 to 44A-6. As to liability for personal injuries and effect of negligence of guest, see note to G.S. 72-2.

§ 72-6. Copies of this Article to be posted.

Every innkeeper shall keep posted in every room of his house occupied by guests, and in the office, a printed copy of this Article and of all regulations relating to the conduct of guests. This Chapter shall not apply to innkeepers, or their guests, where the innkeeper fails to keep such notices posted. (1903, c. 563, ss. 5, 6; Rev., s. 1913; C.S., s. 2254.)

CASE NOTES

Effect of Noncompliance with Section. — Where the provision of this section is not complied with the principle of the common law obtains and the keeper is liable as at common law. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Consequences of failing to post notice as required by this section are clear: rather than benefiting from the protection afforded by the statute, the innkeeper must look to the common law to define its duties and liabilities, and the common-law rule in North Carolina is that the innkeeper is strictly liable for the loss of a guest's property, except in a few rare instances, such as where such loss is occasioned by the guest's own negligence. Frockt v. Goodloe, 670 F. Supp. 163 (W.D.N.C. 1987).

§ 72-7: Repealed by Session Laws 1991, c. 663, s. 1.

§ 72-7.1. Admittance of pets to hotel rooms.

(a) Innkeepers may permit pets in rooms used for sleeping purposes and in adjoining rooms. Persons bringing pets into a room in which they are not permitted are in violation of this section and punishable according to subsection (d) of this section.

(b) Innkeepers allowing pets must post a sign measuring not less than five inches by seven inches at the place where guests register informing them pets are permitted in sleeping rooms and in adjoining rooms. If certain pets are permitted or prohibited, the sign must so state. If any pets are permitted, the innkeeper must maintain a minimum of ten percent (10%) of the sleeping rooms in the inn or hotel as rooms where pets are not permitted and the sign required by this subsection must also state that such rooms are available.

(c) All sleeping rooms in which the innkeeper permits pets must contain a sign measuring not less than five inches by seven inches, posted in a prominent place in the room, which shall be separate from the sign required by G.S. 72-6, stating that pets are permitted in the room, or whether certain pets are prohibited or permitted in the room, and stating that bringing pets into a room in which they are not permitted is a Class 3 misdemeanor.

(d) Any person violating the provisions of this section shall be guilty of a Class 3 misdemeanor.

(e) The provisions of this section are not applicable to assistance dogs admitted to sleeping rooms and adjoining rooms under the provisions of Chapter 168 of the General Statutes. (1991, c. 663, s. 2; 1993, c. 539, ss. 544, 545; 1994, Ex. Sess., c. 14, ss. 41, 42; c. 24, s. 14(c).)

Cross References. — As to assistance dogs for handicapped persons, see G.S. 168-4.2 et seq.

Editor's Note. — The section above has been designated as G.S. 72-7.1 at the direction of the Revisor of Statutes, the number in the enacting act having been G.S. 72-8.

ARTICLE 2.

Sanitary Inspection and Conduct.

§§ 72-8 through 72-29: Repealed by Session Laws 1945, c. 829, s. 4.

Cross References. — As to regulation of food and lodging facilities, see G.S. 130A-247 et seq.

ARTICLE 3.

Immoral Practices of Guests of Hotels and Lodging Houses.

§ 72-30. Registration to be in true name; addresses; peace officers.

No person shall write, or cause to be written, or if in charge of a register knowingly permit to be written, in any register in any lodging house or hotel any other or different name or designation than the true name or names in ordinary use of the person registering or causing himself to be registered therein. Any person occupying any room or rooms in any lodging house or hotel shall register or cause himself to be registered where registration is required by such lodging house or hotel. Any person registering or causing himself to be registered at any lodging house or hotel, shall write, or cause to be written, in the register of such lodging house or hotel the correct address of the person registering, or causing himself to be registered. Any person violating any provision of this section shall be guilty of a Class 3 misdemeanor, and upon conviction shall only be punished by a fine not exceeding two hundred dollars ($200.00). This section shall not apply to any peace officer of this State who shall privately give his true name to the clerk or proprietor of such hotel or lodging house. (1921, c. 111; C.S., s. 2283(v); 1993, c. 539, s. 546; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 4.

Licensing and Regulation of Tourist Camps and Homes, Cabin Camps, Roadhouses and Public Dance Halls.

§§ 72-31 through 72-38: Repealed by Session Laws 2004-203, s. 38, effective August 17, 2004.

§ 72-39: Repealed by Session Laws 1975, c. 402.

§§ 72-40 through 72-45: Repealed by Session Laws 2004-203, s. 38, effective August 17, 2004.

Cross References. — As to regulation of food and lodging facilities, see G.S. 130A-247 et seq.

ARTICLE 5.

Sanitation of Establishments Providing Food and Lodging.

§§ 72-46 through 72-49: Repealed by Session Laws 1983, c. 891, s. 7.

Cross References. — As to regulation of food and lodging facilities, see now G.S. 130A-247 et seq.

Editor's Note. — Repealed G.S. 72-49 was amended by Session Laws 1983, c. 884, s. 1. Pursuant to s. 2 of c. 884, that amendment has been codified as part of G.S. 130A-250.

ARTICLE 6.

Advertisements by Motor Courts, Tourist Camps, etc.

§ 72-50. Rate advertisements to contain additional data.

It shall be unlawful for any person, firm, or corporation, who owns, operates or who has control of the operation of any motor court, tourist court, tourist camp, or guest house to publish or cause to be displayed in writing, or by any other means, any advertisement which includes a statement relating to the rates or charges obtaining at such motor court, tourist court, tourist camp, or guest house, unless such advertisement shall, with equal prominence, contain additional data relating to such room rates, in the following particulars:

(1) Whether the rate advertised is for a single or multiple occupancy of the room;

(2) The number of rooms or units in each price level where such advertisement indicates varying rates; and

(3) The dates or period of time during which such advertised rates are available. (1955, c. 1200, s. 1.)

§ 72-51. Violation a misdemeanor.

Any person, firm, or corporation, violating the provisions of this Article shall be guilty of a Class 1 misdemeanor. (1955, c. 1200, s. 2; 1993, c. 539, s. 551; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 72-52. Article declared supplemental.

This Article is declared to be supplemental in nature and shall not be construed to repeal any existing law relating to the operation of any motor court, tourist court, tourist camp, or guest house. (1955, c. 1200, s. 3.)

Cross References. — As to [illegible] for handicapped persons, see G.S. [illegible] et seq.

Editor's Note. — The sections [illegible]

[illegible] having been G.S. [illegible]

Article 2.

Sanitary Inspection and Conduct.

§§ 72-8 through 72-33: Repealed by Session Laws 1985, c. [illegible]

[illegible]

[illegible] such lodging house or hotel. Any person registering or causing himself to be registered [illegible] the register of such lodging [illegible] person [illegible] guilty of a misdemeanor [illegible] be punished by a fine not exceeding two hundred dollars [illegible] give his true name to the clerk or proprietor of such hotel or [illegible]

§§ 72-37 through 72-38: Repealed by Session Laws 2004-203, s. 78, effective August 17, 2004.

§ 72-39: Repealed by Session Laws 1973, c. 402.

§§ 72-40 through 72-45: Repealed by Session Laws 2004-203, s. 78, effective August 17, 2004.

Chapter 73.

Mills.

Article 1.

Public Mills.

Sec.
73-1. Public mills defined.
73-2. Miller to grind according to turn; tolls regulated.
73-3. Measures to be kept; tolls by weight or measure.
73-4. Keeping false toll dishes misdemeanor.

Article 2.

Condemnation for Mill by Owner of One Bank of Stream.

73-5 through 73-13. [Repealed.]

Article 3.

Condemnation for Races, Waterways, etc., by Owner of Mill or Millsite.

Sec.
73-14 through 73-24. [Repealed.]

Article 4.

Recovery of Damages for Erection of Mill.

73-25. Action in superior court; procedure.
73-26. When dams, etc., abated as nuisances.
73-27. Judgment for annual sum as damages.
73-28. Final judgment; costs and execution.

ARTICLE 1.

Public Mills.

§ 73-1. Public mills defined.

Every grist or grain mill, however powered or operated, which grinds for toll is a public mill. (1777, c. 122, s. 1; R.C., c. 71, s. 1; Code, s. 1846; Rev., s. 2119; C.S., s. 2531; 1947, c. 781.)

CASE NOTES

Cited in Hyatt v. Myers, 73 N.C. 232 (1875); Branch v. Wilmington & W.R.R., 77 N.C. 347 (1877).

§ 73-2. Miller to grind according to turn; tolls regulated.

All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one-eighth part of the Indian corn and wheat, and one-fourteenth part for chopping grain of any kind; and every miller and keeper of a mill making default therein shall, for each offense, forfeit and pay five dollars ($5.00) to the party injured: Provided, that the owner may grind his own grain at any time. (1777, c. 122, s. 10; 1793, c. 402; R.C., c. 71, s. 6; Code, s. 1847; 1905, c. 694; Rev., s. 2120; 1907, c. 367; C.S., s. 2532.)

Local Modification. — Bertie: 1933, c. 150; Chowan: 1937, c. 4; Cleveland: 1933, c. 158; Franklin: 1929, c. 129; Hertford: 1933, c. 150; Hyde: 1933, c. 150; Lenoir: 1929, c. 139; Northampton: 1929, c. 129; Pamlico: 1929, c. 311; Pender: 1933, c. 298; Robeson: 1929, c. 311; Sampson: 1937, c. 164.

§ 73-3. Measures to be kept; tolls by weight or measure.

All millers shall keep in their mills the following measures, namely, a half bushel and peck of full measure, and also proper toll dishes for each measure; but the toll allowed by law may be taken by weight or measure at the option of the miller and customer. (1777, c. 122, s. 11; R.C., c. 71, s. 7; Code, s. 1848; 1885, c. 202; Rev., s. 2121; C.S., s. 2533.)

§ 73-4. Keeping false toll dishes misdemeanor.

If any owner, by himself or servant, keeping any mill, shall keep any false toll dishes, he shall be guilty of a Class 1 misdemeanor. (1777, c. 122, s. 11; R.C., c. 71, s. 7; Code, s. 1848; Rev., s. 3679; C.S., s. 2534; 1993, c. 539, s. 552; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Words "False Toll Dishes" Defined. — The words "false toll dishes," as used in the statute, mean a toll dish measuring more than one-eighth of a half bushel. State v. Perry, 50 N.C. 252 (1858).

The measure kept need not be averred in the indictment. State v. Perry, 50 N.C. 252 (1858).

Sufficiency of Evidence. — An indictment for keeping false toll dishes was sufficiently supported by proving that measures of one seventh and one sixth of a half bushel were kept. State v. Perry, 50 N.C. 252 (1858).

But an indictment for keeping a false toll dish is not sustained by proof that the mill owner took one-sixth part of each half bushel with a half gallon toll dish. State v. Nixon, 50 N.C. 257 (1858).

ARTICLE 2.

Condemnation for Mill by Owner of One Bank of Stream.

§§ 73-5 through 73-13: Repealed by Session Laws 1981, c. 919, s. 9.

Cross References. — For present provisions as to eminent domain, see Chapter 40A.

ARTICLE 3.

Condemnation for Races, Waterways, etc., by Owner of Mill or Millsite.

§§ 73-14 through 73-22: Repealed by Session Laws 1981, c. 919, s. 9.

Cross References. — For present provisions as to eminent domain, see Chapter 40A.

§ 73-23: Repealed by Session Laws 1973, c. 108, s. 25.

§ 73-24: Repealed by Session Laws 1981, c. 919, s. 9.

ARTICLE 4.

Recovery of Damages for Erection of Mill.

§ 73-25. Action in superior court; procedure.

Any person conceiving himself injured by the erection of any gristmill, or mill for other useful purposes, may issue his summons returnable before the judge of the superior court of the county where the damaged land or any part thereof lies, against the persons authorized to be made parties defendant. In his complaint he shall set forth in what respect and to what extent he is injured, together with such other matters as may be necessary to entitle him to the relief demanded. The court shall then proceed to hear and determine all the questions of law and issues of fact arising on the pleadings as in other civil actions. (1876-7, c. 197, s. 1; Code, s. 1858; Rev., s. 2141; C.S., s. 2555.)

Cross References. — As to damages, see G.S. 73-27.

CASE NOTES

Exclusiveness of Remedy. — Ordinarily, in cases to which this section applies, the remedy given must be pursued. Kinsland v. Kinsland, 186 N.C. 760, 120 S.E. 358 (1923).

Section Does Not Apply to Trespass. — The remedy under this section does not apply to an action for damages for a trespass committed on the plaintiff's land. Henley v. Wilson, 77 N.C. 216 (1877).

Sufficiency of Description in Petition. — A petition for damages, caused by the erection of a mill upon the stream below, which described it as a "gristmill" without calling it a public mill, or a gristmill grinding for toll, was sufficient. Little v. Stanback, 63 N.C. 285 (1869).

Procedure to Assess Damages. — Under an early statute, it was held that, in a petition for damages for ponding water back, where in the county court the plaintiff's right to relief was denied, the proper course was to impanel a jury to try the allegations made in bar of such right, and if such allegations were found for the plaintiff, the proper course was then to order a jury on the premises to assess the damages, but in all cases where there was an appeal to the superior court, the facts were to be ascertained by a jury at bar, but in that court, those issues pertaining to the question of relief, and those issues as to that of damages, were to be separately submitted. Jones v. Clarke, 52 N.C. 418 (1860).

Proper Issue. — In an action for damages resulting from ponding water upon plaintiff's land, caused by the erection of defendant's milldam, an issue involving the amount of annual damage done thereby is the proper one to be submitted to the jury. Hester v. Broach, 84 N.C. 251 (1881).

Easement Limited to Mill Purposes. — Where the lower proprietor has acquired an easement in the lands of the upper proprietor to pond water back thereon from a dam erected on his own land to operate a public mill, the exercise of this right under the easement does not affect the title to the submerged land of the upper proprietor or subject the lower proprietor to an action for damages so as to start the running of the statute of limitations, nor will this use of the water ponded on the land of the upper proprietor by the lower proprietor for fishing with hook and seine ripen into his exclusive use for these purposes. Thomas v. Morris, 190 N.C. 244, 129 S.E. 623 (1925).

Liability for Defect in Bridge. — Where water was thrown, by the erection of a milldam, upon the highway, and the former proprietor of the mill had built bridges over the water, which, during his ownership, he repaired, and which were also repaired by the present proprietor, who did no other work on the roads, it was held that the present proprietor was answerable in damages to an individual who sustained an injury by reason of a defect in one of the bridges. Mulholland v. Brownrigg, 9 N.C. 349 (1823).

Proof of Ownership. — In an action for overflowing the plaintiff's land, he need not prove his title, though it be set forth in the declaration, for possession alone is sufficient to support this action against a wrongdoer. Yeargain v. Johnston, 1 N.C. 56 (1800).

Plaintiff Entitled to Nominal Damage. — Instructions to a jury, that if a plaintiff sustains no injury from the ponding of water upon his mill wheel, still he is entitled to nominal damages, are correct. Little v. Stanback, 63 N.C. 285 (1869).

A motion for a new trial for failure of the court to instruct the jury to return at least nominal damages, because some overflow was admitted, it appearing that no such instruction was asked, that the admission was qualified and the testimony conflicting, and that there was evidence to show that no damage was actually done, was properly refused in the discretion of the court. McGee v. Fox, 107 N.C. 766, 12 S.E. 369 (1890).

Same — Injury Unnecessary. — In an action for damages for the maintenance of a dam across a stream, the plaintiff is entitled to recover nominal damages, without showing an injury capable of being estimated, or one that is perceptible in the sense that it is attended with some actual damage; for the mere fact of ponding back the water on plaintiff's premises is sufficient to entitle him to nominal damages. Chaffin v. Fries Mfg. & Power Co., 135 N.C. 95, 47 S.E. 226 (1904), rehearing denied, 136 N.C. 364, 48 S.E. 770 (1904).

If the water be ponded back on the land of another by the erection of a milldam, he is entitled, in the remedy by petition, to nominal damages, whether there be actual damage or not. Wright v. Stowe, 49 N.C. 516 (1857).

Measure of Damages. — The measure of damages for backing water on land by means of a dam is the difference in the value of the land before and after the injury complained of. Borden v. Carolina Power & Light Co., 174 N.C. 72, 93 S.E. 442 (1917).

Permanent Damages. — In an action for backing water on plaintiff's land by means of a dam, the plaintiff is entitled to permanent damages, past, present, and prospective. Borden v. Carolina Power & Light Co., 174 N.C. 72, 93 S.E. 442 (1917). See § 73-27.

Damages to Health. — Damages may be given for injury to health as well as to land by overflowing. Gillet v. Jones, 18 N.C. 339 (1835). See also, Waddy v. Johnson, 27 N.C. 333 (1844).

Exemplary Damages. — In an action for overflowing plaintiff's land by the erection of a milldam, where a recovery has been had before, and the nuisance was not abated, plaintiff can recover sufficient exemplary damages to compel an abatement of the nuisance. Carruthers v. Tillman, 2 N.C. 501 (1797).

Where Damage Suffered Only When Stream Is Swollen. — Where the erection of a mill on a stream causes the water to overflow the land of a proprietor above only when the stream is swollen, that circumstance will not excuse such party from damages altogether, but will only diminish the quantum of such damages. Pugh v. Wheeler, 19 N.C. 50 (1836).

Decrease of Custom. — Where, in suit for damages for ponding water, it appeared that plaintiff sustained injury to his mill by reason of defendant's erecting another mill and dam lower down on the same stream, the measure of damages was the amount of the damages actually sustained by plaintiff up to the time of trial; and, in estimating the same, the decrease of custom (in the matter of toll) could not be considered. Burnett v. Nicholson, 86 N.C. 99 (1882).

Counterclaim Inadmissible. — In an action for damages for ponding water back on plaintiffs' land, it was no error for the judge to charge that defendants could not set up as offset and counterclaim any benefit which plaintiff had received thereby, and add that the jury should, upon all the evidence, ascertain if plaintiff had sustained any damage. McGee v. Fox, 107 N.C. 766, 12 S.E. 369 (1890).

Action May Be Brought at Any Time. — Ponding a stream so as to throw the water over the land of a proprietor above, which the water did not before cover, gives him a good cause of action at any time when he may wish to use his land, unless he has granted the easement, either actually, or by presumption of law from the length of time he has permitted the easement to be enjoyed. Pugh v. Wheeler, 19 N.C. 50 (1836).

Easement Not Purchased by Payment of Judgment. — The payment of a judgment for ponding water by a milldam does not amount to the purchase by defendant of an easement to pond back water on plaintiff's land. Candler v. Asheville Electric Co., 135 N.C. 12, 47 S.E. 114 (1904).

§ 73-26. When dams, etc., abated as nuisances.

When damages are recovered in final judgment in such civil actions, and execution issues and is returned unsatisfied, and the plaintiff is not able to collect the same either because of the insolvency of the defendant or by reason of the exemptions allowed to defendant, the judge shall, on the facts being made to appear before him by affidavit or other evidence, order that the dam, or portion of the dam, or other cause creating the injury, shall be abated as a nuisance, and he shall have power to make all necessary orders to effect this purpose. (1876-7, c. 197, s. 3; Code, s. 1859; Rev., s. 2142; C.S., s. 2556.)

CASE NOTES

When Section Applicable. — This section applies where water is ponded upon the plaintiff's land by a dam constructed on the property of another or where a trespass of like character is committed, because at common law an action could be brought each day so long as the trespass continued. But the statute does not apply and was never intended to apply to an actual entry upon the complainant's premises and the construction thereon of a dam for the purpose of ponding water and retaining possession. Kinsland v. Kinsland, 188 N.C. 810, 125 S.E. 625 (1924).

Denial of Injunction. — An injunction will not be granted to restrain the erection of a dam whereby the mill wheel of the plaintiff is flooded so as to become useless. Burnett v. Nicholson, 72 N.C. 334 (1875).

For such an injury damages will adequately compensate, and should the annual damage exceed $20.00 the plaintiff is remitted to his common-law action, and can compel an abatement of the nuisance. Burnett v. Nicholson, 72 N.C. 334 (1875).

Where the owner of land adjoining an old millsite sought to enjoin the erection of a new mill, and it was ascertained by a verdict that the mill, though injurious to the health of the plaintiff's family, was advantageous to the public, relief was refused; especially as the old mill was erected before the plaintiff purchased. Attorney Gen. ex rel. Eason v. Perkins, 17 N.C. 38 (1831).

When Injunction Granted. — In the case of the erection of a milldam, a court of equity will not interfere by injunction, unless it be shown that it will be a public nuisance, or, if it will be a private nuisance only to an individual, unless it manifestly appears, that so great a difference will exist between the injury to the individual and the public convenience as will bear no comparison or that the erection of the dam will be followed by irreparable mischief. Attorney Gen. ex rel. Bradsher v. Lea's Heirs, 38 N.C. 301 (1844).

Existence of Another Remedy. — On application for an injunction to restrain the defendant from building a new mill, on the ground that the construction of the dam would injure the land of the plaintiff and the health of his family, testimony being heard, the court held that it is not every slight or doubtful injury that will justify the use of the extraordinary power of injunction to restrain a man from using his property as his interests may demand, especially as, if the injury apprehended should result, the complainant could resort to law for damages. Wilder v. Strickland, 55 N.C. 386 (1856).

When Demand and Allegation of Insolvency Unnecessary. — The demand for damages in the complaint for ponding water upon and injuring the lands of the upper proprietor, required by this section, is not necessary when the relief sought is to enjoin the maintenance of a dam on the plaintiff's own land by the defendant's trespass thereon, and the abatement of the nuisance thus caused, and the trespass being continuing, the allegation of defendant's insolvency is not necessary. Kinsland v. Kinsland, 188 N.C. 810, 125 S.E. 625 (1924).

Cited in Hester v. Broach, 84 N.C. 251 (1881).

§ 73-27. Judgment for annual sum as damages.

A judgment giving to the plaintiff an annual sum by way of damages shall be binding between the parties for five years from the issuing of the summons, if the mill is kept up during that time, unless the damages are increased by raising the water or otherwise.

In all cases where the final judgment of the court assesses the yearly damage of the plaintiff as high as twenty dollars ($20.00), nothing contained in this Chapter shall be construed to prevent the plaintiff, his heirs or assigns, from suing as heretofore, and in such case the final judgment aforesaid shall be binding only for the year's damage preceding the issuing of the summons. (1868-9, c. 158, ss. 12, 14; Code, ss. 1860, 1861; Rev., ss. 2143, 2144; C.S., s. 2557.)

CASE NOTES

Assessment Cannot Go Back Further Than Preceding Year. — In proceedings under the statute for ponding water on plaintiff's land, the jury have no right to go back further than one year in assessing damages, but if they do, the error may be corrected by the court only giving judgment for one year preceding the issuing of the summons. Goodson v. Mullen, 92 N.C. 207 (1885). See § 73-28.

Judgment May Be for Sum in Gross. — Where, in an action for damages to land by ponding water on it, the jury found that the land was damaged $80.00 per year, it was not erroneous for the court to give judgment for a sum in gross, and not for each year's damages. Goodson v. Mullen, 92 N.C. 207 (1885).

Recurring Causes of Action. — Case for nuisance in erecting a mill will lie for every fresh continuance after action brought; heavy damages are not usual in the first verdict, but in a second action the damages should be high to compel an abatement of the nuisance. ______ v. Deberry, 2 N.C. 248 (1795).

Conclusiveness of Verdict and Judgment. — In a proceeding to recover damages for ponding water by a milldam, the verdict of the jury and the judgment of the court thereon are conclusive as to the assessment of damages, up to the time when such judgment was rendered. An application for relief from damages, assessed for a period subsequent to the time of the judgment, can only be heard if the dam is taken away or lowered. Beatty v. Conner, 34 N.C. 341 (1851).

Judgment Not Res Judicata. — An action to abate a dam and for damages to land caused by the ponding back of water was submitted to arbitrators to find whether plaintiffs were entitled to damages, and, if so, to distinguish in finding the same between damages from permanent injuries and annual damages for five years from a certain date. The arbitrators assessed "the permanent damage of the plaintiffs to this date to their lands" at a certain sum, and also awarded a certain annual damage for each of the five years. Judgment was entered on the award, the judgment providing that the execution should be subject to the provisions of G.S. 73-26. The judgment was not res judicata of plaintiff's right to recover damages after the termination of the five-year period for all except a fresh injury, since the judgment contemplated the removal of the dam at the end of the five years. Candler v. Asheville Electric Co., 135 N.C. 12, 47 S.E. 114 (1904).

§ 73-28. Final judgment; costs and execution.

If the final judgment of the court is that the plaintiff has sustained no damage, he shall pay the costs of his proceeding; but if the final judgment is in favor of the plaintiff, he shall have execution against the defendant for one year's damage, preceding the issuing of the summons, and for all costs: Provided, that if the damage adjudged does not amount to five dollars ($5.00), the plaintiff shall recover no more costs than damages. And if the defendant does not annually pay the plaintiff, his heirs or assigns, before it falls due, the sum adjudged as the damages for that year, the plaintiff may sue out execution for the amount of the last year's damage, or any part thereof which may remain unpaid. (1868-9, c. 158, s. 15; Code, s. 1862; Rev., s. 2145; C.S., s. 2558.)

Legal Periodicals. — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

Chapter 74.

Mines and Quarries.

Article 1.

Operation of Mines and Quarries.

Sec.
74-1 through 74-14. [Repealed.]

Article 2.

Inspection of Mines and Quarries.

74-15 through 74-24. [Repealed.]

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ARTICLE 1.

Operation of Mines and Quarries.

§§ 74-1 through 74-14: Repealed by Session Laws 1975, c. 206, s. 21.

ARTICLE 2.

Inspection of Mines and Quarries.

§§ 74-15 through 74-24: Repealed by Session Laws 1975, c. 206, s. 21.

ARTICLE 2A.

Mine Safety and Health Act.

§ 74-24.1. Short title and legislative purpose.

(a) This Article shall be known as the Mine Safety and Health Act of North Carolina.

(b) Legislative findings and purpose:

(1) The General Assembly finds that the burden of operators and miners of this State's mines resulting from personal injuries and illnesses arising out of work situations is substantial; that the prevention of these injuries and illnesses is an important objective of the government of this State; that the greatest hope in attaining this objective lies in programs of research, engineering, education, and enforcement, and in earnest cooperation of the federal and state governments, operators, and miners.

(2) The General Assembly of North Carolina declares it to be its purpose and policy through the exercise of its powers to assure so far as possible every worker in North Carolina's mines safe and healthful working conditions and to preserve our human resources:

a. By encouraging operators and miners in their effort to reduce the number of occupational safety and health hazards in mines and to stimulate and assist operators and miners to institute new programs and to perfect existing programs for providing safe and healthful working conditions through technical assistance and consultation;

b. By recognizing that operators and miners have separate but interdependent responsibilities and rights with respect to achieving safe and healthful working conditions;

c. By authorizing the Commissioner to develop occupational safety and health standards applicable to mines giving consideration to the needs of operators and miners and to adopt standards promulgated from time to time by the federal government;

d. By providing occupational health criteria which will assure insofar as practicable that no miner will suffer diminished health, functional capacity, or life expectancy as a result of his work experience in a mine;

e. By providing education and training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

f. By providing an effective enforcement program which shall include a prohibition against giving advance notice of a mine inspection;

g. By providing for appropriate reporting procedures with respect to occupational safety and health which will help achieve the objectives of this Article and accurately describe the nature of the occupational safety and health problems in mines;

h. By providing for research and technical assistance in the field of occupational safety and health in mines and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems in mines; and

i. By authorizing the Commissioner to enter into agreements and contracts with public and private agencies, including agencies of the United States government, organizations, and individuals in order to carry out the ends and purposes of this Article.

(c) The General Assembly of North Carolina appoints the North Carolina Department of Labor as the designated agency to administer the Mine Safety and Health Act of North Carolina. (1975, c. 206, s. 1.)

Legal Periodicals. — For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

§ 74-24.2. Definitions.

In this Article, unless the context otherwise requires:

(1) The term "accident" means an unexpected event resulting in injury to, illness of, or death of a person or persons as a result of mining operations and any mine explosion, mine ignition, mine fire, mine inundation, mine cave-in, or other event which could have readily resulted in serious physical harm.

(2) The term "Advisory Council" shall mean the Advisory Council or body authorized to be established under this Article.

(3) The term "agent" means any person charged by the operator with responsibility for the operation of all or part of a mine or supervision of the miners in a mine, and for the purposes of this Article includes contractors, subcontractors, or independent contractors employed by the operator to perform any work or services at, in, or on the mine.

(4) The term "Commissioner" means the Commissioner of Labor of North Carolina.

(5) The term "Director" means the person authorized under G.S. 74-24.19 and appointed by the Commissioner for the purpose of assisting in the administration of this Article.

(6) The term "imminent danger" means the existence of any condition or practice in a mine which could reasonably be expected to cause death or serious physical harm immediately to any miner if such condition or practice is not abated at once.

(7) The term "mine" means an area of land and all private ways and roads appurtenant thereto, structures, facilities, machinery, tools, equip-

ment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed or constructed on, under, or above the surface of such land by any person, used in, or to be used in, or resulting from (including the reclamation of mined areas or the storage of materials in mined areas), or to facilitate the work of exploring for, developing of, or extracting by any means or method in such area all minerals, inorganic and organic, from their natural deposits. The term "mine" also includes all mineral processing and milling facilities except those used in the processing of source materials as defined in the Atomic Energy Act of 1954, as amended.

(8) The term "miner" means any individual, other than an operator or an agent, working in or about a mine.

(9) The term "operator" means an individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization owning, operating, leasing, controlling, or supervising a mining operation.

(10) The term "repeated violation" means a violation for which an operator was issued a notice or an order on an inspection and which is found to exist again on the next regular inspection, even though the violation was abated within the time fixed for abatement.

(11) The term "State" means the State of North Carolina. (1975, c. 206, s. 2.)

§ 74-24.3. Coverage.

Each mine shall be subject to the provisions of this Article, and each operator of such mine shall comply with all standards, rules, regulations, orders, and notices adopted or issued under this Article. The operator of such mine shall be responsible for the health and safety of all miners in a mine and shall assure insofar as practicable conditions of work and places of work free from hazards that are causing or are likely to cause death or serious physical harm. (1975, c. 206, s. 3.)

§ 74-24.4. Safety and health standards.

(a) The Commissioner shall develop, adopt, revise, and promulgate safety and health standards for the purpose of the protection of life, the promotion of safety and health, and the prevention of "accidents" in mines which are subject to this Article. In the development of safety and health standards, the Commissioner shall consult with the Advisory Council, interested federal agencies, appropriate representatives of other State agencies, appropriate representatives of mine operators and miners, and other interested persons and organizations whose participation would further the purposes of this Article.

(b) In developing and promulgating safety standards pursuant to this section, the Commissioner shall include standards with respect to the training of miners in first aid, safety, the proper use of rescue equipment available within mines, and periodic evacuation drills and disaster procedure training.

(c) The State Health Director shall have primary responsibility for research and the recommendation of health standards to the Commissioner to effectuate the purposes of this Article, and nothing in this subsection shall affect the authority of the Commissioner with respect to the promulgation and enforcement of both safety and health standards.

(d) The procedures utilized for the adoption and promulgation of safety and health standards, including notice and public hearings, shall be in accordance with the Administrative Procedure Act as set out in Chapter 150B of the

General Statutes. (1975, c. 206, s. 4; 1989 (Reg. Sess., 1990), c. 1004, ss. 52, 53; 1993, c. 513, s. 8.)

§ 74-24.5. Modification of safety and health standards.

Upon petition by an operator, a representative of miners, or a miner, the Commissioner may modify the application of any safety and health standard to a mine if the Commissioner determines that an alternative method of protecting the miners will guarantee the same measure of protection afforded the miners by the standard, or will enhance the level of safety and health provided by that standard. Upon receipt of such petition the Commissioner shall give public notice thereof and give notice to the operator, the representative of miners, or the miner in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of such operator, representative of the miners, or miner to enable the operator, the representative of miners, or miner in such mine or any interested party to present information relating to the modification of such standard. The Commissioner shall issue a decision incorporating his findings of fact therein and send a copy thereof to the operator, the representative of the miners, or miner as appropriate. A record shall be kept of a public hearing held under this section. The decision of the Commissioner is considered a final agency decision for purposes of judicial review. (1975, c. 206, s. 5; 1987, c. 827, s. 258.)

§ 74-24.6. Advisory Council.

(a) The Commissioner shall appoint an Advisory Council consisting of 11 members to assist him in the development of safety and health standards for mines which are subject to this Article and to advise him on matters relating to safety and health in such mines. Said Advisory Council shall include three members expressly qualified by experience and affiliation to present the viewpoint of operators of such mines, three persons similarly qualified to present the viewpoint of workers in such mines, and five members of the public sector with knowledge of mining operations or associated health and safety aspects thereof. The Commissioner of Labor shall annually designate one member to act as chairman. The members of the Advisory Council shall serve at the pleasure of the Commissioner and shall have no specific term of office.

(b) The Advisory Council shall hold not fewer than two meetings during each calendar year, and said meetings shall be open to the public. The Commissioner shall furnish to the Advisory Council such secretarial, clerical, and other services as he deems necessary to conduct its business.

(c) The members of the Advisory Council shall be compensated for travel expenses and per diem as authorized by the Commissioner in accordance with those amounts paid to State boards under Chapter 138 of the General Statutes.

(d) The Commissioner may from time to time select representatives of professional organizations of technicians, professional persons specializing in occupational safety and health, and representatives of State agencies who by experience and affiliation are qualified to present the viewpoint of operators of mines and workers in mines to assist the Advisory Council in performing its duties. Such persons, except State employees, selected for temporary purposes may be paid such per diem and travel expenses for attending meetings as may be fixed by the Commissioner. (1975, c. 206, s. 6; 1977, c. 683; 2006-203, s. 20.)

Editor's Note. — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2006-203, s. 20, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "Commissioner" for "Advisory Budget Commission" in subsection (c); and, deleted "by the Advisory Budget Commission and recommended" following "fixed by" near the end of subsection (d).

§ 74-24.7. Inspections and investigations.

(a) The Commissioner through the Director shall make as many inspections and investigations in mines each year as are deemed necessary to effectively and accurately fulfill the requirements of:

(1) Obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of "accidents" and causes of illnesses and physical impairments originating in such mines,

(2) Gathering information with respect to the necessity for health and safety standards,

(3) Determining whether an imminent danger exists,

(4) Determining whether or not there is compliance with safety and health standards or with any notice, order, or decision issued under this Article.

(5) In carrying out the requirements of (4) of this subsection, no advance notice of an inspection shall be provided to any mine operator, official, miner, representative of the miners, or other person, except that the Commissioner or Director may authorize the giving of advance notice only when such notice is essential to the effectiveness of the inspection.

(b) For the purpose of making any inspection or investigation under this Article, the Commissioner or his authorized representative shall have a right of entry to, upon, or through any mine at reasonable times.

(c) For the purpose of making any investigation of any "accident" relating to safety and health in a mine, the Commissioner may, after notice, hold hearings, and may issue subpoenas for the attendance and testimony of persons and the production of relevant documents, and administer oaths in any investigation conducted by him. In case of contumacy or refusal to obey a subpoena served upon any person under this section, the general court of justice, superior court division, of the county in which such person is found or resides or transacts business, upon application by the Commissioner and after notice to such person, shall have jurisdiction to determine whether such person shall be punished as for contempt of court.

(d) In the event of an "accident" occurring in a mine, the operator shall notify the Commissioner or the Director thereof at such time as may be required and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any "accident" occurring in a mine where rescue and recovery work is necessary, the Commissioner through the Director shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activity in such mine.

(e) In the event of any "accident" occurring in a mine, the Commissioner through the Director may issue such orders as he deems appropriate to insure the safety of any person in the mine, and the operator of such mine shall obtain the approval of the Commissioner or his authorized representative in consultation with appropriate federal representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return affected areas of the mine to normal.

(f) Whenever any miner or representative of the miners has reasonable grounds to believe that a violation of a safety or health standard exists, or that an imminent danger exists, such miner or representative of the miners may request an inspection by giving notice to the Commissioner or the Director of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall show the name of the miner, be signed by the miner or representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon request of the person giving such notice, his name and the names of individual miners referred to therein shall not appear in such copy. If, after receipt of such notification, the Commissioner finds that there are reasonable grounds to believe a violation may exist, a special inspection shall be made as soon as practicable to determine if, in fact, such violation or danger does exist under the provisions of this Article.

(g) At the commencement of any inspection of a mine by the Commissioner or his authorized representative, under subsection (a)(3) or subsection (a)(4) of this section, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the Commissioner or his authorized representative on such inspection, to inform the Commissioner or his authorized representative of conditions and practices in the mine, without loss or deduction in pay. Where there is no authorized representative of the miners, the Commissioner or his authorized representative shall have the right to consult with a reasonable number of miners concerning matters of safety and health in the work place. (1975, c. 206, s. 7.)

§ 74-24.8. Findings, notices, and orders.

(a)(1) If, upon any inspection of a mine, the Commissioner or his authorized representative finds that an imminent danger exists, he shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except as provided in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until the Commissioner or his authorized representative determines such imminent danger no longer exists.

(2) If, upon any inspection of a mine, the Commissioner or his authorized representative finds that an imminent danger exists with respect to the condition or manner of use of any equipment, machinery, article, or apparatus, he shall thereupon issue an order requiring the operator or his agent to cause immediately such equipment, machinery, article, or apparatus to be withdrawn from, and to be prohibited from, use or operation until the Commissioner or his authorized representative determines that such imminent danger no longer exists.

(3) As a result of any investigation of any "accident" or as a result of any other investigation or tests performed, the Commissioner or his authorized representative may cause to be withdrawn and prohibited from use or operation in any mine any equipment, machinery, article, or apparatus the use of which is likely to cause serious physical harm or an "accident" until the Commissioner or his authorized representative determines that such equipment, machinery, article, or apparatus has been repaired, modified, reconditioned, or altered in such manner that "accidents" or serious physical harm will thereafter be avoided.

(b) If, upon any inspection of a mine, the Commissioner or his authorized representative finds that there has been a violation of any safety and health standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period as originally fixed or subsequently extended, the Commissioner or his authorized representative finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except as provided in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until the Commissioner or his authorized representative determines that the violation has been abated.

(c) If, upon any inspection of a mine, the Commissioner or his authorized representative finds that there has been a repeated violation of a safety or health standard which could reasonably be expected to result in serious physical harm to any miner, he shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except as provided in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until the Commissioner or his authorized representative determines that the violation has been abated.

(d) The following persons may enter, upon approval of the Commissioner or his authorized representative, any area of a mine subject to an order issued under this section:

(1) Any person whose presence in such area is necessary, in the judgment of the operator or the Commissioner or his authorized representative, to eliminate the condition described in the order;
(2) A public official whose official duties require him to enter such area;
(3) A representative of the miners in such mine who, in the judgment of the operator or the Commissioner, or his authorized representative, is qualified to make mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the condition described in the order;
(4) A consultant to any of the foregoing.

(e) Notices and orders issued pursuant to this section shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger or a violation of any safety or health standard and where appropriate, a description of the area of the mine from which persons must be withdrawn and prohibited from entering, and a description of the equipment, machinery, article, or apparatus which shall be withdrawn and prohibited from use or operation.

(f) A notice or order issued pursuant to this section may be modified, vacated, or terminated upon review by the Commissioner or his authorized representative. (1975, c. 206, s. 8.)

§ 74-24.9. Issuance and delivery of notices, orders, and decisions.

(a) All notices or orders issued under G.S. 74-24.8 shall be in writing, signed by the Commissioner or his authorized representative, and shall be given promptly to the operator of the mine.

(b) In order to insure prompt compliance with all notices, orders, or decisions issued under this Article, the Commissioner or his authorized representative may deliver such notices, orders, or decisions to an agent of the operator, and such agent shall immediately take appropriate measures to insure compliance with such notice, order, or decision.

(c) Each operator of a mine shall file with the Commissioner the name and address of such mine and the name and address of the operator of the mine. Any revisions in such names or addresses shall be promptly filed with the Commissioner. Each operator of a mine shall designate a responsible official, and shall file the name and address of said official with the Commissioner, as the principal officer in charge of safety and health at such mine, and such official shall receive a copy of any notice, order, or decision issued under this Article affecting such mine. In any case, where the mine is subject to the control of any person not directly involved in the daily operations of the mine, there shall be filed with the Commissioner the name and address of such person and the name and address of a principal official who shall have overall responsibility for the conduct of an effective safety and health program at any mine subject to the control of such person, and such official shall receive a copy of any notice, order, or decision issued affecting any such mine. The mere designation of a safety and health official under this subsection shall not be construed as making such official subject to any penalty under this Article. (1975, c. 206, s. 9.)

§ 74-24.10. Administrative and judicial review of decisions on mine safety.

(a) An operator to whom a notice of order is issued under G.S. 74-24.8 and G.S. 74-24.9 may contest the notice or order by filing a petition for a contested case under G.S. 150B-23 within 30 days after receiving the notice or order. An operator who files a petition for a contested case shall send a copy of the petition to all affected miners or to their representative, if any, when the petition is filed. Judicial review of a decision by the Commissioner in a contested case is available under Article 4 of Chapter 150B of the General Statutes.

(b) A notice or order, except an order issued under G.S. 74-24.8 (a), shall be stayed while it is under administrative or judicial review. (1975, c. 206, s. 10; 1987, c. 827, s. 259.)

§ 74-24.11: Repealed by Session Laws 1987, c. 827, s. 260.

§ 74-24.12. Injunctions.

The Commissioner through the Director may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the superior court of the county in which a mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent (i) violates or fails or refuses to comply with any final order or decision issued under this Article or (ii) interferes with, hinders, or delays the Commissioner in carrying out the provisions of this Article, or (iii) refuses to admit the Commissioner or his authorized representative to the mine, or (iv) refuses to permit the inspection of the mine, or the investigation of an accident or occupational illness occurring in, or connected with, such mine, or (v) refuses to furnish any information or report requested by the Commissioner in furtherance of the provisions of this Article. (1975, c. 206, s. 12.)

§ 74-24.13. Mandatory reporting.

Under such regulations as he may prescribe, the Commissioner shall require that:

(1) Operators of mines which are subject to this Article submit, at least annually and at such other times as he deems necessary, and in such form as he may prescribe, reports of "accidents," injuries, occupational disease, and related data, and the Commissioner through the Director shall compile, analyze, and publish, either in summary or detailed form, the information obtained; and all information, reports, orders,

or findings, obtained or issued under this Article may be published and released to any interested person, and shall be made available for public inspection.

(2) All "accidents" shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence. Records of such "accidents" and investigations shall be kept, and the information shall be made readily available for inspection by the Commissioner or his authorized representative. Such records shall include man-hours worked and shall be reported for periods determined by the Commissioner, but at least annually.

(3) The operators of mines which are subject to this Article shall notify the Commissioner, before starting operations, of the approximate or actual date mine operations will commence. The notification shall include mine name, location, the company name, mailing address, the person in charge, and whether operations will be continuous or intermittent. When any mine subject to this Article is closed, the operator shall notify the Commissioner of such closure and indicate whether the closure is temporary or permanent. (1975, c. 206, s. 13.)

§ 74-24.14. Criminal penalties.

Any person who (i) willfully violates any standard, order, notice, decision, rule, or regulation issued under authority of this Article, and said violation causes death or serious physical harm to another; (ii) knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Article or required by any order, notice, or decision issued under this Article; (iii) knowingly distributes, sells, offers for sale, introduces, or delivers any equipment, machinery, article, or apparatus which is represented as complying with the provisions of this Article, or with any specification or regulation of the Commissioner applicable to such equipment, machinery, article, or apparatus and knowing it does not so comply, shall be guilty of a Class 2 misdemeanor. In any instance in which such offense is committed by a corporation, the officer or authorized representative of such corporation who knowingly permits such offense to be committed shall, upon conviction, be subject to the same fine or imprisonment, or both. (1975, c. 206, s. 14; 1993, c. 539, s. 553; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 74-24.15. Rights and duties of miners.

Miners shall comply with all safety and health standards and all rules, regulations, or orders issued pursuant to this Article which are applicable to their own actions and conduct and shall have the rights afforded under Article 21 of Chapter 95 of the General Statutes. (1975, c. 206, s. 15; 1987, c. 827, s. 261; 1991 (Reg. Sess., 1992), c. 1021, s. 5.)

Legal Periodicals. — For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

§ 74-24.16. Education, training, technical assistance, and research.

(a) The Commissioner through the Director is authorized to develop and conduct expanded programs for the education, training, and technical assistance of operators and miners in the recognition, avoidance, and prevention of accidents or unsafe or unhealthful working conditions and to conduct such research as may be necessary in mines which are subject to this Article.

(b) The Commissioner is authorized to conduct, directly or by grants, short-term training of personnel engaged in work related to the Commissioner's responsibilities under this Article.

(c) In carrying out the provisions of this Article, the Commissioner is authorized to enter into agreements and contracts with, and accept grants from and make grants to, public and private agencies and organizations and individuals.

(d) Repealed by Session Laws 2006-66, s. 13.1, effective July 1, 2006. (1975, c. 206, s. 16; 2005-276, s. 42.2(a); 2005-345, s. 48(a); 2006-66, s. 13.1.)

§ 74-24.17. State-federal plan.

In order to promote sound and effective coordination in State and federal activities within the field covered by this Article, the Commissioner is hereby authorized to enter into and, from time to time, to amend or terminate a State-federal plan agreement with the federal agency charged with administering laws relating to safety and health in mines. (1975, c. 206, s. 17.)

§ 74-24.18. Legal representation.

It shall be the duty of the Attorney General of North Carolina to represent the Department of Labor in all actions or proceedings in connection with this Article. (1975, c. 206, s. 18.)

§ 74-24.19. Administrative provisions.

(a) The Commissioner shall appoint a Director to assist him in administering the provisions of this Article and, through the Director, shall have authority to appoint, subject to Chapter 126 of the General Statutes of North Carolina, such officers, engineers, inspectors, and employees as he deems requisite for the administration of this Article; and to prescribe powers, duties, and responsibilities of all officers, engineers, inspectors, and employees engaged in the administration of this Article.

(b) All persons appointed as representatives of the Commissioner shall be qualified by practical experience in mine safety and health administration or practical experience in mining or by experience as a practical mining engineer or by education. All persons so appointed shall be physically able to perform their duties predicated on their work assignments, and all persons subject to making inspections, investigations, or participating in rescue and recovery work shall be examined prior to their employment and annually thereafter by a physician who shall certify their physical ability to perform their duties in mines subject to this Article. The fee for the required annual examination shall be satisfied as recommended by the Commissioner.

(c) The Commissioner, the Director, or any other officer, engineer, inspector, or employee engaged in the administration of this Article shall not, upon taking office or being employed, or at any other time during the term of his office or employment, have any affiliation, financial or otherwise, with any operating mining company, operator's association, or labor union. (1975, c. 206, s. 19.)

§ 74-24.20. Construction of Article and severability.

This Article shall receive a liberal construction to the end that the safety and health of miners in the State may be effectuated and protected. If any provision of this Article or the application thereof to any person or circumstance is held to be invalid, such invalidity shall not affect other provisions or applications of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable. (1975, c. 206, s. 20.)

ARTICLE 3.

Waterways Obtained.

§ 74-25. Water and drainage rights obtained.

Any person or body corporate engaged or about to engage in mining, who may find it necessary for the furtherance of his operations to convey water either to or from his mine or mines over the lands of any other person or persons, may make application by petition in writing to the clerk of the superior court of the county in which the lands to be affected or the greater part are situate, for the right so to convey such water. The owner of the lands to be affected shall be made a party defendant, and the proceedings shall be conducted as other special proceedings. (1871-2, c. 158, ss. 1, 3; Code, ss. 3293, 3294, 3300; Rev., s. 4953; C.S., s. 6920.)

§ 74-26. The petition, what to contain.

The petition shall specify the lands to be affected, the name of the owner of such lands, and the character of the ditch or drain intended to be made. (1871-2, c. 158, s. 3; Code, s. 3294; Rev., s. 4954; C.S., s. 6921.)

§ 74-27. Appraisers; appointment and duties.

Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons, qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the lands by the contemplated work, and shall issue a notice to them to meet upon the premises at a day specified, not to exceed 10 days from the date of such notice. The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice in the case, and shall then examine all the lands in any way to be affected by such work, and assess the damage thereto, and make report thereof under their hands and seals to the clerk from whom the notice issued. (1871-2, c. 158, ss. 4, 5, 9; Code, ss. 3295, 3296, 3299; Rev., s. 4955; C.S., s. 6922.)

§ 74-28. Confirmation of report; payment of damages; rights of petitioner.

After the filing of the report and confirmation thereof by the clerk, who shall have power to confirm or, for good cause, set aside the same, the petitioner shall have full right and power to enter upon such lands and make such ditches, drains, or other necessary work: Provided, he has first paid or tendered the damages, assessed as above, to the owner of such lands or his known and recognized agent, if he be a resident of this State, or have such agent in this State. If the owner be a nonresident and have no known agent in this State, the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner. (1871-2, c. 158, s. 12; Code, s. 3298; Rev., s. 4957; C.S., s. 6923.)

§ 74-29. Registration of report.

The petitioner, or any other person interested, may have the report of the appraisers registered upon the certificate of the clerk and shall pay the register a fee of twenty-five cents (25¢) therefor. (1871-2, c. 158, s. 8; Code, s. 3298; Rev., s. 4957; C.S., s. 6924.)

§ 74-30. Obstructing mining drains.

If any person shall obstruct any drain or ditch constructed under the provisions of this Chapter, he shall be guilty of a Class 1 misdemeanor. (1871-2, c. 158, s. 12; Code, s. 3301; Rev., s. 3380; C.S., s. 6925; 1993, c. 539, s. 554; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 362 N.C. 431, 666 S.E.2d 107, 2008 N.C. LEXIS 687 (2008).

§ 74-31. Disposition of waste.

In getting out and washing the products of kaolin and mica mines, the persons engaged in such business shall have the right to allow the waste, water, and sediment to run off into the natural courses and streams. (1917, c. 123; C.S., s. 6926; 1937, c. 378.)

CASE NOTES

Strictly Construed. — This section being in derogation of the common law must be strictly construed. McKinney v. Deneen, 231 N.C. 540, 58 S.E.2d 107 (1950).

Modification of Stream Pollution Law in Interest of Miners. — While this section authorizes persons engaged in the business of mining kaolin and mica to discharge the water used in washing the products, together with the incidental waste and sediment, into the natural courses and streams of the State, it does not purport to relieve such persons from liability for any damages which may directly result therefrom. This section would seem to be nothing more than a modification of the prevailing stream pollution law in the interest of miners of kaolin and mica. McKinney v. Deneen, 231 N.C. 540, 58 S.E.2d 107 (1950); Phillips v. Hassett Mining Co., 244 N.C. 17, 92 S.E.2d 429 (1956).

ARTICLE 4.

Adjustment of Conflicting Claims.

§ 74-32. Liability for damage for trespass.

If any owner or person in possession of any mine or mining claim shall enter upon, either on the surface or underground, any mine or mining claim, the property of another, and shall mine or carry away any valuable mineral therefrom, he shall be liable to the owner of the mine so trespassed upon for double the value of all such mineral mined or carried away and for all other damages; and the value of the mineral mined or carried away shall be presumed to be the amount of the gross value ascertained by an average assay of the excavated material or vein or ledge from which it was taken. If such trespass is wrongfully and willfully made, punitive damages may be allowed. (1913, c. 51, s. 1; C.S., s. 6927.)

Legal Periodicals. — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Action by Cotenant. — Where tenants in common, under the erroneous impression that they owned the fee, removed valuable minerals from the property, upon suit by the other tenant in common for damages under this section and admission by the defendants of the cotenancy, removal and value, plaintiff was entitled to judgment on the pleadings, though not to the damages provided in this section. Jones v. McBee, 222 N.C. 152, 22 S.E.2d 226 (1942).

§ 74-33. Persons entitled to bring suit.

The owner of a mine in this State, or any person in possession under a lease or other contract, may maintain an action to recover damages to such property arising from the operation of any adjacent mine by the owner thereof or other person in possession and working the same under lease or contract, and also to prevent the continuance of the operation of the adjacent mine in such a manner as to injure or endanger the safety of the complainant's mine. (1913, c. 51, s. 1; C.S., s. 6928.)

§ 74-34. Application and order for survey.

The person entitled to bring an action, as provided in G.S. 74-33, may apply to any judge of the superior court having jurisdiction to grant injunctions and restraining orders, and obtain an order of survey in the following manner: He shall file an affidavit giving the names of the parties and the location as near as may be, of the mine complained of; the location of the plaintiff's mine, and that he has reason to believe that the defendant, or his agents or employees, are or have been trespassing upon his mine, or working the defendant's mine in such a manner as to damage or endanger the plaintiff's property. Upon the filing of the affidavit, the judge shall cause a notice to be issued to the defendant or his agents, stating the time and place and before whom the application will be heard, and requiring them to appear, in not less than 10 nor more than 20 days from the date thereof, and show cause why an order of survey should not be granted. Upon the hearing, and for good cause shown, the judge shall grant an order directed to some competent disinterested surveyor or mining engineer, or both, as the case may be, who shall proceed to make the necessary examination and surveys, as directed by the court, and report their action to the court. The persons selected by the judge to make the survey and examination shall be residents of the State, and, before entering upon the discharge of their duty, shall take and subscribe an oath that they will fairly and impartially survey the mines described in the petition. In all other respects, except as stated above, the surveyors appointed by the judge shall proceed as in surveys in disputed boundaries. (1913, c. 51, s. 2; C.S., s. 6929.)

CASE NOTES

Applied in Vance v. Guy, 224 N.C. 607, 31 S.E.2d 766 (1944).

Cited in Carolina Mineral Co. v. Young, 211 N.C. 387, 190 S.E. 520 (1937).

§ 74-35. Free access to mine for survey.

Upon the order made for the survey in the manner, at the time, and by the persons mentioned in the order, which shall include a representative of the party making the application, who shall not be one of the surveyors, there shall be given free access to the mine for the purpose of survey, and any interference with the persons acting under the order of survey shall be contempt of court and punished accordingly. If the persons named in the order of survey so require, they, with their instruments, shall be carefully lowered and raised in and out of the mine with the cage, bucket, or skip ordinarily used in the shafts of the mine; and they may demand of the owner of the mine, or his manager or agent, that they be so raised and lowered at a speed agreeable to them and not to endanger their comfort and safety or to injure the accuracy of their instruments. The owner of the mine, his managers or agents, shall be liable in damages to the persons making the examination for any injury to them or to their instruments, caused by the careless and negligent operation of any bucket, cage, or skip at such a high rate of speed as to injure the persons or their instruments while being lowered or raised in the mine. (1913, c. 51, s. 2; C.S., s. 6930.)

§ 74-36. Costs of the survey.

The costs of the order and survey shall be paid by the person making the application; but if he shall maintain an action and recover damages for the injury done or threatened prior to such survey and examination, the costs of the order and survey shall be taxed against the defendant as other costs in the action. The party obtaining the survey shall be liable for any unnecessary injury done to the property examined and surveyed in making the survey. (1913, c. 51, s. 2; C.S., s. 6931.)

ARTICLE 5.

Interstate Mining Compact.

§ 74-37. Compact enacted into law.

The Interstate Mining Compact is hereby enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows:

INTERSTATE MINING COMPACT

ARTICLE I. Findings and Purposes

(a) The party states find that:

(1) Mining and the contributions thereof to the economy and well-being of every state are of basic significance.

(2) The effects of mining on the availability of land, water and other resources for other uses present special problems which properly can be approached only with due consideration for the rights and interests of those engaged in mining, those using or proposing to use these resources for other purposes, and the public.

(3) Measures for the reduction of the adverse effects of mining on land, water and other resources may be costly and the devising of means to deal with them are of both public and private concern.

(4) Such variables as soil structure and composition, physiography, climatic conditions, and the needs of the public make impracticable the application to all mining areas of a single standard for the conservation, adaptation, or restoration of mined land, or the development of mineral and other natural resources; but justifiable requirements of law and practice relating to the effects of mining on land, water, and other resources may be reduced in equity or effectiveness unless they

pertain similarly from state to state for all mining operations similarly situated.

(5) The states are in a position and have the responsibility to assure that mining shall be conducted in accordance with sound conservation principles, and with due regard for local conditions.

(b) The purposes of this Compact are to:

(1) Advance the protection and restoration of land, water and other resources affected by mining.

(2) Assist in the reduction or elimination or counteracting of pollution or deterioration of land, water and air attributable to mining.

(3) Encourage, with due recognition of relevant regional, physical, and other differences, programs in each of the party states which will achieve comparable results in protecting, conserving, and improving the usefulness of natural resources, to the end that the most desirable conduct of mining and related operations may be universally facilitated.

(4) Assist the party states in their efforts to facilitate the use of land and other resources affected by mining, so that such use may be consistent with sound land use, public health, and public safety, and to this end to study and recommend, wherever desirable, techniques for the improvement, restoration or protection of such land and other resources.

(5) Assist in achieving and maintaining an efficient and productive mining industry and in increasing economic and other benefits attributable to mining.

ARTICLE II. Definitions

As used in this Compact, the term:

(1) "Mining" means the breaking of the surface soil in order to facilitate or accomplish the extraction or removal of minerals, ores, or other solid matter; any activity or process constituting all or part of a process for the extraction or removal of minerals, ores, and other solid matter from its original location; and the preparation, washing, cleaning, or other treatment of minerals, ores, or other solid matter so as to make them suitable for commercial, industrial, or construction use; but shall not include those aspects of deep mining not having significant effect on the surface, and shall not include excavation or grading when conducted solely in aid of on site farming or construction.

(2) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

ARTICLE III. State Programs

Each party state agrees that within a reasonable time it will formulate and establish an effective program for the conservation and use of mined land, by the establishment of standards, enactment of laws, or the continuing of the same in force, to accomplish:

(1) The protection of the public and the protection of adjoining and other landowners from damage to their lands and the structures and other property thereon resulting from the conduct of mining operations or the abandonment or neglect of land and property formerly used in the conduct of such operations.

(2) The conduct of mining and the handling of refuse and other mining wastes in ways that will reduce adverse effects on the economic, residential, recreational or aesthetic value and utility of land and water.

(3) The institution and maintenance of suitable programs for adaptation, restoration, and rehabilitation of mined lands.

(4) The prevention, abatement and control of water, air and soil pollution resulting from mining, present, past and future.

Article IV. Powers

In addition to any other powers conferred upon the Interstate Mining Commission, established by Article V of this Compact, such Commission shall have power to:

(1) Study mining operations, processes and techniques for the purpose of gaining knowledge concerning the effects of such operations, processes and techniques on land, soil, water, air, plant and animal life, recreation, and patterns of community or regional development or change.

(2) Study the conservation, adaption, improvement and restoration of land and related resources affected by mining.

(3) Make recommendations concerning any aspect or aspects of law or practice and governmental administration dealing with matters within the purview of this Compact.

(4) Gather and disseminate information relating to any of the matters within the purview of this Compact.

(5) Cooperate with the federal government and any public or private entities having interests in any subject coming within the purview of this Compact.

(6) Consult, upon the request of a party state and within resources available therefor, with the officials of such state in respect to any problem within the purview of this Compact.

(7) Study and make recommendations with respect to any practice, process, technique, or course of action that may improve the efficiency of mining or the economic yield from mining operations.

(8) Study and make recommendations relating to the safeguarding of access to resources which are or may become the subject of mining operations to the end that the needs of the economy for the products of mining may not be adversely affected by unplanned or inappropriate use of land and other resources containing minerals or otherwise connected with actual or potential mining sites.

Article V. The Commission

(a) There is hereby created an agency of the party states to be known as the "Interstate Mining Commission," hereinafter called "the Commission." The Commission shall be composed of one commissioner from each party state who shall be Governor thereof. Pursuant to the laws of his party state, each Governor shall have the assistance of an advisory body (including membership from mining industries, conservation interests, and such other public and private interests as may be appropriate) in considering problems relating to mining and in discharging his responsibilities as the commissioner of his state on the Commission. In any instance where a Governor is unable to attend a meeting of the Commission or perform any other function in connection with the business of the Commission, he shall designate an alternate, from among the members of the advisory body required by this paragraph, who shall represent him and act in his place and stead. The designation of an alternate shall be communicated by the Governor to the Commission in such manner as its bylaws may provide.

(b) The commissioners shall be entitled to one vote each on the Commission. No action of the Commission making a recommendation pursuant to Article IV-3, IV-7, and IV-8 or requesting, accepting or disposing of funds, services, or other property pursuant to this paragraph, Articles V (g), V (h), or VII shall be valid unless taken at a meeting at which a majority of the total number of votes on the Commission is cast in favor thereof. All other action shall be by a majority of those present and voting: Provided that action of the Commission shall be only at a meeting at which a majority of the commissioners, or their alternates, is present. The Commission may establish and maintain such facilities as may be necessary for the transacting of its business. The Commission may acquire, hold, and convey real and personal property and any interest therein.

(c) The Commission shall have a seal.

(d) The Commission shall elect annually, from among its members, a chairman, a vice-chairman, and a treasurer. The Commission shall appoint an executive director and fix his duties and compensation. Such executive director shall serve at the pleasure of the Commission. The executive director, the treasurer, and such other personnel as the Commission shall designate shall be bonded. The amount or amounts of such bond or bonds shall be determined by the Commission.

(e) Irrespective of the civil service, personnel or other merit system laws of any of the party states, the executive director with the approval of the Commission, shall appoint, remove or discharge such personnel as may be necessary for the performance of the Commission's functions, and shall fix the duties and compensation of such personnel.

(f) The Commission may establish and maintain independently or in conjunction with a party state, a suitable retirement system for its employees. Employees of the Commission shall be eligible for social security coverage in respect of old age and survivor's insurance provided that the Commission takes such steps as may be necessary pursuant to the laws of the United States, to participate in such program of insurance as a governmental agency or unit. The Commission may establish and maintain or participate in such additional programs of employee benefits as it may deem appropriate.

(g) The Commission may borrow, accept or contract for the services of personnel from any state, the United States, or any other governmental agency, or from any person, firm, association or corporation.

(h) The Commission may accept for any of its purposes and functions under this Compact any and all donations, and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any state, the United States, or any other governmental agency, or from any person, firm, association or corporation, and may receive, utilize and dispose of the same. Any donation or grant accepted by the Commission pursuant to this paragraph or services borrowed pursuant to paragraph (g) of this Article shall be reported in the annual report of the Commission. Such report shall include the nature, amount and conditions, if any, of the donation, grant or services borrowed and the identity of the donor or lender.

(i) The Commission shall adopt bylaws for the conduct of its business and shall have the power to amend and rescind these bylaws. The Commission shall publish its bylaws in convenient form and shall file a copy thereof and a copy of any amendment thereto, with the appropriate agency or officer in each of the party states.

(j) The Commission annually shall make to the Governor, legislature and advisory body required by Article V (a) of each party state a report covering the activities of the Commission for the preceding year, and embodying such recommendations as may have been made by the Commission. The Commission may make such additional reports as it may deem desirable.

Article VI. Advisory, Technical and Regional Committees

The Commission shall establish such advisory and technical, and regional committees as it may deem necessary, membership on which shall include private persons and public officials, and shall cooperate with and use the services of any such committees and the organizations which the members represent in furthering any of its activities. Such committees may be formed to consider problems of special interest to any party states, problems dealing with particular commodities or types of mining operations, problems related to reclamation, development, or use of mined land, or any other matters of concern to the Commission.

Article VII. Finance

(a) The Commission shall submit to the Governor or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that party state for presentation to the legislature thereof.

(b) Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states. The total amount of appropriations requested under any such budget shall be apportioned among the party states as follows: One half in equal shares; and the remainder in proportion to the value of minerals, ores, and other solid matter mined. In determining such values, the Commission shall employ such available public source or sources of information as, in its judgment, present the most equitable and accurate comparisons among the party states. Each of the Commission's budgets of estimated expenditures and requests for appropriations shall indicate the source or sources used in obtaining information concerning value of minerals, ores, and other solid matter mined.

(c) The Commission shall not pledge the credit of any party state. The Commission may meet any of its obligations in whole or in part with funds available to it under Article V (h) of this Compact: Provided that the Commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the Commission makes use of funds available to it under Article V (h) hereof, the Commission shall not incur any obligation prior to the allotment of funds by the party states adequate to meet the same.

(d) The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become part of the annual report of the Commission.

(e) The accounts of the Commission shall be open at any reasonable time for inspection by duly constituted officers of the party states and by any persons authorized by the Commission.

(f) Nothing contained herein shall be construed to prevent Commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the Commission.

Article VIII. Entry into Force and Withdrawal

(a) This Compact shall enter into force when enacted into law by any four or more states. Thereafter, this Compact shall become effective as to any other state upon its enactment thereof.

(b) Any party state may withdraw from this Compact by enacting a statute repealing the same, but no such withdrawal shall take effect until one year after the Governor of the withdrawing state has given notice in writing of the withdrawal to the Governors of all other party states. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

Article IX. Effect on Other Laws

Nothing in this Compact shall be construed to limit, repeal or supersede any other law of any party state.

ARTICLE X. Construction and Severability

This Compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this Compact shall be severable and if any phrase, clause, sentence or provision of this Compact is declared to be contrary to the constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this Compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this Compact shall be held contrary to the constitution of any state participating herein, the Compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters. (1967, c. 946, s. 1.)

Legal Periodicals. — For note, "Governmental Regulation of Surface Mining Activities," see 46 N.C.L. Rev. 103 (1967).

§ 74-38. Commission to file copies of bylaws with Department of Environment and Natural Resources.

(a), (b) Repealed by Session Laws 1973, c. 1262, s. 33.

(c) In accordance with Article V(i) of the Compact, the Commission shall file copies of the bylaws and any amendments thereto with the Department of Environment and Natural Resources. (1967, c. 946, s. 2; 1973, c. 1262, s. 33; 1977, c. 771, s. 4; 1989, c. 727, s. 218(12); 1997-443, s. 11A.119(a).)

State Government Reorganization. — The administration of the Interstate Mining Compact was transferred to the Department of Natural and Economic Resources (now the Department of Natural Resources and Community Development) by former G.S. 143A-127, enacted by Session Laws 1971, c. 864.

ARTICLE 6.

Mining Registration.

§§ 74-39, 74-40: Repealed by Session Laws 1977, c. 712, s. 2.

§ 74-41: Repealed by Session Laws 1973, c. 1262, s. 33.

§§ 74-42 through 74-45: Repealed by Session Laws 1977, c. 712, s. 2.

ARTICLE 7.

The Mining Act of 1971.

§ 74-46. Title.

This Article may be known and cited as "The Mining Act of 1971." (1971, c. 545, s. 1.)

Cross References. — For provisions relating to the Department of Environment and Natural Resources, see G.S. 143B-279.1 et seq. As to the North Carolina Mining Commission, see G.S. 143B-290 through 143B-293.

CASE NOTES

Cited in Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996); Good Hope Hosp., Inc. v. N.C. HHS, Div. of Facility Servs., 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005).

§ 74-47. Findings.

The General Assembly finds that the extraction of minerals by mining is a basic and essential activity making an important contribution to the economic well-being of North Carolina and the nation. Furthermore, it is not practical to extract minerals required by our society without disturbing the surface of the earth and producing waste materials, and the very character of certain surface mining operations precludes complete restoration of the land to its original condition. However, it is possible to conduct mining in such a way as to minimize its effects on the surrounding environment. Furthermore, proper reclamation of mined land is necessary to prevent undesirable land and water conditions that would be detrimental to the general welfare, health, safety, beauty, and property rights of the citizens of the State. The General Assembly finds that the conduct of mining and reclamation of mined lands as provided by this Article will allow the mining of valuable minerals and will provide for the protection of the State's environment and for the subsequent beneficial use of the mined and reclaimed land. (1971, c. 545, s. 2.)

CASE NOTES

Significant Adverse Effect Violates Mining Act. — In light of the purpose of the Mining Act of 1971, G.S. 74-46 et seq., specifically as set forth in G.S. 74-47, where a mining operation adversely affects the purposes of a publicly owned park, forest, or recreation area to a significant degree, such operation violates the Mining Act. Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 164 N.C. App. 24, 594 S.E.2d 832, 2004 N.C. App. LEXIS 726 (2004), appeal dismissed, 358 N.C. 731, 603 S.E.2d 878 (2004).

§ 74-48. Purposes.

The purposes of this Article are to provide:

(1) That the usefulness, productivity, and scenic values of all lands and waters involved in mining within the State will receive the greatest practical degree of protection and restoration.

(2) That from June 11, 1971, no mining shall be carried on in the State unless plans for such mining include reasonable provisions for protection of the surrounding environment and for reclamation of the area of land affected by mining. (1971, c. 545, s. 3.)

§ 74-49. Definitions.

Wherever used or referred to in this Article, unless a different meaning clearly appears from the context:

(1) "Affected land" means the surface area of land that is mined, the surface area of land associated with a mining activity so that soil is exposed to accelerated erosion, the surface area of land on which overburden and waste is deposited, and the surface area of land used for processing or treatment plant, stockpiles, nonpublic roads, and settling ponds.

(1a) "Affiliate" has the same meaning as in 17 Code of Federal Regulations § 240.12(b)-2 (1 April 1992 Edition), which defines "affiliate" as a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control of another person.

(2) "Borrow pit" means an area from which soil or other unconsolidated materials are removed to be used, without further processing, for highway construction and maintenance.

(3) "Commission" means the Mining Commission created by G.S. 143B-290.

(4) "Department" means the Department of Environment and Natural Resources. Whenever in this Article the Department is assigned duties, they may be performed by the Secretary or an employee of the Department designated by the Secretary.

(5) "Land" shall include submerged lands underlying any river, stream, lake, sound, or other body of water and shall specifically include, among others, estuarine and tidal lands.

(6) "Minerals" means soil, clay, coal, stone, gravel, sand, phosphate, rock, metallic ore, and any other solid material or substance of commercial value found in natural deposits on or in the earth.

(7) "Mining" means:

a. The breaking of the surface soil in order to facilitate or accomplish the extraction or removal of minerals, ores, or other solid matter.

b. Any activity or process constituting all or part of a process for the extraction or removal of minerals, ores, soils, and other solid matter from their original location.

c. The preparation, washing, cleaning, or other treatment of minerals, ores, or other solid matter so as to make them suitable for commercial, industrial, or construction use.

"Mining" does not include:

a. Those aspects of deep mining not having significant effect on the surface, where the affected land does not exceed one acre in area.

b. Mining operations where the affected land does not exceed one acre in area.

c. Plants engaged in processing minerals produced elsewhere and whose refuse does not affect more than one acre of land.

d. Excavation or grading when conducted solely in aid of on-site farming or of on-site construction for purposes other than mining.

e. Removal of overburden and mining of limited amounts of any ores or mineral solids when done only for the purpose and to the extent necessary to determine the location, quantity, or quality of any natural deposit, provided that no ores or mineral solids removed during exploratory excavation or mining are sold, processed for sale, or consumed in the regular operation of a business, and provided further that the affected land resulting from any exploratory excavation does not exceed one acre in area.

f. Excavation or grading where all of the following apply:

1. The excavation or grading is conducted to provide soil or other unconsolidated material to be used without further processing for a single off-site construction project for which an erosion and sedimentation control plan has been approved in accordance with Article 4 of Chapter 113A of the General Statutes.

2. The affected land, including nonpublic access roads, does not exceed five acres.

3. The excavation or grading is completed within one year.

4. The excavation or grading does not involve blasting, the removal of material from rivers or streams, the disposal of off-site waste on the affected land, or the surface disposal of groundwater beyond the affected land.

5. The excavation or grading is not in violation of any local ordinance.
6. An erosion and sedimentation control plan for the excavation or grading has been approved in accordance with Article 4 of Chapter 113A of the General Statutes.

(8) "Neighboring" means in close proximity, in the immediate vicinity, or in actual contact.

(9) "Operator" means any person or persons, any partnership, limited partnership, or corporation, or any association of persons, engaged in mining operations, whether individually, jointly, or through subsidiaries, agents, employees, or contractors.

(10) "Overburden" means the earth, rock, and other materials that lie above the natural deposit of minerals.

(10a) "Parent" has the same meaning as in 17 Code of Federal Regulations § 240.12(b)-2 (1 April 1992 Edition), which defines "parent" as an affiliate that directly, or indirectly through one or more intermediaries, controls another person.

(11) "Peak" means overburden removed from its natural position and deposited elsewhere in the shape of conical piles or projecting points.

(12) "Reclamation" means the reasonable rehabilitation of the affected land for useful purposes, and the protection of the natural resources of the surrounding area. Although both the need for and the practicability of reclamation will control the type and degree of reclamation in any specific instance, the basic objective will be to establish on a continuing basis the vegetative cover, soil stability, water conditions and safety conditions appropriate to the area.

(13) "Reclamation plan" means the operator's written proposal as required and approved by the Department for reclamation of the affected land, which shall include but not be limited to:

a. Proposed practices to protect adjacent surface resources;
b. Specifications for surface gradient restoration to a surface suitable for the proposed subsequent use of the land after reclamation is completed, and proposed method of accomplishment;
c. Manner and type of revegetation or other surface treatment of the affected areas;
d. Method of prevention or elimination of conditions that will be hazardous to animal or fish life in or adjacent to the area;
e. Method of compliance with State air and water pollution laws;
f. Method of rehabilitation of settling ponds;
g. Method of control of contaminants and disposal of mining refuse;
h. Method of restoration or establishment of stream channels and stream banks to a condition minimizing erosion, siltation, and other pollution;
i. Maps and other supporting documents as may be reasonably required by the Department; and
j. A time schedule that meets the requirements of G.S. 74-53.

(14) "Refuse" means all waste soil, rock, mineral, scrap, tailings, slimes, and other material directly connected with the mining, cleaning, and preparation of substances mined and shall include all waste materials deposited on or in the permit area from other sources.

(15) "Ridge" means overburden removed from its natural position and deposited elsewhere in the shape of a long, narrow elevation.

(16) "Spoil bank" means a deposit of excavated overburden or refuse.

(16a) "Subsidiary" has the same meaning as in 17 Code of Federal Regulations § 240.12(b)-2 (1 April 1992 Edition), which defines "subsidiary" as an affiliate that is directly, or indirectly through one or more intermediaries, controlled by another person.

(17) "Termination of mining" means cessation of mining operations with intent not to resume, or cessation of mining operations as a result of expiration or revocation of the permit of the operator. Whenever the Department shall have reason to believe that a mining operation has terminated, the Department shall give the operator written notice of its intention to declare the operation terminated, and the operator shall have an opportunity to appear within 30 days and present evidence that the operation is continuing; where the Department finds that the evidence is satisfactory, the Department shall not declare the mining operation terminated. (1971, c. 545, s. 4; 1973, c. 1262, ss. 33, 86; 1977, c. 771, s. 4; c. 845, s. 1; 1989, c. 727, s. 218(13); 1993 (Reg. Sess., 1994), c. 568, s. 1; 1997-443, s. 11A.119(a); 1999-82, s. 1; 2002-165, s. 2.1.)

CASE NOTES

Removal from Sandpile as Mining. — Where stockpiles of sand as high as 25 feet tall were placed upon surface soil and 24 years later the sand was covered with new surface soil which grew vegetation, including pine trees, the Department of Environment and Natural Resources was not without substantial justification in its position that the landowner was engaged in mining by removing the sand. Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996).

Cited in Builders Supplies Co. v. Gainey, 282 N.C. 261, 192 S.E.2d 449 (1972); Sanders v. Wilkerson, 20 N.C. App. 331, 201 S.E.2d 571 (1974); Crowell Constructors, Inc. v. North Carolina Dep't of Env't, Health & Natural Resources, 107 N.C. App. 716, 421 S.E.2d 612 (1992).

§ 74-50. Permits — General.

(a) No operator shall engage in mining without having first obtained from the Department an operating permit that covers the affected land and that has not been terminated, revoked, suspended for the period in question, or otherwise become invalid. An operating permit may be modified from time to time to include land neighboring the affected land, in accordance with procedures set forth in G.S. 74-52. A separate permit shall be required for each mining operation that is not on land neighboring a mining operation for which the operator has a valid permit.

(b) As used in subsection (b1) of this section:

(1) "Land adjoining" means any parcel or tract of land that is not owned in whole or in part by, or that is not under the control of, the applicant or operator or any lessor, affiliate, parent, or subsidiary of the applicant or operator and that is contiguous to either: (i) any parcel or tract that includes the permitted area or (ii) any parcels or tracts of land that are owned in whole or in part by or under the control of the applicant or operator or any lessor, affiliate, parent, or subsidiary of the applicant or operator and that, taken together, are contiguous to the permitted area.

(2) "Permit boundaries" means the boundaries of a permitted area.

(3) "Permitted area" means affected land and all other land used for or designated as buffers or reserves, or used for other purposes, as delineated in a mining permit or an application for a mining permit.

(b1) At the time of an application for a new mining permit or for a modification of a mining permit to add land to the permitted area, the applicant or operator shall make a reasonable effort, satisfactory to the Department, to notify:

(1) The chief administrative officer of each county and municipality in which any part of the permitted area is located.

(2) The owners of record of land adjoining that lies within 1,000 feet of the permit boundaries.

(3) The owners of record of land that lies directly across and is contiguous to any highway; creek, stream, river, or other watercourse; railroad track; or utility or other public right-of-way and that lies within 1,000 feet of the permit boundaries. For purposes of this subdivision, "highway" means a highway, as defined in G.S. 20-4.01(13) that has four lanes of travel or less and that has not been designated a part of the Interstate Highway System.

(b2) The notice shall inform the owners of record and chief administrative officers of the opportunity to submit written comments to the Department regarding the proposed mining operation and the opportunity to request a public hearing regarding the proposed mining operation. Requests for public hearing shall be made within 30 days of issuance of the notice.

(b3) When the Department receives an application for a new mining permit or for a modification of a mining permit to add land to the permitted area, the Department shall send a notice of the application to each of the following agencies with a request that each agency review and provide written comment on the application within 30 days of the date on which the request is made:

(1) Division of Air Quality, Department of Environment and Natural Resources.
(2) Division of Parks and Recreation, Department of Environment and Natural Resources.
(3) Division of Water Quality, Department of Environment and Natural Resources.
(4) Division of Water Resources, Department of Environment and Natural Resources.
(5) North Carolina Geological Survey, Division of Land Resources, Department of Environment and Natural Resources.
(6) Wildlife Resources Commission, Department of Environment and Natural Resources.
(7) Office of Archives and History, Department of Cultural Resources.
(8) United States Fish and Wildlife Service, United States Department of the Interior.
(9) Any other federal or State agency that the Department determines to be appropriate, including the Division of Coastal Management, Department of Environment and Natural Resources; the Division of Marine Fisheries, Department of Environment and Natural Resources; the Division of Waste Management, Department of Environment and Natural Resources; and the Department of Transportation.

(c) No permit shall become effective until the operator has deposited with the Department an acceptable performance bond or other security pursuant to G.S. 74-54. If at any time the bond or other security, or any part thereof, shall lapse for any reason other than a release by the Department, and the lapsed bond or security is not replaced by the operator within 30 days after notice of the lapse, the permit to which the lapsed bond or security pertains shall be automatically revoked.

(d) An operating permit shall be granted for a period not exceeding 10 years. If the mining operation terminates and the reclamation required under the approved reclamation plan is completed prior to the end of the period, the permit shall terminate. Termination of a permit shall not have the effect of relieving the operator of any obligations that the operator has incurred under an approved reclamation plan or otherwise. Where the mining operation itself has terminated, no permit shall be required in order to carry out reclamation measures under the reclamation plan. (1971, c. 545, s. 5; 1973, c. 1262, s. 33; 1981, c. 787, s. 1; 1993 (Reg. Sess., 1994), c. 568, s. 2; 2000-116, s. 1; 2002-159, s. 35(d).)

Editor's Note. — The definitions in subsection (b) were redesignated at the direction of the Revisor of Statutes to preserve alphabetical order.

CASE NOTES

Applied in Crowell Constructors, Inc. v. North Carolina Dep't of Env't, Health & Natural Resources, 107 N.C. App. 716, 421 S.E.2d 612 (1992).

Cited in Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 164 N.C. App. 24, 594 S.E.2d 832, 2004 N.C. App. LEXIS 726 (2004).

§ 74-51. Permits — Application, granting, conditions.

(a) Any operator desiring to engage in mining shall make written application to the Department for a permit. The application shall be upon a form furnished by the Department and shall fully state the information called for; in addition, the applicant may be required to furnish any other information as may be deemed necessary by the Department in order adequately to enforce this Article. The application shall be accompanied by a reclamation plan that meets the requirements of G.S. 74-53. No permit shall be issued until a reclamation plan has been approved by the Department. The application shall be accompanied by a signed agreement, in a form specified by the Department, that in the event a bond forfeiture is ordered pursuant to G.S. 74-59, the Department and its representatives and contractors shall have the right to make whatever entries on the land and to take whatever actions may be necessary in order to carry out reclamation that the operator has failed to complete.

(b) Before deciding whether to grant a new permit, the Department shall circulate copies of a notice of application for review and comment as it deems advisable. The Department shall grant or deny the permit requested as expeditiously as possible, but in no event later than 60 days after the application form and any relevant and material supplemental information reasonably required shall have been filed with the Department, or if a public hearing is held, within 30 days following the hearing and the filing of any relevant and material supplemental information reasonably required by the Department. Priority consideration shall be given to applicants who submit evidence that the mining proposed will be for the purpose of supplying materials to the Board of Transportation.

(c) If the Department determines, based on public comment relevant to the provisions of this Article, that significant public interest exists, the Department shall conduct a public hearing on any application for a new mining permit or for a modification of a mining permit to add land to the permitted area, as defined in G.S. 74-50(b). The hearing shall be held before the Department reaches a final decision on the application, and in making its determination, the Department shall give full consideration to all comments submitted at the public hearing. The public hearing shall be held within 60 days of the end of the 30-day period within which any requests for the public hearing shall be made.

(d) The Department may deny the permit upon finding:

(1) That any requirement of this Article or any rule promulgated hereunder will be violated by the proposed operation;

(2) That the operation will have unduly adverse effects on potable groundwater supplies, wildlife, or fresh water, estuarine, or marine fisheries;

(3) That the operation will violate standards of air quality, surface water quality, or groundwater quality that have been promulgated by the Department;

(4) That the operation will constitute a direct and substantial physical hazard to public health and safety or to a neighboring dwelling house, school, church, hospital, commercial or industrial building, public road or other public property, excluding matters relating to use of a public road;

(5) That the operation will have a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area;

(6) That previous experience with similar operations indicates a substantial possibility that the operation will result in substantial deposits of sediment in stream beds or lakes, landslides, or acid water pollution; or

(7) That the applicant or any parent, subsidiary, or other affiliate of the applicant or parent has not been in substantial compliance with this Article, rules adopted under this Article, or other laws or rules of this State for the protection of the environment or has not corrected all violations that the applicant or any parent, subsidiary, or other affiliate of the applicant or parent may have committed under this Article or rules adopted under this Article and that resulted in:
  a. Revocation of a permit,
  b. Forfeiture of part or all of a bond or other security,
  c. Conviction of a misdemeanor under G.S. 74-64,
  d. Any other court order issued under G.S. 74-64, or
  e. Final assessment of a civil penalty under G.S. 74-64.

(e) In the absence of any finding set out in subsection (d) of this section, or if adverse effects are mitigated by the applicant as determined necessary by the Department, a permit shall be granted.

(f) Any permit issued shall be expressly conditioned upon compliance with all requirements of the approved reclamation plan for the operation and with any other reasonable and appropriate requirements and safeguards that the Department determines are necessary to assure that the operation will comply fully with the requirements and objectives of this Article. These conditions may, among others, include a requirement of visual screening, vegetative or otherwise, so as to screen the view of the operation from public highways, public parks, or residential areas, where the Department finds screening to be feasible and desirable. Violation of any conditions of the permit shall be treated as a violation of this Article and shall constitute a basis for suspension or revocation of the permit.

(g) If the Department denies an application for a permit, the Department shall notify the operator in writing, stating the reasons for the denial and any modifications in the application that would make the application acceptable. The operator may thereupon modify and resubmit the application, or file an appeal as provided in G.S. 74-61.

(h) Upon approval of an application, the Department shall set the amount of the performance bond or other security that is to be required pursuant to G.S. 74-54. The operator shall have 60 days after the Department mails a notice of the required bond to the operator in which to deposit the required bond or security with the Department. The operating permit shall not be issued until receipt of this deposit.

(i) When one operator succeeds to the interest of another in any uncompleted mining operation by virtue of a sale, lease, assignment, or otherwise, the Department may release the first operator from the duties imposed upon the operator by this Article with reference to the mining operation and transfer the permit to the successor operator; provided, that both operators have complied with the requirements of this Article and that the successor operator assumes the duties of the first operator with reference to reclamation of the land and posts a suitable bond or other security. (1971, c. 545, s. 6; 1973, c. 507, s. 5;

1977, c. 771, s. 4; c. 845, s. 2; 1981, c. 787, ss. 2, 3; 1987, c. 827, c. 82; 1989, c. 727, s. 11; 1993 (Reg. Sess., 1994), c. 568, s. 3; 2000-116, s. 2.)

CASE NOTES

Cited in Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 164 N.C. App. 24, 594 S.E.2d 832, 2004 N.C. App. LEXIS 726 (2004).

§ 74-52. Permits — Modification, renewal.

(a) Any operator engaged in mining under an operating permit may apply at any time for modification of the permit. A permittee may apply for renewal of the permit at any time during the two years prior to the expiration of the permit. The application shall be in writing upon forms furnished by the Department and shall fully state the information called for. The applicant must provide the Department with any additional information necessary to satisfy application requirements. The applicant is not required to resubmit information that remains unchanged since the time of the prior application. In addition, the applicant may be required to furnish any other information as may be deemed necessary by the Department in order adequately to enforce the Article.

(b) The procedure to be followed and standards to be applied in renewing a permit shall be the same as those for issuing a permit; provided, however, that in the absence of any changes in legal requirements for issuance of a permit since the date on which the prior permit was issued, the only basis for denying a renewal permit shall be an uncorrected violation of the type listed in G.S. 74-51(7), or failure to submit an adequate reclamation plan in light of conditions then existing.

(c) A modification under this section may affect the land area covered by the permit, the approved reclamation plan coupled with the permit, or other terms and conditions of the permit. A permit may be modified to include land neighboring the affected land, but not other lands. The reclamation plan may be modified in any manner, so long as the Department determines that the modified plan fully meets the standards set forth in G.S. 74-53 and that the modifications would be generally consistent with the bases for issuance of the original permit. Other terms and conditions may be modified only where the Department determines that the permit as modified would meet all requirements of G.S. 74-50 and [G.S.] 74-51. No modification shall extend the expiration date of any permit issued under this Article.

(d) No modification or renewal of a permit shall become effective until any required changes have been made in the performance bond or other security posted under the provisions of G.S. 74-54, so as to assure the performance of obligations assumed by the operator under the permit and reclamation plan. (1971, c. 545, s. 7; 1993 (Reg. Sess., 1994), c. 568, s. 4.)

Editor's Note. — In subsection (c) above, the bracketed "G.S." was added by the publisher in order to conform with stylistic rules.

CASE NOTES

Cited in Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 164 N.C. App. 24, 594 S.E.2d 832, 2004 N.C. App. LEXIS 726 (2004).

§ 74-53. Reclamation plan.

The operator shall submit with his application for an operating permit a proposed reclamation plan. Said plan shall include as a minimum, each of the elements specified in the definition of "reclamation plan" in G.S. 74-49, plus such other information as may be reasonably required by the Department. The reclamation plan shall provide that reclamation activities, particularly those relating to control of erosion, shall to the extent feasible be conducted simultaneously with mining operations and in any event be initiated at the earliest practicable time after completion or termination of mining on any segment of the permit area. The plan shall provide that reclamation activities shall be completed within two years after completion or termination of mining on each segment of the area for which a permit is requested unless a longer period is specifically permitted by the Department.

The Department may approve, approve subject to stated modifications, or reject the plan which is proposed. The Department shall approve a reclamation plan (as submitted or as modified) only where it finds that it adequately provides for those actions necessary to achieve the purposes and requirements of this Article, and that in addition, the plan meets the following minimum standards:

(1) The final slopes in all excavations in soil, sand, gravel, and other unconsolidated materials shall be at such an angle as to minimize the possibility of slides and be consistent with the future use of the land.

(2) Provisions for safety to persons and to adjoining property must be provided in all excavations in rock.

(3) At open pit mining operations, all overburden and spoil shall be left in a configuration which is in accordance with accepted conservation practices and which is suitable for the proposed subsequent use of the land.

(4) In no event shall any provision of this section be construed to allow small pools of water that are, or are likely to become, noxious, odious, or foul to collect or remain on the mined area. Suitable drainage ditches or conduits shall be constructed or installed to avoid such conditions. Lakes, ponds, and marsh lands shall be considered adequately reclaimed lands when approved by the Department.

(5) The type of vegetative cover and methods of its establishment shall be specified, and in every case shall conform to accepted and recommended agronomic and reforestation restoration practices as established by the North Carolina Agricultural Experiment Station and Department of Environment and Natural Resources. Advice and technical assistance may be obtained through the State soil and water conservation districts.

The Department shall be authorized to approve a reclamation plan despite the fact that such plan does not provide for reclamation treatment of every portion of the affected land, where the Department finds that because of special conditions such treatment would not be feasible for particular areas and that the plan takes all practical steps to minimize the extent of such areas. (1971, c. 545, s. 8; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(14); 1991, c. 342, s. 1; 1997-443, s. 11A.119(a).)

§ 74-54. Bonds.

(a) Each applicant for an operating permit, or for the renewal of a permit shall, following the approval of the application, file and maintain in force a bond in favor of the State of North Carolina, executed by a surety approved by the Commissioner of Insurance, in the amount set forth below. The bond herein provided for must be continuous in nature and shall remain in force until cancelled by the surety. Cancellation by the surety shall be effectuated only upon 60 days written notice thereof to the Department and to the operator.

(b) The applicant shall have the option of filing a separate bond for each operating permit or of filing a blanket bond covering all mining operations within the State for which the applicant holds a permit. The amount of each bond shall be based upon the area of affected land to be reclaimed under the approved reclamation plan or plans to which the bond pertains, less any area where reclamation has been completed and released from coverage by the Department, pursuant to G.S. 74-56, or based on any other criteria established by the Mining Commission. The Department shall set the amount of the required bond in all cases, based upon a schedule established by the Mining Commission.

(c) The bond shall be conditioned upon the faithful performance of the requirements set forth in this Article and of the rules adopted under this Article. Upon filing the bond with the Department, the operator shall lose all right, title, and interest in the bond while the bond is held by the Department. Liability under the bond shall be maintained as long as reclamation is not completed in compliance with the approved reclamation plan unless released only upon written notification from the Department. Notification shall be given upon completion of compliance or acceptance by the Department of a substitute bond. In no event shall the liability of the surety exceed the amount of the surety bond required by this section.

(d) In lieu of the surety bond required by this section, the operator may file with the Department a cash deposit, an irrevocable letter of credit, a guaranty of payment from an acceptable bank, an assignment of a savings account in an acceptable bank on an assignment form prescribed by the Department, or other security acceptable to the Department. Security shall be subject to the release provisions of G.S. 74-56.

(e) If the license to do business in North Carolina of any surety upon a bond filed pursuant to this Article should be suspended or revoked, the operator shall, within 60 days after receiving notice thereof, substitute for the surety a good and sufficient corporate surety authorized to do business in this State. Upon failure of the operator to substitute sufficient surety within the time specified, the operator's permit shall be automatically revoked. (1971, c. 545, s. 9; 1981, c. 787, s. 4; 1987, c. 827, s. 85; 1993 (Reg. Sess., 1994), c. 568, s. 5.)

§ 74-54.1. Permit fees.

(a) The fee schedule for the processing of permit applications and permit renewals and modifications is as follows:

	0-25 acres	26+ acres
New Permit Applications	$3,750.00	$5,000.00
Permit Modifications	$750.00	$1,000.00
Permit Renewals	$750.00	$1,000.00
Transfers	$100.00	$100.00

(b) The Mining Account is established as a nonreverting account within the Department. Fees collected under this section shall be credited to the Mining Account and shall be applied to the costs of administering this Article.

(c) The Department shall annually report on or before 1 September to the Environmental Review Commission, the Fiscal Research Division, and the Mining Commission on the cost of implementing this Article. The report shall include the fees established, collected, and disbursed under this section and any other information requested by the General Assembly or the Commission.

(1989 (Reg. Sess., 1990), c. 944, s. 1; 1991 (Reg. Sess., 1992), c. 1039, s. 16; 1993, c. 513, s. 3; 1993 (Reg. Sess., 1994), c. 568, s. 6; 2007-323, s. 30.2(a).)

Editor's Note. — This section is former subdivision (4) of G.S. 143-290, as rewritten and recodified by Session Laws 1991 (Reg. Sess., 1992), c. 1039, s. 16. The appropriate portion of the historical citation to former G.S. 143B-290 has been included in the historical citation for this section.

§ 74-55. Reclamation report.

Within 30 days after completion or termination of mining on an area under permit or within 30 days after each anniversary of the issuance of the operating permit, whichever is earlier, or at such later date as may be provided by rules of the Department, and each year thereafter until reclamation is completed and approved, the operator shall file a report of activities completed during the preceding year on a form prescribed by the Department, which shall:

(1) Identify the mine, the operator and the permit number;
(2) State acreage disturbed by mining in the last 12-month period;
(3) State and describe amount and type of reclamation carried out in the last 12-month period;
(4) Estimate acreage to be newly disturbed by mining in the next 12-month period;
(5) Provide such maps as may be specifically requested by the Department. (1971, c. 545, s. 10; 1987; c. 827, s. 85.)

§ 74-56. Inspection and approval of reclamation; bond release or forfeiture.

(a) The Department may direct investigations as it may reasonably deem necessary to carry out its duties as prescribed by this Article, and for this purpose may enter at reasonable times upon any mining operation for the purpose of determining compliance with this Article and any rules adopted under this Article and for determining compliance with the terms and conditions of a mining permit, but for no other purpose. No person shall refuse entry or access to any authorized representative of the Department who enters the mining operation for purposes of inspection or other official duties and who presents appropriate credentials; nor shall any person obstruct, hamper, or interfere with the representative while the representative is carrying out official duties. Upon arriving at the site, the representative of the Department shall make every reasonable effort to notify the operator or the operator's agent that the representative of the Department intends to inspect the site. Upon receipt of the operator's annual report or report of completion of reclamation and at any other reasonable time the Department may elect, the Department shall cause the permit area to be inspected to determine whether the operator has complied with the reclamation plan, the requirements of this Article, any rules adopted under this Article, and the terms and conditions of the permit.

(b) The operator shall proceed with reclamation as scheduled in the approved reclamation plan. The Department shall conduct an inspection and give written notice to the operator of any deficiencies noted. The operator shall thereupon commence action within 30 days to rectify these deficiencies and shall diligently proceed until they have been corrected. The Department may extend performance periods referred to in this section and in G.S. 74-53 for delays clearly beyond the operator's control, but only in cases where the Department finds that the operator is making every reasonable effort to comply.

(c) Upon completion of reclamation of an area of affected land, the operator shall notify the Department. The Department shall make an inspection of the area, and if it finds that reclamation has been properly completed, it shall notify the operator in writing and release the operator from further obligations regarding the affected land. At the same time the Department shall release all or the appropriate portion of any performance bond or other security that the operator has posted under G.S. 74-54.

(d) If at any time the Department finds that reclamation of the permit area is not proceeding in accordance with the reclamation plan and that the operator has failed within 30 days after notice to commence corrective action, or if the Department finds that reclamation has not been properly completed in conformance with the reclamation plan within two years, or longer if authorized by the Department, after termination of mining on any segment of the permit area, the Department shall initiate forfeiture proceedings against the bond or other security filed by the operator under G.S. 74-59. In addition, failure to implement the reclamation plan shall constitute grounds for suspension or revocation of the operator's permit, as provided in G.S. 74-58. (1971, c. 545, s. 11; 1987, c. 827, s. 85; 1993 (Reg. Sess., 1994), c. 568, s. 7; 1995, c. 504, s. 3.)

§ 74-57. Departmental modification of permit or reclamation plan.

If at any time it appears to the Department from its inspection of the affected land that the activities under the reclamation plan and other terms and conditions of the permit are failing to achieve the purposes and requirements of this Article, it shall give the operator written notice of that fact, of its intention to modify the reclamation plan and other terms and conditions of the permit in a stated manner, and of the operator's right to a hearing on the proposed modification at a stated time and place. The date for such hearing shall be not less than 30 nor more than 60 days after the date of the notice unless the Department and the operator shall mutually agree on another date. Following the hearing the Department shall have the right to modify the reclamation plan and other terms and conditions of the permit in the manner stated in the notice or in such other manner as it deems appropriate in view of the evidence submitted at the hearing. (1971, c. 545, s. 12.)

CASE NOTES

No Obligation to Modify Prior to Revocation. — Trial court erred in concluding that revocation of petitioner's mining permit by the North Carolina Department of Environment and Natural Resources (DENR) was made upon improper procedure where, the uncontroverted evidence showed that, once it determined that petitioner's mining operation violated the Mining Act, DENR complied with the procedure set forth in G.S. 74-58(a) by: (1) serving petitioner with written notice of the violation; (2) informing petitioner of its right to an informal conference; (3) holding an informal conference with petitioner; (4) allowing petitioner the opportunity to correct the violation; and (5) revoking petitioner's permit after petitioner failed to correct the violation. Moreover, although DENR could have modified petitioner's permit pursuant to G.S. 74-57 had it so chosen, it was under no statutory obligation to do so. Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 164 N.C. App. 24, 594 S.E.2d 832, 2004 N.C. App. LEXIS 726 (2004), appeal dismissed, 358 N.C. 731, 603 S.E.2d 878 (2004).

§ 74-58. Suspension or revocation of permit.

(a) Whenever the Department shall have reason to believe that a violation of (i) this Article, (ii) any rules adopted under this Article, or (iii) the terms and conditions of a permit, including the approved reclamation plan, has taken place, it shall serve written notice of the apparent violation upon the operator, specifying the facts constituting the apparent violation and informing the operator of the operator's right to an informal conference with the Department. The date for an informal conference shall be not less than 15 nor more than 30 days after the date of the notice, unless the Department and the operator mutually agree on another date. If the operator or the operator's representative does not appear at the informal conference, or if the Department following the informal conference finds that there has been a violation, the Department may suspend the permit until the violation is corrected or may revoke the permit where the violation appears to be willful.

(b) The effective date of any suspension or revocation shall be 30 days following the date of the decision. The filing of a petition for a contested case under G.S. 74-61 shall stay the effective date until the Commission makes a final decision. If the Department finds at the time of its initial decision that any delay in correcting a violation would result in imminent peril to life or danger to property or to the environment, it shall promptly initiate a proceeding for injunctive relief under G.S. 74-64 hereof and Rule 65 of the Rules of Civil Procedure. The pendency of any appeal from a suspension or revocation of a permit shall have no effect upon an action for injunctive relief.

(c) Any operator whose permit has been suspended or revoked shall be denied a new permit or a renewal of an existing permit to engage in mining until the operator gives evidence satisfactory to the Department of the operator's ability and intent to fully comply with the provisions of this Article and rules adopted under this Article, and the terms and conditions of the permit, including the approved reclamation plan, and that the operator has satisfactorily corrected all previous violations. (1971, c. 545, s. 13; 1973, c. 1262, s. 33; 1979, c. 252, s. 1; 1987, c. 827, s. 82A; 1993 (Reg. Sess., 1994), c. 568, s. 8.)

Cross References. — For Rules of Civil Procedure, see G.S. 1A-1.

CASE NOTES

Steps for Compliance With Procedure. — Trial court erred in concluding that revocation of petitioner's mining permit by the North Carolina Department of Environment and Natural Resources (DENR) was made upon improper procedure where, the uncontroverted evidence showed that, once it determined that petitioner's mining operation violated the Mining Act, DENR complied with the procedure set forth in G.S. 74-58(a) by: (1) serving petitioner with written notice of the violation; (2) informing petitioner of its right to an informal conference; (3) holding an informal conference with petitioner; (4) allowing petitioner the opportunity to correct the violation; and (5) revoking petitioner's permit after petitioner failed to correct the violation. Moreover, although DENR could have modified petitioner's permit pursuant to G.S. 74-57 had it so chosen, it was under no statutory obligation to do so. Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 164 N.C. App. 24, 594 S.E.2d 832, 2004 N.C. App. LEXIS 726 (2004), appeal dismissed, 358 N.C. 731, 603 S.E.2d 878 (2004).

Willful Failure to Act After Notice of Violation. — Trial court erred in concluding that petitioner's violation of its mining permit was not willful under G.S. 74-58 because the North Carolina Department of Environment and Natural Resources put petitioner on notice of its violation and gave it the opportunity to correct the situation, but petitioner failed to act. Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 164 N.C. App. 24, 594 S.E.2d 832, 2004 N.C. App. LEXIS 726 (2004), appeal dismissed, 358 N.C. 731, 603 S.E.2d 878 (2004).

§ 74-59. Bond forfeiture proceedings.

Whenever the Department determines the necessity of a bond forfeiture under the provisions of G.S. 74-56, or whenever it revokes an operating permit under the provisions of G.S. 74-58, it shall request the Attorney General to initiate forfeiture proceedings against the bond or other security filed by the operator under G.S. 74-54; provided, however, that no such request shall be made for forfeiture of a bond until the surety has been given written notice of the violation and a reasonable opportunity to take corrective action. Such proceedings shall be brought in the name of the State of North Carolina. In such proceedings, the face amount of the bond or other security, less any amount released by the Department pursuant to G.S. 74-56, shall be treated as liquidated damages and subject to forfeiture. All funds collected as a result of such proceedings shall be placed in a special fund and used by the Department to carry out, to the extent possible, the reclamation measures which the operator has failed to complete. If the amount of the bond or other security filed pursuant to this section proves to be insufficient to complete the required reclamation pursuant to the approved reclamation plan, the operator shall be liable to the Department for any excess above the amount of the bond or other security which may be required to defray the cost of completing the required reclamation. (1971, c. 545, s. 14.)

§ 74-60. Notice.

Whenever in this Article written notice is required to be given by the Department, such notice shall be mailed by registered or certified mail to the permanent address of the operator set forth in his most recent application for an operating permit or for a modification or renewal of such permit. No other notice shall be required. (1971, c. 545, s. 15.)

§ 74-61. Administrative and judicial review of decisions.

An applicant, permittee, or affected person may contest a decision of the Department to deny, suspend, modify, or revoke a permit or a reclamation plan, to refuse to release part or all of a bond or other security, or to assess a civil penalty by filing a petition for a contested case under G.S. 150B-23 within 30 days after the Department makes the decision. The Commission shall make the final decision in a contested case under this section. Article 4 of Chapter 150B of the General Statutes governs judicial review of a decision of the Commission. (1971, c. 545, s. 16; 1973, c. 1262, s. 33; 1977, c. 771, s. 4; 1979, c. 252, s. 3; 1987, c. 827, s. 86; 1993 (Reg. Sess., 1994), c. 568, s. 9.)

CASE NOTES

Cited in North Buncombe Ass'n of Concerned Citizens v. Rhodes, 100 N.C. App. 24, 394 S.E.2d 462 (1990).

§ 74-62: Repealed by Session Laws 1987, c. 827, s. 83.

§ 74-63. Rules.

The Commission may adopt rules necessary to administer this Article. (1971, c. 545, s. 18; 1973, c. 1262, s. 33; c. 1331, s. 3; 1987, c. 827, s. 84.)

CASE NOTES

Regulations Empower Director to Issue, Deny, Modify, etc., Permits. — Regulations promulgated under the authority of this section empower the Director of the Division of Land Resources, Department of Environment, Health, and Natural Resources (now the Department of Environment and Natural Resources) to issue, deny, modify, renew, suspend, and revoke permits. North Buncombe Ass'n of Concerned Citizens v. Rhodes, 100 N.C. App. 24, 394 S.E.2d 462 (1990), appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990).

§ 74-64. Penalties for violations.

(a) Civil Penalties.

(1)a. A civil penalty of not more than five thousand dollars ($5,000) may be assessed by the Department against any person who fails to secure a valid operating permit prior to engaging in mining, as required by G.S. 74-50. No civil penalty shall be assessed until the operator has been given notice of the violation pursuant to G.S. 74-60. Each day of a continuing violation shall constitute a separate violation and a civil penalty of not more than five thousand dollars ($5,000) per day may be assessed for each day the violation continues.

b. Any permitted operator who violates any of the provisions of this Article, any rules adopted under this Article, or any of the terms and conditions of the mining permit shall be subject to a civil penalty of not more than five hundred dollars ($500.00). Each day of a continuing violation shall constitute a separate violation. Prior to the assessment of any civil penalty, written notice of the violation shall be given. The notice shall describe the violation with reasonable particularity, shall specify a time period reasonably calculated to permit the violator to complete actions to correct the violation, and shall state that failure to correct the violation within that period may result in the assessment of a civil penalty.

c. In determining the amount of the penalty, the Department shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by the noncompliance, whether the violation was committed willfully, and the prior record of the violator in complying or failing to comply with this Article.

(2) The Department shall determine the amount of the civil penalty to be assessed pursuant to G.S. 74-64(a)(1) and shall give notice to the operator of the assessment of the civil penalty pursuant to G.S. 74-60, or by any means authorized by G.S. 1A-1, Rule 4. The notice shall set forth in detail the violation or violations for which the civil penalty has been assessed. The operator may appeal the assessment of any civil penalty assessed pursuant to this section in accordance with the procedures set forth in G.S. 74-61.

(3) The notice of assessment shall direct the violator to pay the assessment or contest the assessment as provided in G.S. 74-61. If the violator does not pay the assessment within 30 days after receipt of the notice of assessment or within 30 days after receipt of the final agency decision, where the assessment has been contested, the Department shall request the Attorney General to institute a civil action in superior court to recover the amount of the penalty. A civil action under this section shall be filed within three years of the date the final agency decision was served on the violator.

(4) The clear proceeds of civil penalties collected pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(5) In addition to other remedies, the Department may request the Attorney General to institute any appropriate action or proceedings to prevent, restrain, correct or abate any violation of this Article or any

rules adopted under this Article, or the obstruction, hampering, or interference with an authorized representative of the Department while the representative is carrying out official duties pursuant to this Article.

(b) Criminal Penalties. — In addition to other penalties provided by this Article, any operator who engages in mining in willful violation of the provisions of this Article or of any rules promulgated hereunder or who willfully misrepresents any fact in any action taken pursuant to this Article or willfully gives false information in any application or report required by this Article shall be guilty of a Class 3 misdemeanor and, upon conviction thereof, shall only be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) for each offense. Each day of continued violation after written notification shall be considered a separate offense. (1971, c. 545, s. 19; 1979, c. 252, s. 2; 1981, c. 787, ss. 7, 8; 1987, c. 246, s. 1; c. 827, s. 85; 1989 (Reg. Sess., 1990), c. 1024, s. 16; 1993, c. 539, s. 555; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 568, s. 10; 1998-215, s. 42.)

CASE NOTES

Timeliness of Notice. — The statute allows the department to assess civil penalties against petitioner for violations of the Mining Act which occurred prior to petitioner's receipt of the notice of violation as long as the notice is received by the operator before the civil penalty is assessed. Crowell Constructors, Inc. v. North Carolina Dep't of Env't, Health & Natural Resources, 107 N.C. App. 716, 421 S.E.2d 612 (1992), cert. denied, 333 N.C. 343, 426 S.E.2d 704 (1993).

County zoning board exceeded its authority when it voided a mine operator's special use exception permit after finding violations, then treated the mine operator's current permit application as one for a new permit and applied the standard under a new ordinance; the board did not have the power to void the original permit, but only to impose civil or criminal penalties for the violations. Hewett v. County of Brunswick, 155 N.C. App. 138, 573 S.E.2d 688, 2002 N.C. App. LEXIS 1592 (2002).

Cited in Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 164 N.C. App. 24, 594 S.E.2d 832, 2004 N.C. App. LEXIS 726 (2004).

§ 74-65. Effect on local zoning regulations.

No provision of this Article shall be construed to supersede or otherwise affect or prevent the enforcement of any zoning regulation or ordinance duly adopted by an incorporated city or county or by any agency or department of the State of North Carolina, except insofar as a provision of said regulation or ordinance is in direct conflict with this Article. (1971, c. 545, s. 20.)

§ 74-66. Private relief against nuisance or hazard.

No provision of this Article shall be construed to restrict or impair the right of any private or public person, association, corporation, partnership, officer, or agency to bring any legal or equitable action for redress against nuisances or hazards. (1971, c. 545, s. 21.)

§ 74-67. Exemptions.

The provisions of this Article shall not apply to those activities of the Department of Transportation, nor of any person, firm, or corporation acting under contract with said Department of Transportation, on highway rights-of-way or borrow pits maintained solely in connection with the construction, repair, and maintenance of the public road systems of North Carolina; provided, that this exemption shall not become effective until the Department of Transportation shall have adopted reclamation standards applying to such activities and such standards have been approved by the Mining Commission.

The provisions of this Article shall not apply to mining on federal lands under a valid permit from the U.S. Forest Service or the U.S. Bureau of Land Management. (1971, c. 545, s. 22; 1973, c. 507, s. 5; c. 1262, s. 33; 1977, c. 464, s. 34.)

§ 74-68. Cooperation with other agencies; contracts and grants.

The Department, with the approval of the Governor, and in order to accomplish any of the purposes of the Department, may apply for, accept, and expend grants from the federal government and its agencies and from any foundation, corporation, association, or individual; may enter into contracts relating to such grants; and may comply with the terms, conditions, and limitations of any such grant or contract. The Department may engage in such research as may be appropriate to further its ability to accomplish its purposes under this Article, and may contract for such research to be done by others. The Department may cooperate with any federal, state, or local government or agency, of this or any other state, in mutual programs to improve the enforcement of this Article or to accomplish its purposes more successfully. (1971, c. 545, s. 23.)

CASE NOTES

Cited in Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996); Good Hope Hosp., Inc. v. N.C. HHS, Div. of Facility Servs., 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005).

§§ 74-69 through 74-74: Reserved for future codification purposes.

Article 8.

Control of Exploration for Uranium in North Carolina.

§ 74-75. Legislative findings; declaration of policy.

The General Assembly finds that exploration for uranium within the State has the potential to lead to employment opportunities and other economic benefits for the citizens of North Carolina.

However, improper and unregulated exploration for uranium could adversely affect the health, safety and general welfare of the citizens of this State and could cause environmental harm.

The purpose of this Article is to assure that such exploration will be accomplished in a manner that protects the environment and the health, safety and welfare of the public. (1983, c. 279, s. 1.)

§ 74-76. Definitions.

Wherever used or referred to in this Article, unless a different meaning clearly appears from the context:

(1) "Commission" means the Mining Commission created by G.S. 143B-290.

(2) "Department" means the Department of Environment and Natural Resources.

(3) "Exploration activity" means (i) the breaking of the surface soil in order to locate a natural deposit of uranium and to determine its

quality and quantity or (ii) any activity that is directly connected with the breaking of the surface soil and that is undertaken to facilitate or accomplish the location and analysis of a uranium deposit. Exploration activity does not include an insignificant breaking of the surface soil and extraction of samples by hand tools for exploration purposes. This Article shall in no way limit or restrict to applicability of the Mining Act of 1971 to any activity that satisfies the definition of mining in that act.

(4) "Land" includes submerged, tidal and estuarine lands. (1983, c. 279, s. 1; 1989, c. 727, s. 218(15); 1997-443, s. 11A.119(a).)

§ 74-77. Permit requirement.

No person shall engage in exploration activity for the discovery of uranium without having first obtained from the Department an exploration permit which covers the affected land and which has not terminated, been revoked, or otherwise become invalid. (1983, c. 279, s. 1.)

§ 74-78. Permits; application; granting; terms; duration; renewal.

(a) A person desiring to engage in exploration activities for discovery of uranium shall make written application to the Department for an exploration permit. An application shall be upon a form furnished by the Department and shall fully state the information called for. In addition, the applicant may be required to furnish any other information the Department deems necessary in order to enforce this Article.

The application shall be accompanied by a signed agreement, in form specified by the Department, that in the event a bond or other security forfeiture is ordered pursuant to G.S. 74-81, the Department and its representatives and contractors may make any necessary entries on the land and take any necessary action to carry out abandonment procedures not completed by the permit holder.

The Department shall also notify the Radiation Protection Commission of the application and request its views and comments on the application.

The applicant shall make a reasonable effort, satisfactory to the Department, to notify all owners of record of land adjoining the proposed site and the chief administrative officer of the county or municipality in which the proposed site is located that he intends to explore for uranium on the site.

(b) The Department shall deny an application upon finding:

(1) That the proposed exploration activity will or is likely to violate any requirement of this Article or any rule promulgated under it; or

(2) That the person seeking to conduct the exploration activity has not corrected all violations which he committed under a prior uranium exploration permit. In the absence of any such findings, a permit shall be granted.

The Department shall grant or deny the permit as expeditiously as possible, but in no event later than 60 days after the filing of the application and of any reasonably required supplementary information.

(c) A permit may be conditioned upon any reasonable requirements and safeguards the Department deems necessary to assure that exploration activity will comply fully with the requirements and objectives of this Article and of other applicable State environmental and public health laws.

The Department shall set the amount of the performance bond or other security required pursuant to G.S. 74-79. The applicant shall have 30 days following the mailing of notification of the bond or security requirement in which to deposit the required bond or security with the Department. The exploration permit shall be issued upon timely receipt of this deposit.

(d) Exploration permits shall be valid for a period of one year. Permits may be renewed annually upon a showing that the person conducting exploration activity has complied with this Article, the rules promulgated under it, and the terms of his permit. Renewal applications shall be upon a form furnished by the Department and shall state the information called for, as well as other information the Department deems necessary. (1983, c. 279, s. 1; 1989, c. 727, s. 12.)

§ 74-79. Bonds.

Each applicant for an exploration permit shall file with the Department following approval of his application and shall thereafter maintain in force a bond or other security in favor of the State of North Carolina. The bond or other security shall be acceptable to the Department and shall be in an amount determined by the Department based upon a schedule established by the Commission. That schedule shall provide for bond or other security at a level that will allow the Department, through whatever reasonable means it chooses, to perform the abandonment and other work required by this Article. The bond or other security shall be continuous in nature and shall remain in force until cancelled by the guarantor. Cancellation shall be effectuated upon written notice thereof by certified mail, return receipt requested, to the Department and to the permit holder, and shall be effective no sooner than 60 days following receipt by the Department and the operator.

The bond or other security shall be conditioned upon the faithful performance of the requirements set forth in this Article and of the rules adopted pursuant to it. Liability under the bond or other security shall remain in effect until completion of abandonment or until substitution of a good and sufficient bond or other security acceptable to the Department. In no event shall the liability of the surety exceed the amount of the bond or other security required by this section.

If notice of impending cancellation is issued by the surety, or if for any reason, the bond or other security provided is suspended or revoked or ceases to be effective, the permit holder shall, within 30 days of receipt of notice thereof, substitute a good and sufficient bond or other security acceptable to the Department. Upon failure of the permit holder to make the required substitution, his permit shall automatically become void and of no effect. Any continuation of exploration after the permit becomes void and ineffective shall make him subject to all sanctions and remedies afforded by this Article. (1983, c. 279, s. 1.)

§ 74-80. Abandonment.

All exploration holes shall be abandoned by adequately plugging them with cement from the bottom of the hole upward to a point three feet below ground surface. The remainder of the hole between the top of the plug and the surface shall be filled with cuttings or nontoxic material.

If multiple aquifers are encountered that have alternating usable quality water and salt water zones, or if other conditions determined by the Department to be potentially deleterious to surface or ground water are encountered, the conditions must be isolated immediately by cement plugs. Each such hole shall be plugged with cement to prevent water from flowing into or out of the hole or mixing within the hole. Usable quality water is ground water that is used or can be used for a beneficial purpose, including, domestic, livestock, irrigation or industrial uses.

Alternative plugging procedures and materials may be utilized when the applicant has demonstrated to the Department's satisfaction that the alternatives will protect ground waters and comply with the provisions of this Article. In the event that a hole is more suitably plugged with a nonporous material other than cement, the material shall have sealing and lasting characteristics at least equal to cement.

All other excavations or disturbances made in connection with exploration activities shall be adequately reclaimed so as to protect the natural resources of the surrounding area and to prevent the release of toxic substances.

Abandonment shall be undertaken as soon as practicable after exploration, except if multiple aquifers or other conditions potentially deleterious to surface or ground water are encountered. In any event, all abandonment shall be accomplished no later than 30 days following completion of exploration activity in an area of affected land. (1983, c. 279, s. 1.)

§ 74-81. Inspection and approval of abandonment; bond release; forfeiture.

Upon completion of abandonment of an area of affected land, the permit holder shall notify the Department on a form and in a manner it shall require. Upon receipt of the report, and at any other time it deems reasonable, the Department shall make an inspection of the area to determine whether the permit holder has complied with the requirements of this Article, any rules promulgated under it and the terms and conditions of his permit. Following its inspection, the Department shall give written notice to the permit holder of any deficiencies noted. The permit holder shall commence action within 10 days of receipt of notice to rectify these deficiencies and shall diligently proceed to correct them. The Department may extend the 10-day performance period if it finds that the permit holder is making every reasonable effort to comply.

Whenever the Department finds that the person conducting exploration activity has failed to properly abandon an area of affected land within the time allowed by G.S. 74-80 and has failed to undertake timely corrective actions following notice, it shall initiate forfeiture proceedings against the bond or other security filed pursuant to G.S. 74-79.

If the Department finds that abandonment has been properly completed, it shall so notify the person conducting the exploration activity in writing within 10 days after that finding and release him from further obligations under this Article. At the same time it shall release all or the appropriate portion of the bond or other security that has been provided. (1983, c. 279, s. 1.)

§ 74-82. Suspension, revocation or modification of permit.

The Department may revoke, suspend or modify a permit for violations of this Article, any rules promulgated under it, or other terms or conditions of the permit. This authority is subject to the "Special Provisions on Licensing" of G.S. 150B-3. (1983, c. 279, s. 1; 1989 (Reg. Sess., 1990), c. 1004, s. 54.)

§ 74-83. Forfeiture proceedings.

Whenever the Department determines the necessity of a bond or other security forfeiture under the provisions of G.S. 74-81, or whenever it revokes, suspends or modifies a permit under the provisions of G.S. 74-82, it shall request the Attorney General to initiate forfeiture proceedings against the bond or other security filed by the permit holder: Provided, however, that no such request shall be made for forfeiture of a bond or other security until the guarantor has been given written notice of the violation and a reasonable opportunity to take corrective action. These proceedings shall be brought in the name of the State of North Carolina. In these proceedings, the face amount of the bond or other security, less any amount previously released by the Department, shall be treated as liquidated damages and subject to forfeiture. All funds collected as a result of these proceedings shall be placed in a special fund and used by the Department to carry out, to the extent possible, the abandonment measures which the permit holder has failed to complete. If the amount of the bond or other security filed pursuant to this section proves to be insufficient to complete the required abandonment, the permit holder shall be liable to the Department for any excess above the amount of the bond or other security which may be required to defray the cost of completing the required reclamation. (1983, c. 279, s. 1.)

§ 74-84. Notice.

Whenever in this Article written notice is required to be given by the Department, such notice, unless otherwise provided, shall be mailed by registered or certified mail to the permanent address of the person set forth in his most recent application for an exploration permit. No other notice shall be required. (1983, c. 279, s. 1.)

§ 74-85. Administrative and judicial review of decisions.

Any affected person may contest a decision of the Department to approve, deny, suspend, or revoke a permit, to require additional abandonment work, to refuse to release part or all of a bond or other security, or to assess a civil penalty by filing a petition for a contested case under G.S. 150B-23 within 30 days after the Department makes the decision. The Commission shall make the final decision in a contested case under this section. Article 4 of Chapter 150B of the General Statutes governs judicial review of a decision of the Commission. (1983, c. 279, s. 1; 1987, c. 827, s. 87.)

§ 74-86. Rules.

The Mining Commission may promulgate any rules necessary to administer and carry out the purposes of this Article. (1983, c. 279, s. 1; 1987, c. 827, s. 88.)

§ 74-87. Penalty for violations.

(a) Civil Penalties. —

(1)a. A civil penalty of not more than five thousand dollars ($5,000) may be assessed by the Department against any person who fails to secure a valid exploration permit prior to engaging in the exploration for uranium, as required by G.S. 74-48. Each day of continuing violation shall constitute a separate violation and a civil penalty of not more than five thousand dollars ($5,000) per day may be assessed for each day the violation continues.

b. Any person with an exploration permit who violates any of the provisions of this Article, any rules promulgated under it, or any of the terms and conditions of his exploration permit shall be subject to a civil penalty of not more than two hundred fifty dollars ($250.00). Each day of a continuing violation shall constitute a separate violation. Prior to the assessment of any civil penalty, written notice of the violation shall be given pursuant to G.S. 74-84. The notice shall describe the violation with reasonable particularity, shall specify a time period reasonably calculated to permit the violator to complete actions to correct the violations, and shall state that failure to correct the violations within that period will be considered an aggravating factor in the determination of the amount of the civil penalty, if any, to be assessed.

(2) The Department shall determine the amount of the civil penalty to be assessed. In determining the amount of the penalty, the Department shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by his noncompliance, the violator's state of mind in committing the violation, the prior record of the violator in complying or failing to comply with this Article, and any corrective action taken by the violator. The Department shall notify the person conducting exploration activity of the assessment of the civil penalty by certified mail, return receipt requested or by other reasonable means calculated to provide actual notice. This notice shall describe the violations for which the civil penalty has been assessed. The person conducting exploration activity may appeal the assessment of any civil penalty assessed pursuant to this section in accordance with the procedures set forth in G.S. 74-85.

(3) If payment of any civil penalty assessed pursuant to this section is not received by the Department or if no administrative hearing is requested within 30 days following notice to the person of the assessment of the civil penalty, or within 30 days following denial of appeal pursuant to G.S. 74-85, the Department shall refer the matter to the Attorney General for the institution of a civil action in the name of the State in the superior court of the county in which the violation is alleged to have occurred to recover the amount of the penalty.

(4) The clear proceeds of civil penalties collected pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Injunctive Relief. — In addition to other remedies, the Department may request the Attorney General to institute any appropriate action or proceedings to prevent, restrain, correct or abate any violation of this Article or any rules promulgated under it.

(c) Criminal Penalties. — In addition to other penalties provided by this Article, any person who engaged in exploration activity in willful violation of the provisions of this Article or of any rules promulgated under it or who willfully misrepresented any material fact in any action taken pursuant to this Article shall be guilty of a Class 3 misdemeanor and, upon conviction thereof, shall only be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) for each offense. Each day of continued violation after written notification shall be considered a separate offense. (1983, c. 279, s. 1; 1993, c. 539, s. 556; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 43.)

§ 74-88. Confidentiality of logs, surveys, and reports.

If a person engaged in uranium exploration shows to the satisfaction of the Department that logs, surveys plats, and reports filed under this Article are of a proprietary nature relating to his competitive rights, that information shall be confidential and not subject to inspection and examination (as authorized by G.S. 132-6) for four years after receipt of the information by the Department. Further, upon written request of any such person, and a showing of a continued proprietary interest affecting competitive rights, the Department shall hold the material confidential for additional two-year periods. Nothing in this section shall be construed to deny the North Carolina Geological Survey access to all logs, plats, and reports filed under this Chapter. The North Carolina

Geological Survey shall be bound to hold this information confidential to the same extent that the Department is bound. (1983, c. 279, s. 1.)

§ 74-89. Delay before mining permits issued.

No permit for the mining of uranium shall be issued to an applicant for either three years, beginning with the date of issuance of his first permit to explore for uranium, or for two years, beginning with the date of the filing of his first application for a permit to mine uranium, whichever comes first. (1983, c. 279, s. 1.)

Chapter 74A.

Company Police.

§§ 74A-1 through 74A-6: Repealed by Session Laws 1991 (Regular Session, 1992), c. 1043, s. 8.

Cross References. — For present provisions pertaining to the subject matter of this repealed chapter, see Chapter 74E.

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 1043, which repealed this chapter, in s. 9 provides: "A certification or commission issued under former Chapter 74A is considered to have been issued under Chapter 74E, as enacted by this act, and expires in accordance with Chapter 74E."

Chapter 74B.

Private Protective Services Act.

§§ 74B-1 through 74B-16: Repealed by Session Laws 1979, c. 818, s. 1.

Cross References. — For present provisions as to the Private Protective Services Act, see G.S. 74C-1 et seq.

Chapter 74C.

Private Protective Services.

Article 1.

Private Protective Services Board.

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Article 2.

Private Protective Services Education Fund.

74C-30. Private Protective Services Education Fund created; payments to Fund; management; use of funds.
74C-31 through 74C-33. [Repealed.]

ARTICLE 1.

Private Protective Services Board.

§ 74C-1. Title.

This Chapter may be cited as the Private Protective Services Act. The purpose of this act is to increase the level of integrity, competency, and performance of Private Protective Service Professions in order to safeguard the public health, safety, and welfare. (1979, c. 818, s. 2; 1989, c. 759, s. 1.)

Editor's Note. — Session Laws 1983, c. 673, s. 1, designated G.S. 74C-1 through 74C-19 as Article 1 of Chapter 74C and enacted Article 2 thereof.

Session Laws 2007-323, s. 15.2, provides: "The Private Protective Services and Alarm Systems Licensing Boards shall pay the appropriate State agency for the use of physical facilities and services provided to those Boards by the State." For prior similar provisions, see Session Laws 2001-424, s. 23.2, and Session Laws 2005-276, s. 15.2.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'." For prior similar provisions, see Session Laws 2001-424, s. 1.2, and Session Laws 2005-276, s. 1.2.

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium." For prior similar provisions, see Session Laws 2001-424, s. 36.3, and Session Laws 2005-276, s. 46.3.

Session Laws 2007-323, s. 32.5 is a severability clause. For prior similar provisions, see Session Laws 2001-424, s. 36.5, and Session Laws 2005-276, s. 46.5.

CASE NOTES

Constitutionality. — Regulating an occupation which engages in many of the same activities as public police officers is clearly a legitimate purpose of state government. Shipman v. North Carolina Private Protective Servs. Bd., 82 N.C. App. 441, 346 S.E.2d 295, cert. denied and appeal dismissed, 318 N.C. 509, 349 S.E.2d 866 (1986).

The classification in G.S. 74C-3(b), which exempts from regulation under the Private Protective Services Act insurance adjusters, credit rating services, attorneys, company or railroad police, and holders of liens on personal property when engaging in repossession of that property, is reasonably related to the purposes of the Act, in that it requires the Private Protective Services Board to license only those individuals engaged in a covered occupation not regulated elsewhere. Shipman v. North Carolina Private Protective Servs. Bd., 82 N.C. App. 441, 346 S.E.2d 295, cert. denied and appeal dismissed, 318 N.C. 509, 349 S.E.2d 866 (1986).

The purpose of the Private Protective Services Act is to regulate those professions which charge members of the public a fee for engaging in many activities which overlap the functions of the public police. Shipman v. North Carolina Private Protective Servs. Bd., 82 N.C. App. 441, 346 S.E.2d 295, cert. denied and appeal dismissed, 318 N.C. 509, 349 S.E.2d 866 (1986).

§ 74C-2. Licenses required.

(a) No private person, firm, association, or corporation shall engage in, perform any services as, or in any way represent or hold itself out as engaging in a private protective services profession or activity in this State without having first complied with the provisions of this Chapter. Compliance with the licensing requirements of this Chapter shall not relieve any person, firm, association or corporation from compliance with any other licensing law.

(b) An individual in possession of a valid private protective services license or private detective trainee permit issued prior to October 1, 1989, shall not be subject to forfeiture of such license by virtue of this Chapter. Such license shall, however, remain subject to suspension, denial, or revocation in the same manner in which all other licenses issued pursuant to this Chapter are subject to suspension, denial, or revocation.

(c) In its discretion, the Private Protective Services Board may issue a trainee permit in lieu of a private investigator license provided that the applicant works under the direct supervision of a licensee. (1973, c. 528, s. 1; 1979, c. 818, s. 1; 1989, c. 759, s. 2.)

CASE NOTES

Cited in Cowan v. North Carolina Private Protective Servs. Bd., 98 N.C. App. 498, 391 S.E.2d 217 (1990); Virgin Records Am., Inc. v. Doe, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 21701 (E.D.N.C. Mar. 16, 2009).

OPINIONS OF ATTORNEY GENERAL

Municipality Need Not Obtain License to Provide Services Under Contract to Hospital. — This chapter does not require that a municipality obtain a private protective service license when the municipality provides police services on a contractual basis to a nonprofit hospital. See opinion of the Attorney General to Mr. James F. Kirk, Administrator, Private Protective Services Board, 58 N.C.A.G. 45 (June 15, 1988).

The fact that a municipality maintains liability insurance on officers assigned to furnish police services on a contractual basis to a nonprofit hospital does not require municipality to obtain a private protective service license. See opinion of the Attorney General to Mr. James F. Kirk, Administrator, Private Protective Services Board, 58 N.C.A.G. 45 (June 15, 1988).

§ 74C-3. Private protective services profession defined.

(a) As used in this Chapter, the term "private protective services profession" means and includes the following:

(1) Armored car profession. — Any person, firm, association, or corporation which for a fee or other valuable consideration provides secured transportation and protection from one place or point to another place or point of money, currency, coins, bullion, securities, checks, documents, stocks, bonds, jewelry, paintings, and other valuables. This definition does not include a person operating an armored car business pursuant to a motor carrier certificate or permit issued by the North Carolina Utilities Commission which grants operating rights for such business; however, armed armored car service guards shall be subject to the provisions of G.S. 74C-13.

(2) Repealed by Session Laws 1983, c. 786, s. 2.

(3) Redesignated as (a)(5a) by Reviser of Statues. See Editor's notes.

(4) Courier service profession. — Any person, firm, association, or corporation which for a fee or other valuable consideration transports or offers to transport from one place or point to another place or point documents, papers, maps, stocks, bonds, checks, or other small items of value which require expeditious services. Armed courier service guards shall be subject to the provisions of G.S. 74C-13.

(5) Detection of deception examiner. — Any person, firm, association, or corporation which uses any device or instrument, regardless of its name or design, for the purpose of the detection of deception or any person who reviews the work product of an examiner including charts, tapes or other methods of record keeping for the purpose of detecting deception or determining accuracy.

(5a) Electronic countermeasures profession. — Any person, firm, association, or corporation which for a fee or other valuable consideration discovers, locates, or disengages by electronic, electrical, or mechanical means any listening or other monitoring equipment surreptitiously placed to gather information concerning any individual, firm, association, or corporation.

(6) Security guard and patrol profession. — Any person, firm, association, or corporation that provides a security guard on a contractual basis for another person, firm, association, or corporation for a fee or other valuable consideration and performs one or more of the following functions:

a. Prevention or detection of intrusion, entry, larceny, vandalism, abuse, fire, or trespass on private property.

b. Prevention, observation, or detection of any unauthorized activity on private property.

c. Protection of patrons and persons lawfully authorized to be on the premises or being escorted between premises of the person, firm, association, or corporation that entered into the contract for security services.

d. Control, regulation, or direction of the flow or movement of the public, whether by vehicle or otherwise, only to the extent and for the time directly and specifically required to assure the protection of properties.

(7) Guard dog service profession. — Any person, firm, association, or corporation which for a fee or other valuable consideration contracts with another person, firm, association, or corporation to place, lease, rent, or sell a trained dog for the purpose of protecting lives or property.

(8) Private detective or private investigator. — Any person who engages in the profession of or accepts employment to furnish, agrees to make, or makes inquiries or investigations concerning any of the following on a contractual basis:

a. Crimes or wrongs done or threatened against the United States or any state or territory of the United States.

b. The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person.

c. The location, disposition, or recovery of lost or stolen property.

d. The cause or responsibility for fires, libels, losses, accidents, damages, or injuries to persons or to properties.

e. Securing evidence to be used before any court, board, officer, or investigative committee.

f. Protection of individuals from serious bodily harm or death.

(9) Special limited guard and patrol profession. — Any person who is licensed under Chapter 74D of the General Statutes of North Carolina and provides armed alarm responders pursuant to G.S. 74C-13. Applicants for this limited license shall not be required to meet the experience requirements for a security guard and patrol license. Any experience gained under this limited license shall not be counted as experience for a security guard and patrol license.

(b) "Private protective services" shall not include any of the following:

(1) Licensed insurance adjusters legally employed as such and who engage in no other investigative activities unconnected with adjustment or claims against an insurance company.

(2) An officer or employee of the United States, this State, or any political subdivision of either while the officer or employee is engaged in the performance of his or her official duties within the course and scope of his or her employment with the United States, this State, or any political subdivision of either.

(3) A person engaged exclusively in the business of obtaining and furnishing information as to the financial rating or credit worthiness of persons; and a person who provides consumer reports in connection with:

a. Credit transactions involving the consumer on whom the information is to be furnished and involving the extensions of credit to the consumer,

b. Information for employment purposes,

c. Information for the underwriting of insurance involving the consumer,

d. Information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility, or

e. A legitimate business need for the information in connection with a business transaction involving the consumer.

(4) An attorney at law licensed to practice in North Carolina while engaged in the practice of law and the attorney's agent, provided the agent is performing duties only in connection with his or her principal's practice of law.

(5) The legal owner or lien holder, and his or her agents and employees, of personal property which has been sold in a transaction wherein a security interest in personal property has been created to secure the sales transaction, who engage in repossession of the personal property.

(6) Repealed by Session Laws 1989, c. 759, s. 3.

(7) Repealed by Session Laws 1981, c. 807, s. 1.

(8) Employees of a licensee who are employed exclusively as undercover agents; provided that for purposes of this section, undercover agent means an individual hired by another person, firm, association, or corporation to perform a job for that person, firm, association, or corporation and, while performing the job, to act as an undercover operative, employee, or independent contractor of a licensee, but under the supervision of a licensee.

(9) A person who is engaged in an alarm systems business subject to the provisions of Chapter 74D of the General Statutes.

(10) A person who obtains or verifies information regarding applicants for employment, with the knowledge and consent of the applicant, and is (i) engaged in business as a private personnel service as defined in G.S. 95-47.1 or engaged in business as a private employer fee pay personnel service, (ii) engaged in the business of obtaining or verifying information regarding applicants for employment, or (iii) an employer with whom the applicant has applied for employment.

(11) A person who conducts efficiency studies. An efficiency study is an analysis of an employer's business, made at the request of the employer, to determine one or more of the following:

a. The most efficient procedures by which an employee of the business can perform the employee's assigned duties.

b. The adequacy of an employee's performance of the employee's assigned duties that require interaction with a client or customer of the business.

If a person making an efficiency study observes an instance of theft or another illegal act committed by an employee of the business, the person may report the instance to the employer without violating G.S. 74C-3(a)(8).

(12) Research laboratories and consultants who analyze, test, or in any way apply their expertise to interpreting, evaluating, or analyzing facts or evidence submitted by another in order to determine the cause or effect of physical or psychological occurrences, and give their opinions and findings to the requesting source or to a designee of the requestor.

(13) A person who works regularly and exclusively as an employee of an employer in connection with the business affairs of that employer. If the employee is an armed security guard and wears, carries, or possesses a firearm in the performance of the employee's duties, the provisions of G.S. 74C-13 apply.

(14) An employee of a security department of a private business that conducts investigations exclusively on matters internal to the business affairs of the business.

(15) Representatives of nonprofit organizations funded all or in part by business improvement districts who provide information and directions to local tourists and residents, engage in street cleaning and beautification services within the business improvement districts, and notify local law enforcement of any illegal activity observed by the representatives within the business improvement districts.

(16) Emergency medical services personnel credentialed under Article 7 of Chapter 131E of the General Statutes who engage in search and rescue activities at the request of either the State, a political subdivision of the State, or one of the following types of facilities: an adult care home licensed under Chapter 131D of the General Statutes, a health care facility or agency licensed under Chapter 131E of the

General Statutes, or a facility licensed to offer mental health, developmental disabilities, or substance abuse services under Chapter 122C of the General Statutes. For the purposes of this subdivision, "search and rescue" means activities and documents relating to efforts to locate an individual following the individual's disappearance. This exemption shall not apply if the emergency medical services provider provides services beyond emergency search and rescue and said activities meet the definition of private protective services as defined in G.S. 74C-3.

(17) A person engaged in (i) computer or digital forensic services or in the acquisition, review, or analysis of digital or computer-based information, whether for the purposes of obtaining or furnishing information for evidentiary or other purposes, or for providing expert testimony before a court; or (ii) network or system vulnerability testing, including network scans and risk assessment and analysis of computers connected to a network. (1973, c. 528, s. 1; 1977, c. 481; 1979, c. 818, s. 2; 1981, c. 807, ss. 1-3; 1983, c. 259; c. 786, ss. 2, 3; c. 794, s. 1; 1987, c. 284; c. 657, s. 1; 1989, c. 759, s. 3; 2001-487, s. 64(a); 2006-264, s. 46; 2007-469, s. 6; 2007-511, s. 1; 2009-328, s. 1.)

Editor's Note. — Subdivision (a)(3) has been redesignated as subdivision (a)(5a) at the direction of the Revisor of Statutes in order to maintain the definitions in alphabetical order following the amendment of that subdivision by Session Laws 2007-511, s. 1.

Session Laws 2009-328, s. 17, provides: "The Joint Legislative Commission on Governmental Operations shall study the regulation and impacts of digital forensics and report to the 2009 General Assembly when it reconvenes in 2010."

Effect of Amendments. — Session Laws 2009-328, s. 1, effective October 1, 2009, added subdivision (b)(17).

Legal Periodicals. — For comment, "The Polygraph: Perceiving or Deceiving Us?," see 13 N.C. Cent. L.J. 84 (1981).

CASE NOTES

Constitutionality. — The classification in subsection (b) of this section, which exempts from regulation under the Private Protective Services Act insurance adjusters, credit rating services, attorneys, company or railroad police, and holders of liens on personal property when engaging in repossession of that property, is reasonably related to the purposes of the Act, in that it requires the Private Protective Services Board to license only those individuals engaged in a covered occupation not regulated elsewhere. Shipman v. North Carolina Private Protective Servs. Bd., 82 N.C. App. 441, 346 S.E.2d 295, cert. denied and appeal dismissed, 318 N.C. 509, 349 S.E.2d 866 (1986), decided prior to the 1989 amendment.

Purpose of Exceptions in Subsection (b). — The exceptions in subsection (b) of this section are a recognition by the General Assembly that all those who could conceivably fit within the definitions of those occupations covered by the Act are not similarly situated. Those exceptions serve merely to exempt those occupations regulated elsewhere in state or federal law, often more extensively than the regulation of private investigators. Shipman v. North Carolina Private Protective Servs. Bd., 82 N.C. App. 441, 346 S.E.2d 295, cert. denied and appeal dismissed, 318 N.C. 509, 349 S.E.2d 866 (1986) (decided prior to the 1989 amendment).

Newspaper reporter's research activities were investigative, for the "purpose of obtaining information." Cowan v. North Carolina Private Protective Servs. Bd., 98 N.C. App. 498, 391 S.E.2d 217 (1990), decided prior to the 1989 amendment.

Consideration of Private Investigative Work. — While the Private Protective Services Board has the statutory power to grant or deny licenses, it must still act within the scope of its statutory powers. The statutes direct the Board to consider all evidence of experience that is investigative in nature to determine if the applicant had the necessary experience. Therefore, where the Board recognized that petitioner had worked as a runner for a bail bondsman, but refused to consider that work in satisfaction of the investigative experience requirement, the Board erroneously disregarded the mandate of subdivision (a)(8) to consider all private investigative work. Boston v. North Carolina Private Protective Servs. Bd., 96 N.C. App. 204, 385 S.E.2d 148 (1989).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinions below were issued prior to the 1989 amendment of this section.*

Investigator of Personal Injury Claims, etc., Subject to License Requirements. — A company which represents itself as being in the business of investigating, furnishing reports, and testifying in court concerning matters involving personal injury, workers' compensation claims, death claims, hospital bill audits, group claims, subrogation services, and surveillance services comes under the license requirements of this section. See opinion of Attorney General to Mr. James F. Kirk, Administrator N.C. Private Protective Services Board, 57 N.C.A.G. 4 (1987).

Temporary employment agency providing armed guards to its clients on a contractual basis falls within the definition of a contract security company and must be licensed by the Board as a statutory prerequisite to engaging in the private protective services business as defined in this section. See opinion of Attorney General to Mr. James F. Kirk, Administrator, N.C. Private Protection Services Board, 57 N.C.A.G. 55 (1987).

A special employment relationship exists between security guards furnished by temporary employment agency and client seeking security services. See opinion of Attorney General to Mr. James F. Kirk, Administrator, N.C. Private Protection Services Board, 57 N.C.A.G. 55 (1987).

Unarmed guards provided by temporary employment agencies do not fall within the exemption under subdivision (a)(6) of this section, for proprietary security guards. See opinion of Attorney General to Mr. James F. Kirk, Administrator, N.C. Private Protection Services Board, 57 N.C.A.G. 55 (1987), decided prior to the 1989 amendment.

Temporary employment agency under contract to North Carolina Ports Authority to provide armed guards who are certified law-enforcement officers under Chapter 17C must be licensed under this Chapter, even though the Chief of Security for the Ports Authority interviews and selects the officers hired by the agency to provide armed security for the Ports Authority, where the agency places the guards on its payroll, withholds taxes and social security and provides other fringe benefits. See opinion of Attorney General to Mr. James F. Kirk, Administrator, N.C. Private Protection Services Board, 57 N.C.A.G. 55 (1987).

Municipality Need Not Obtain License to Provide Services Under Contract to Hospital. — This Chapter does not require that a municipality obtain a private protective service license when the municipality provides police services on a contractual basis to a nonprofit hospital. See opinion of the Attorney General to Mr. James F. Kirk, Administrator, Private Protective Services Board, 58 N.C.A.G. 45 (1988).

The fact that the municipality maintains liability insurance on officers assigned to furnish police services on a contractual basis to a nonprofit hospital does not require municipality to obtain a private protective service license. See opinion of the Attorney General to Mr. James F. Kirk, Administrator, Private Protective Services Board, 58 N.C.A.G. 45 (1988).

The specific provisions of G.S. 89C-3(6) should prevail over the more general provisions of subdivision (a)(8) of this section; to interpret this chapter as requiring licensed professional engineers to obtain a private investigator's license would defeat the intent of G.S. 89C-3(6), which allows licensed professional engineers to conduct investigations. See opinion of Attorney General to Mr. Montgomery T. Speir, Executive Secretary, State Board of Registration for Professional Engineers and Land Surveyors, 57 N.C.A.G. 47 (1987).

The legislature has made it clear that licensed professional engineers need not be licensed as private investigators in order to engage in "investigation and consultation" that is included within the definition of the "practice of engineering" as defined by G.S. 89C-3(6). See opinion of Attorney General to Mr. Montgomery T. Speir, Executive Secretary, State Board of Registration for Professional Engineers and Land Surveyors, 57 N.C.A.G. 47 (1987).

§ 74C-4. Private Protective Services Board established; members; terms; vacancies; compensation; meetings.

(a) The Private Protective Services Board is hereby established in the Department of Justice to administer the licensing and set educational and training requirements for persons, firms, associations, and corporations engaged in a private protective services profession within this State.

(b) The Board shall consist of 14 members: the Attorney General or his designated representative, two persons appointed by the Attorney General, one person appointed by the Governor, five persons appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and five persons appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives. All appointments by the General Assembly shall be subject to the provisions of G.S. 120-121, and vacancies in the positions filled by those appointments shall be filled pursuant to G.S. 120-122. One of those persons appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate and all five persons appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be licensees under this Chapter; all other appointees may not be licensees of the Board nor licensed by the Board while serving as Board members. All persons appointed shall serve terms of three years. With the exception of the Attorney General or his designated representative, no person shall serve more than eight consecutive years on the Board, including years of service prior and subsequent to July 1, 1983. Board members may continue to serve until their successors have been appointed.

(c) Vacancies on the Board occurring for any reason shall be filled by the authority making the original appointment of the person causing the vacancy.

(d) Each member of the Board, before assuming the duties of his office, shall take an oath for the faithful performance of his duties. A Board member may be removed at the pleasure of the authority making the original appointment or by the Board for misconduct, incompetence, or neglect of duty.

(e) Members of the Board who are State officers or employees shall receive no per diem compensation for serving on the Board, but shall be reimbursed for their expenses in accordance with G.S. 138-6. Members of the Board who are full-time salaried public officers or employees other than State officers or employees shall receive no per diem compensation for serving on the Board, but shall be reimbursed for their expenses in accordance with G.S. 138-6 in the same manner as State officers or employees. All other Board members shall receive per diem compensation and reimbursement in accordance with G.S. 93B-5.

(f) The Board shall elect a chairman, vice-chairman, and other officers and committee chairmen from among its members as the Board deems necessary and desirable at the first meeting after July 1 of each year. The chairman and vice-chairman shall be selected by the members of the Board for a term of one year and shall be eligible for reelection. The Board shall meet at the call of the chairman or a majority of the members of the Board at such time, date, and location as may be decided upon by a majority of the Board.

(g) All decisions heretofore made by the Private Protective Services Board, established pursuant to Chapter 74B, shall remain in full force and effect unless and until repealed or suspended by action of the Private Protective Services Board established herein. (1973, c. 528, s. 1; 1975, c. 592, ss. 8, 9; 1977, c. 535; 1979, c. 818, s. 2; 1981, c. 148, s. 1; c. 807, s. 7; 1983, c. 794, s. 7; 1985, c. 597, s. 12; 1989, c. 759, s. 4; 1995, c. 490, s. 39; 2000-181, s. 2.3.)

Editor's Note. — Session Laws 1989, c. 500, s. 59 provides that the Private Protective Services and Alarm Systems Licensing Boards are responsible for adjusting fees as necessary within the statutory limits to ensure that both boards are operated on a self-supporting fee-funded basis.

Chapter 74B, referred to in this section, was repealed by Session Laws 1979, c. 818, s. 1. See now this chapter.

Session Laws 1995, c. 490, which amended this section, in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

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Temporary employment agency providing armed guards to its clients on a contractual basis falls within the definition of a contract security company and must be licensed by the Board as a statutory prerequisite to engaging in the private protective services business as defined in G.S. 74C-3. See opinion of Attorney General to Mr. James F. Kirk, Administrator, N.C. Private Protection Services Board, 57 N.C.A.G. 55 (Oct. 16, 1987).

Temporary employment agency under contract to North Carolina Ports Authority to provide armed guards who are certified law-enforcement officers under Chapter 17C must be licensed under this Chapter, even though the Chief of Security for the Ports Authority interviews and selects the officers hired by the agency to provide armed security for the Ports Authority, where the agency places the guards on its payroll, withholds taxes and social security and provides other fringe benefits. See opinion of Attorney General to Mr. James F. Kirk, Administrator, N.C. Private Protection Services Board, 57 N.C.A.G. 55 (Oct. 16, 1987).

§ 74C-5. Powers of the Board.

In addition to the powers conferred upon the Board elsewhere in this Chapter, the Board shall have the power to do all of the following:

(1) Adopt rules necessary to carry out and administer the provisions of this Chapter including the authority to require the submission of reports and information by licensees under this Chapter.

(2) Determine minimum qualifications, establish and require written or oral examinations, and establish minimum education, experience, and training standards for applicants and licensees under this Chapter.

(3) Conduct investigations regarding alleged violations and to make evaluations as may be necessary to determine if licensees and trainees under this Chapter are complying with the provisions of this Chapter.

(4) Adopt and amend bylaws, consistent with law, for its internal management and control.

(5) Approve individual applicants to be licensed or registered according to this Chapter.

(6) Deny, suspend, or revoke any license or trainee permit issued or to be issued under this Chapter to any applicant, licensee, or permit holder who fails to satisfy the requirements of this Chapter or the rules established by the Board. The denial, suspension, or revocation shall be in accordance with Chapter 150B of the General Statutes of North Carolina.

(7) Issue subpoenas to compel the attendance of witnesses and the production of pertinent books, accounts, records, and documents. The district court shall have the power to impose punishment pursuant to G.S. Chapter 5A, Article 2, for acts occurring in matters pending before the Private Protective Services Board which would constitute civil contempt if the acts occurred in an action pending in court.

(8) Repealed by Session Laws 1989, c. 759, s. 5.

(9) Adopt rules governing detection of deception schools, and charge fees for reimbursement of costs incurred pursuant to approval of the schools.

(10) Contract for services as necessary to carry out the functions of the Board.

(11) Approve training schools, instructors, and course materials for any person, firm, association, or corporation wishing to provide training described in this Chapter.

(12) Approve a design for a badge or shield that indicates a person is licensed or registered to engage in private protective services. The

badge or shield shall be approved by the North Carolina Sheriffs' Association and the North Carolina Association of Chiefs of Police. (1973, c. 528, s. 1; c. 1331, s. 3; 1979, c. 818, s. 2; 1981 (Reg. Sess., 1982), c. 1359, s. 3; 1983, c. 794, s. 2; c. 810; 1989, c. 759, s. 5; 1999-456, s. 19; 2007-511, s. 2.)

OPINIONS OF ATTORNEY GENERAL

Temporary employment agency providing armed guards to its clients on a contractual basis falls within the definition of a contract security company and must be licensed by the Board as a statutory prerequisite to engaging in the private protective services business as defined in G.S. 74C-3. See opinion of Attorney General to Mr. James F. Kirk, Administrator, N.C. Private Protection Services Board, 57 N.C.A.G. 55 (Oct. 16, 1987).

Temporary employment agency under contract to North Carolina Ports Authority to provide armed guards who are certified law-enforcement officers under Chapter 17C must be licensed under this Chapter, even though the Chief of Security for the Ports Authority interviews and selects the officers hired by the agency to provide armed security for the Ports Authority, where the agency places the guards on its payroll, withholds taxes and social security and provides other fringe benefits. See opinion of Attorney General to Mr. James F. Kirk, Administrator, N.C. Private Protection Services Board, 57 N.C.A.G. 55 (Oct. 16, 1987).

The Private Protective Services Board has the authority to inspect the records of all licensees as part of an evaluation conducted pursuant to subdivision (3). See opinion of Attorney General to James F. Kirk, Administrator, N.C. Private Protective Services Board, 60 N.C.A.G. 12 (1990).

The Private Protective Services Board does not have authority to issue temporary private investigator trainee permits and cannot delegate authority to the Administrator to issue such a permit. See opinion of Attorney General to Mr. Wayne Woodard, Administrator, Private Protective Services Board, 1999 N.C. AG LEXIS 29 (11/22/99).

§ 74C-6. Position of Director created.

The position of Director of the Private Protective Services Board is hereby created within the Department of Justice. The Attorney General shall appoint a person to fill this full-time position. The Director's duties shall be to administer the directives contained in this Chapter and the rules promulgated by the Board to implement this Chapter and to carry out the administrative duties incident to the functioning of the Board in order to actively police the private protective services industry to ensure compliance with the law in all aspects. (1973, c. 528, s. 1; 1979, c. 818, s. 2; 1999-456, s. 20; 2001-487, s. 64(b).)

OPINIONS OF ATTORNEY GENERAL

The Private Protective Services Board cannot delegate its authority to a supervising private investigator to conduct a criminal background check, verify previous employment, check character references, and submit a report that is stapled to the request for a temporary permit. See opinion of Attorney General to Mr. Wayne Woodard, Administrator, Private Protective Services Board, 1999 N.C. AG LEXIS 29 (11/22/99).

§ 74C-7. Investigative powers of the Attorney General.

The Attorney General for the State of North Carolina shall have the power to investigate or cause to be investigated any complaints, allegations, or suspicions of wrongdoing or violations of this Chapter involving individuals licensed, or to be licensed, under this Chapter. Any investigation conducted pursuant to this section is confidential and is not subject to review under G.S. 132-1 until the investigation is complete and a report is presented to the Board. However, the report may be released to the licensee after the investigation is complete but before the report is presented to the Board. (1973, c. 528, s. 1; 1979, c. 818, s. 2; 2009-328, s. 2.)

Effect of Amendments. — Session Laws 2009-328, s. 2, effective October 1, 2009, added the last two sentences.

§ 74C-8. License requirements.

(a) License Required. — Any person, firm, association, or corporation desiring to carry on or engage in the private protective services profession in this State shall be licensed in accordance with this Chapter.

(b) Application. — To apply for a license, an applicant must submit a verified application in writing to the Board that includes all of the following:

(1) Full name, home address, post office box, and the actual street address of the applicant's business.
(2) The name under which the applicant intends to do business.
(3) A statement as to the general nature of the business in which the applicant intends to engage.
(4) The full name and address of any partners in the business and the principal officers, directors and business manager, if any.
(5) The names of not less than three unrelated and disinterested persons as references of whom inquiry can be made as to the character, standing, and reputation of the persons making the application.
(6) Such other information, evidence, statements, or documents as may be required by the Board.
(7) Accompanying trainee permit applications only, a notarized statement signed by the applicant and his employer stating that the trainee applicant will at all times work with and under the direct supervision of a licensed private detective.

(c) Qualifying Agent. — A business entity, other than a sole proprietorship, that engages in private protective services is subject to all of the requirements listed in this subsection with respect to a qualifying agent. For purposes of this Chapter, a "qualifying agent" is an individual in a management position who is licensed under this Chapter and whose name and address have been registered with the Director. The requirements are:

(1) The business entity shall employ a designated resident qualifying agent who meets the requirements for a license issued under this Chapter and who is, in fact, licensed under the provisions of this Chapter, unless otherwise approved by the Board. Provided however, that this approval shall not be given unless the business entity has and continuously maintains in this State a registered agent who shall be an individual resident in this State. Service upon the registered agent appointed by the business entity of any process, notice, or demand required by or permitted to be served upon the business entity by the Private Protective Services Board shall be binding upon the business entity and the licensee. Nothing herein contained shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a business entity in any other manner now or hereafter permitted by law.
(2) Repealed by Session Laws 2009-328, s. 3, effective October 1, 2009.
(3) In the event that the qualifying agent upon whom the business entity relies in order to do business ceases to perform his duties as qualifying agent, the business entity shall notify the Director within 10 working days. The business entity must obtain a substitute qualifying agent within 30 days after the original qualifying agent ceases to serve as

qualifying agent unless the Board, in its discretion, extends this period, for good cause, for a period of time not to exceed three months.

(4) The certificate authorizing the business entity to engage in a private protective services profession shall list the name of at least one designated qualifying agent. No licensee shall serve as the qualifying agent for more than one business entity without prior approval of the Director, subject to the approval of the Board.

(5) Repealed by Session Laws 2009-328, s. 3, effective October 1, 2009.

(d) Criminal Record Check. — An applicant must meet all of the following requirements and qualifications determined by a background investigation conducted by the Board in accordance with G.S. 74C-8.1 and upon receipt of an application:

(1) That the applicant is at least 18 years of age.

(2) That the applicant is of good moral character and temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits: conviction by any local, State, federal, or military court of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverage; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking or entering, burglary, larceny, or any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this subsection, "conviction" means and includes the entry of a plea of guilty or no contest or a verdict rendered in open court by a judge or jury.

(3) Repealed by Session Laws 1989, c. 759, s. 6.

(4) That the applicant has the necessary training, qualifications, and experience in order to determine the applicant's competency and fitness as the Board may determine by rule for all licenses to be issued by the Board.

(e) Examination. — The Board may require the applicant to demonstrate the applicant's qualifications by oral or written examination or by successful completion of a Board-approved training program, or all three.

(f) Issuance. — Upon a finding that the application is in proper form, the completion of the background investigation, and the completion of an examination required by the Board, the Director shall submit to the Board the application and the Director's recommendations. Upon completion of the background investigation, the Director may issue a temporary license pending approval of the application by the Board at the next regularly scheduled meeting. The Board shall determine whether to approve or deny the application for a license. Upon approval by the Board, a license will be issued to the applicant upon payment by the applicant of the initial license fee and the required contribution to the Private Protective Services Education Fund, and certificate of liability insurance.

(1) through (5) Repealed by Session Laws 1989, c. 759, s. 6.

(g) Confidentiality. — Except for purposes of administering the provisions of this section and for law enforcement purposes, the home address or telephone number of an applicant, licensee, or the spouse, children, or parents of an applicant or licensee is confidential under G.S. 132-1.2, and the Board shall not disclose this information unless the applicant or licensee consents to the disclosure. The provisions of this subsection shall not apply when a licensee's home address or telephone number is also the licensee's business address and telephone number. Violation of this subsection shall constitute a Class 3 misdemeanor. (1973, c. 47, s. 2; c. 528, s. 1; 1975, c. 592, s. 1; 1977, c. 570, s. 2;

1979, c. 818, s. 2; 1983, c. 673, s. 3; c. 794, ss. 3, 11; 1985, c. 560; 1987, c. 657, ss. 2, 2.1; 1989, c. 759, s. 6; 1999-446, s. 1; 2001-487, s. 64(c); 2002-147, s. 3; 2009-328, s. 3.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. — Session Laws 2009-327, s. 3, effective October 1, 2009, rewrote the section.

Legal Periodicals. — For comment, "The Polygraph: Perceiving or Deceiving Us,?" see 13 N.C. Cent. L.J. 84 (1981).

CASE NOTES

Cited in Boston v. North Carolina Private Protective Servs. Bd., 96 N.C. App. 204, 385 S.E.2d 148 (1989).

OPINIONS OF ATTORNEY GENERAL

The Private Protective Services Board does not have authority to issue temporary private investigator trainee permits and cannot delegate authority to the Administrator to issue such a permit. See opinion of Attorney General to Mr. Wayne Woodard, Administrator, Private Protective Services Board, 1999 N.C. AG LEXIS 29 (11/22/99).

§ 74C-8.1. Criminal background checks.

(a) Authorization. — Upon receipt of an application for a license, registration, certification, or permit, the Board shall conduct a background investigation to determine whether the applicant meets the requirements for a license, registration, certification, or permit set out in G.S. 74C-8(d). The Department of Justice may provide a criminal record check to the Board for a person who has applied for a new or renewal license, registration, certification, or permit through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of a new applicant, and the Department of Justice shall provide a criminal record check based upon the applicant's fingerprints. The Board may request a criminal record check from the Department of Justice for a renewal applicant based upon the applicant's fingerprints in accordance with policy adopted by the Board. The Board shall provide any additional information required by the Department of Justice and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection.

The Board may require a new or renewal applicant to obtain a criminal record report from one or more reporting services designated by the Board to provide criminal record reports. Applicants are required to pay the designated reporting service for the cost of these reports.

(b) Confidentiality. — The Board shall keep all information obtained pursuant to this section confidential in accordance with applicable State law and federal guidelines, and the information shall not be a public record under Chapter 132 of the General Statutes. (2009-328, s. 4.)

Editor's Note. — Session Laws 2009-328, s. 18, made this section effective October 1, 2009.

§ 74C-9. Form of license; term; renewal; posting; branch offices; not assignable; late renewal fee.

(a) The license when issued shall be in such form as may be determined by the Board and shall state:

(1) The name of the licensee,
(2) The name under which the licensee is to operate, and
(3) The number and expiration date of the license.

(b) The license shall be issued for a term of two years. A trainee permit shall be issued for a term of two years. All licenses must be renewed prior to the expiration of the term of the license. Following issuance, the license shall at all times be posted in a conspicuous place in the licensee's principal place of business, in North Carolina, unless for good cause exempted by the Director. A license issued under this Chapter is not assignable. The Board may require all licensees to complete continuing education courses approved by the Board before renewal of their licenses.

(c) Repealed by Session Laws 1989, c. 759, s. 7.

(d) The operator or manager of any branch office shall be properly licensed or registered. The license shall be posted at all times in a conspicuous place in the branch office. This license shall be issued for a term of two years. Every business covered under the provisions of this Chapter shall file in writing with the Board the addresses of each of its branch offices, if any, within 10 working days after the establishment, closing, or changing of the location of any branch office. The Director may, upon the successful completion of an investigation of the application, issue a temporary branch office license pending approval of the application by the Board.

(e) The Board is authorized to charge reasonable application and license fees as follows:

(1) A nonrefundable initial application fee in an amount not to exceed one hundred fifty dollars ($150.00).
(2) A new or renewal license fee in an amount not to exceed two hundred fifty dollars ($250.00) per year of the license term.
(3) A new or renewal trainee permit fee in an amount not to exceed two hundred fifty dollars ($250.00) per year of the license term.
(4) A new or renewal fee for each license or duplicate license in addition to the basic license referred to in subsection (2) in an amount not to exceed fifty dollars ($50.00) per year of the license term.
(5) A late renewal fee to be paid within 90 days from the date the license, registration, permit, or certification expires in addition to the renewal fee due in an amount not to exceed one hundred dollars ($100.00), if the license, registration, permit, or certification has not been renewed on or before the expiration date of the license, registration, permit, or certification.
(6) A new, renewal, replacement or reissuance fee for an unarmed registration identification card in an amount not to exceed thirty dollars ($30.00).
(7) An application fee for a firearm registration permit not to exceed fifty dollars ($50.00).
(8) A new, renewal, replacement, or reissuance fee for a firearm registration permit not to exceed thirty dollars ($30.00).
(9) An application fee for certification as a certified trainer not to exceed fifty dollars ($50.00).
(10) A renewal or replacement fee for certified trainer certification not to exceed twenty-five dollars ($25.00).

(11) A new nonresident temporary permit fee not to exceed one hundred dollars ($100.00).
(12) An unarmed registration transfer fee not to exceed fifteen dollars ($15.00).
(13) A branch office license fee not to exceed fifty dollars ($50.00) per year of the license term.
(14) A special limited guard and patrol license fee not to exceed one hundred dollars ($100.00) per year of the license term.
(15) A correctable error fee not to exceed one hundred dollars ($100.00) for each subsequent filing of an application following review and rejection of the initial application.

Except as provided in G.S. 74C-13(k), all fees collected pursuant to this section shall be expended, under the direction of the Board, for the purpose of defraying the expenses of administering this Chapter.

(f) A license or trainee permit granted under the provisions of this Chapter may be renewed by the Private Protective Services Board upon notification by the licensee or permit holder to the Director of intended renewal, the payment of the proper fee, and evidence of a policy of liability insurance as prescribed in G.S. 74C-10(e).

The renewal shall be finalized before the expiration date of the license. In no event will renewal be granted more than three months after the date of expiration of a license or trainee permit.

(g) Upon notification of approval of the application by the Board, an applicant must furnish evidence that the applicant has obtained the necessary liability insurance required by G.S. 74C-10 and obtain the license applied for or the application shall lapse.

(h) Trainee permits shall not be issued to applicants that qualify for a private detective license. A licensed private detective may supervise no more than five trainees at any given time. (1973, c. 528, s. 1; c. 1428; 1975, c. 592, ss. 2-4; 1979, c. 818, s. 2; 1983, c. 67, s. 1; c. 794, s. 8; 1985, c. 597, ss. 1-7; 1987, c. 657, s. 3; 1989, c. 759, s. 7; 2001-487, s. 64(d); 2007-511, s. 3; 2009-328, ss. 5, 6.)

Effect of Amendments. — Session Laws 2009-328, ss. 5 and 6, effective October 1, 2009, in subsection (d), substituted "two years" for "one year" at the end of the third sentence; and in subsection (e), made minor punctuation changes throughout; in subdivisions (e)(4), (e)(13), and (e)(14), added "per year of the license term" at the end; in subdivision (e)(5), inserted "within 90 days from the date the license, registration, permit, or certification expires" once and "registration, permit, or certification" twice; and added subdivision (e)(15).

OPINIONS OF ATTORNEY GENERAL

Permit Fees. — The Private Protective Services Board has the authority pursuant to subdivision (e)(8) to charge private investigators a full fee for an armed security guard firearm registration permit. See opinion of Attorney General to James F. Kirk, Administrator, N.C. Private Protective Services Board, 60 N.C.A.G. 12 (1990).

§ 74C-10. Certificate of liability insurance required; form and approval; suspension for noncompliance.

(a) through (d) Repealed by Session Laws 1983, c. 673, s. 4.

(e) No security guard and patrol, armored car, or special limited guard and patrol license shall be issued under this Chapter unless the applicant files with the Board evidence of a policy of liability insurance. The policy must provide for the following minimum coverage: fifty thousand dollars ($50,000) because of bodily injury or death of one person as a result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his employment; subject to said limit for one person, one hundred thousand dollars ($100,000) because of bodily injury or death of two or more persons as the result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his or her agency; twenty thousand dollars ($20,000) because of injury to or destruction of property of others as the result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his or her agency. If the licensee, other than a security guard and patrol, armored car, or special limited guard and patrol licensee, carries a firearm while engaged in private protective services activities, the licensee shall obtain a policy of liability insurance with a minimum coverage as specified above. A licensee is deemed to be "carrying a firearm" for purposes of this section while engaged in private protective services if the licensee has a firearm on the licensee's person or in the automobile the licensee is using to perform private protective services.

(f) An insurance carrier shall have the right to cancel such policy of liability insurance upon giving a 30-day notice to the Board. Provided, however, that such cancellation shall not affect any liability on the policy which accrued prior thereto. The policy of liability shall be approved by the Board as to form, execution, and terms thereon.

(g) The holder of any trainee permit and persons registered pursuant to G.S. 74C-11 shall not be required to obtain a certificate of liability insurance.

(h) Every security guard and patrol licensee, armored car licensee, special limited guard and patrol licensee, or licensee carrying a firearm while engaged in private protective services shall at all times maintain on file with the Board the certificate of insurance required by this Chapter in full force and effect and upon failure to do so, the license of such licensee shall be automatically suspended and shall not be reinstated until an application therefor, in the form prescribed by the Board, is filed together with a proper insurance certificate.

No cancellation or refusal to renew by an insurer of a licensee under this Chapter shall be effective unless the insurer has given the insured licensee notice of the cancellation or refusal to renew. Upon termination of insurance coverage for said licensee, the insurer shall give notice to the Director of the Board.

(i) The Board may deny the application notwithstanding the applicant's compliance with this section:

(1) For any reason which would justify refusal to issue or a suspension or revocation of a license; or

(2) Because the applicant engaged in a private protective services profession while the applicant's license was suspended for failure to keep the required liability insurance policy in force. (1973, c. 528, s. 1; 1979, c. 818, s. 2; 1981, c. 807, ss. 4, 5; 1983, c. 673, ss. 4-6, 8; c. 794, s. 4; 1989, c. 759, s. 8; 2001-487, s. 64(e); 2007-511, ss. 4, 5.)

§ 74C-11. Probationary employees and registration of regular employees; unarmed security guard required to have registration card.

(a) All licensees may employ unarmed security guards as probationary employees for 20 consecutive calendar days. Upon completion of the probationary period and the desire of the licensee to hire an unarmed security guard as a regular employee, the licensee shall register the employee who will be engaged in providing private protective services covered by this Chapter with the Board within 30 days after the probationary employment period ends, unless the Director, in the Director's discretion, extends the time period, for good cause. Before a probationary employee engages in private protective services, the employee shall complete any training requirements, and the licensee shall conduct a criminal record check on the employee, as the Board deems appropriate. The licensee shall submit a list of the probationary employees to the Director on a monthly basis. The list shall include the name, address, social security number, and dates of employment of the employees.

To register an employee after the probationary period ends, a licensee must give the Board the following:

(1) Set(s) of classifiable fingerprints on standard F.B.I. applicant cards; recent photograph(s) of acceptable quality for identification; and

(2) Statements of any criminal records obtained from the appropriate authority in each area where the employee has resided within the immediately preceding 48 months.

(b) A security guard and patrol company may not employ an unarmed security guard in a regular position unless the guard has a registration card issued under subsection (d) of this section. A person engaged in a private protective services profession may not employ an armed security guard unless the guard has a firearm registration permit issued under G.S. 74C-13.

(c) The Director shall be notified in writing of the termination of any regular employee registered under subsection (a) of this section within 10 days after the termination.

(d) An unarmed security guard shall make application to the Director for an unarmed registration card which the Director shall issue to the applicant after receipt of the information required to be submitted by the applicant's employer pursuant to subsection (a) of this section, and after meeting any additional requirements which the Board, in its discretion, deems to be necessary. The unarmed security guard registration card shall be in the form of a pocket card designed by the Board, shall be issued in the name of the applicant, and may have the applicant's photograph affixed to the card. The unarmed security guard registration card shall expire one year after its date of issuance and shall be renewed every year. The Board may require all registration holders to complete continuing education courses approved by the Board before renewal of their registrations. If an unarmed registered security guard is terminated by a licensee and changes employment to another security guard and patrol company, the security guard's registration card shall remain valid, provided the security guard pays the unarmed guard registration transfer fee to the Board and a new unarmed security guard registration card is issued. An unarmed security guard whose transfer registration application and transfer fee have been sent to the Board may work with a copy of the transfer application until the registration card is issued.

(e) Notwithstanding the provisions of this section, a licensee may employ a person properly registered or licensed as an unarmed security guard in another state for a period not to exceed 10 days in any given month; provided the licensee, prior to employing the unarmed security guard, submits to the Director the name, address, and social security number of the unarmed guard and the name of the state of current registration or licensing, and the Director approves the employment of the unarmed guard in this State.

(f) Repealed by Session Laws 2005-211, s. 1, effective July 20, 2005. (1979, c. 818, s. 2; 1983, c. 67, s. 2; 1985, c. 597, ss. 8, 9; 1987, c. 657, ss. 4, 5; 1989, c. 759, s. 9; 2001-487, s. 64(f); 2005-211, s. 1; 2007-511, s. 6; 2009-328, s. 7.)

Effect of Amendments. — Session Laws 2009-328, s. 7, effective October 1, 2009, inserted "consecutive" in the first sentence of the first paragraph of subsection (a).

§ 74C-12. Denial, suspension, or revocation of license, registration, or permit; duty to report criminal arrests.

(a) The Board may, after compliance with Chapter 150B of the General

Statutes, deny, suspend or revoke a license, registration, or permit issued under this Chapter if it is determined that the applicant, licensee, registrant, or permit holder has done any of the following acts:

(1) Made any false statement or given any false information in connection with any application for a license, registration, or permit or for the renewal or reinstatement of a license, registration, or permit.
(2) Violated any provision of this Chapter.
(3) Violated any rule adopted by the Board pursuant to the authority contained in this Chapter.
(4) Repealed by Session Laws 1989, c. 759, s. 10.
(5) Impersonated or permitted or aided and abetted any other person to impersonate a law enforcement officer of the United States, this State, any other state, or any political subdivision of a state.
(6) Engaged in or permitted any employee to engage in a private protective services profession when not lawfully in possession of a valid license issued under the provisions of this Chapter.
(7) Willfully failed or refused to render to a client service as agreed between the parties and for which compensation has been paid or tendered in accordance with the agreement of the parties.
(8) Knowingly made any false report to the employer or client for whom information is being obtained.
(9) Committed an unlawful breaking or entering, assault, battery, or kidnapping.
(10) Knowingly violated or advised, encouraged, or assisted the violation of any court order or injunction in the course of business as a licensee.
(11) Repealed by Session Laws 1989, c. 759, s. 10.
(12) Undertaken to give legal advice or counsel or to in any way falsely represent that he or she is representing any attorney or he or she is appearing or will appear as an attorney in any legal proceeding.
(13) Issued, delivered, or uttered any simulation of process of any nature which might lead a person to believe that such simulation — written, printed, or typed — may be a summons, warrant, writ or court process, or any pleading in any court proceeding.
(14) Failed to make the required contribution to the Private Protective Services Education Fund or failed to maintain the certificate of liability insurance required by this Chapter.
(15) Violated the firearm provisions set forth in this Chapter.
(16) Repealed by Session Laws 1989, c. 759, s. 10.
(17) Failed to notify the Director by a business entity other than a sole proprietorship licensed pursuant to this Chapter of the cessation of employment of the business entity's qualifying agent within the time set forth in this Chapter.
(18) Failed to obtain a substitute qualifying agent by a business entity within 30 days after its qualifying agent has ceased to serve as the business entity's qualifying agent.
(19) Been judged incompetent by a court having jurisdiction under Chapter 35A or former Chapter 35 of the General Statutes or committed to a mental health facility for treatment of mental illness, as defined in G.S. 122C-3, by a court under G.S. 122C-271.
(20) Failed or refused to offer a report to a client within 30 days of the client's written request after the client has paid for services rendered.
(21) Been previously denied a license, registration, or permit under this Chapter or previously had a license, registration, or permit revoked for cause. The denial or revocation shall include a principal in the applicant's business.
(22) Engaged in a private protective services profession under a name other than the name under which the license was obtained under the provisions of this Chapter.

(23) Divulged to any person, except as required by law, any information acquired by the license holder except at the direction of the employer or client for whom the information was obtained. A licensee may divulge to any law enforcement officer or district attorney or district attorney's representative any information the law enforcement officer may require to investigate a criminal offense with the prior approval and consent of the client.

(24) Fraudulently held himself or herself out as employed by or licensed by the State Bureau of Investigation or any other governmental authority.

(25) Demonstrated intemperate habits or a lack of good moral character. The acts that are prima facie evidence of intemperate habits or lack of good moral character under G.S. 74C-8(d)(2) are prima facie evidence of the same under this subdivision.

(26) Advertised or solicited business using a name other than that in which the license was issued.

(27) Worn, carried, or accepted any badge or shield purporting to indicate that the person is a law enforcement officer while licensed under the provisions of this Chapter as a private investigator.

(28) Possessed or displayed a badge or shield while providing private protective services that was not designed and approved by the Board pursuant to G.S. 74C-5(12).

(29) Failed or refused to reasonably cooperate with the Board or its agents during an investigation of any complaint, allegation, suspicion of wrongdoing, or violation of this Chapter.

(30) Failed to properly make any disclosure to the Board or provide documents or information required by this Chapter or rules adopted by the Board.

(31) Engaged in conduct constituting dereliction of duty or otherwise deceived, defrauded, or harmed the public in the course of professional activities or services.

(32) Demonstrated a lack of financial responsibility.

(b) The denial, revocation, or suspension of a license, registration, or permit by the Board shall be in writing, be signed by the Director of the Board, and state the grounds upon which the Board decision is based. The aggrieved person shall have the right to appeal from this decision as provided in Chapter 150B of the General Statutes. The aggrieved person shall file the appeal within 60 days of receipt of the Board's decision.

(c) The following persons may not be issued a license under this Chapter:

(1) A sworn court official.

(2) A holder of a company police commission under Chapter 74E of the General Statutes.

(d) A licensee shall report to the Board in writing within 30 days any charge, arrest for, or conviction of a misdemeanor or felony for any of the following:

(1) Crimes that have as an essential element dishonesty, deceit, fraud, or misrepresentation.

(2) Illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverage.

(3) Illegal use, carrying, or possession of a firearm.

(4) Acts involving assault.

(5) Acts involving unlawful breaking or entering, burglary, or larceny.

(6) Any offense involving moral turpitude.

For purposes of this section, the term "conviction" includes the entry of a plea of guilty, a plea of nolo contendere, prayer for judgment continued, or a finding of guilt by a court of competent jurisdiction. The licensee's failure to report a charge, arrest for, or conviction of a misdemeanor or felony is grounds for revocation of the license. (1979, c. 818, s. 2; 1981, c. 807, s. 6; 1987, c. 550, s. 20; c. 657, s. 6; 1989, c. 759, s. 10; 1991 (Reg. Sess., 1992), c. 1043, s. 5; 2001-487, s. 64(g); 2007-511, s. 7; 2009-328, ss. 8, 9.)

Effect of Amendments. — Session Laws 2009-328, ss. 8 and 9, effective October 1, 2009, in subdivision (a)(13), deleted "or persons" following "a person"; in subdivision (a)(14), substituted "Education" for "Recovery"; in subdivision (a)(21), added the last sentence; in subdivision (a)(25), in the first sentence, substituted "Demonstrated intemperate habits or a lack of" for "Intemperate habits or lacks" at the beginning; added subdivisions (a)(29) through (a)(32); and in subsection (c), deleted "registration, or permit" following "license" in the introductory language.

§ 74C-13. Armed licensee or registered employee required to have firearm registration permit; firearms training.

(a) It shall be unlawful for any person performing private protective services duties to carry a firearm in the performance of those duties without first having met the qualifications of this section and having been issued a firearm registration permit by the Board. A licensee shall register any individual carrying a firearm within 30 days of employment. Before engaging in any private protective services activity, the individual shall receive any required training prescribed by the Board.

(a1) The following definitions apply in this section:

(1) Armed private investigator. — A licensed private investigator who, at any time, wears, carries, or possesses a firearm in the performance of duty.

(1a) Armed security guard. — An individual employed by a contract security company or a proprietary security organization whose principal duty is that of an armed security watchman; armed armored car service guard; armed alarm system company responder; or armed courier service who at any time wears, carries, or possesses a firearm in the performance of duty.

(2) Contract security company. — Any person, firm, association, or corporation engaging in a private protective services profession that provides services on a contractual basis for a fee or other valuable consideration to any other person, firm, association, or corporation.

(3) Proprietary security organization. — Any person, firm, association, or corporation or department thereof which employs security guards, alarm responders, armored car personnel, or couriers who are employed regularly and exclusively as an employee by an employer in connection with the business affairs of the employer.

(b) It shall be unlawful for any person, firm, association, or corporation and its agents and employees to employ an armed security guard or an armed private investigator and knowingly authorize or permit the armed security guard or armed private investigator to carry a firearm during the course of performing his or her duties as an armed security guard or an armed private investigator if the Board has not issued him or her a firearm registration permit under this section or if the person, firm, association, or corporation permits an armed security guard or an armed private investigator to carry a firearm during the course of performing his or her duties whose firearm registration permit has been suspended, revoked, or has otherwise expired:

(1) A firearm registration permit grants authority to the armed security guard, or armed private investigator, while in the performance of his or her duties or traveling directly to and from work, to carry any firearm approved by the Board and not otherwise prohibited by law. The use of any firearm not approved by the Board is prohibited.

(2) All firearms carried by authorized armed security guards in the performance of their duties shall be owned or leased by the employer. Personally owned firearms shall not be carried by an armed security guard in the performance of his or her duties.

(c) The applicant for a firearm registration permit shall submit an application to the Board on a form provided by the Board.

(d) Each firearm registration permit issued under this section to an armed security guard shall be in the form of a pocket card designed by the Board and shall identify the contract security company or proprietary security organization by whom the holder of the firearm registration permit is employed. A firearm registration permit issued to an armed security guard expires one year after the date of its issuance and must be renewed annually unless the permit holder's employment terminates before the expiration of the permit. The Board may require all permit holders to complete continuing education courses approved by the Board before renewal of their permits.

(d1) Each firearm registration permit issued under this section to an armed private investigator shall be in the form of a pocket card designed by the Board and shall identify the name of the armed private investigator. While carrying a firearm and engaged in private protective services, the armed private investigator shall carry the firearms registration permit issued by the Board, together with valid identification, and shall disclose to any law enforcement officer that the person holds a valid permit and is carrying a firearm, whether concealed or in plain view, when approached or addressed by the law enforcement officer, and shall display both the permit and the proper identification upon the request of a law enforcement officer. A private investigator firearm registration permit expires one year from the date of issuance and shall be renewed annually. The Board may require all permit holders to complete continuing education courses approved by the Board before renewal of their permits.

(e) If an armed security guard terminates his or her employment with the contract security company or proprietary security organization, the firearm registration permit expires and must be returned to the Board within 15 working days of the date of termination of the employee.

(f) A contract security company or proprietary security organization shall be allowed to employ an individual for 30 days as an armed security guard pending completion of the firearms training required by this Chapter, if the contract security company or proprietary security organization obtains prior approval from the Director. The Board and the Attorney General shall provide by rule the procedure by which an armed private investigator, a contract security company, or a proprietary security organization applicant may be issued a temporary firearm registration permit by the Director of the Board pending a determination by the Board of whether to grant or deny an applicant a firearm registration permit.

(g) The Board may suspend, revoke, or deny a firearm registration permit if the holder or applicant has been convicted of any crime involving moral turpitude or any crime involving the illegal use, carrying, or possession of a deadly weapon or for violation of this section or rules promulgated by the Board to implement this section. The Director may summarily suspend a firearm registration permit pending resolution of charges involving the illegal use, carrying, or possession of a firearm lodged against the holder of the permit.

(h) The Board and the Attorney General shall establish a firearms training program for licensees and registered employees to be conducted by agencies and institutions approved by the Board and the Attorney General. The Board and the Attorney General may approve training programs conducted by a contract security company and the security department of a proprietary security organization, if the contract security company or security department of a proprietary security organization offers the courses listed in subdivision (1) of this subsection and if the instructors of the training program are certified trainers approved by the Board and the Attorney General:

(1) The basic training course approved by the Board and the Attorney General shall consist of a minimum of four hours of classroom training which shall include all of the following:
  a. Legal limitations on the use of hand guns and on the powers and authority of an armed security guard.
  b. Familiarity with this section.
  c. Range firing and procedure and hand gun safety and maintenance.
  d. Any other topics of armed security guard training curriculum which the Board deems necessary.

(2) An applicant for a firearm registration permit must fire a minimum qualifying score to be determined by the Board and the Attorney General on any approved target course approved by the Board and the Attorney General.

(3) A firearms registrant must complete a refresher course and shall requalify on the prescribed target course prior to the renewal of his or her firearm registration permit.

(4) The Board and the Attorney General shall have the authority to promulgate all rules necessary to administer the provisions of this section concerning the training requirements of this section.

(i) The Board may not issue a firearm registration permit to an applicant until the applicant's employer submits evidence satisfactory to the Board that the applicant:

(1) Has satisfactorily completed an approved training course.

(2) Meets all the qualifications established by this section and by the rules promulgated to implement this section.

(3) Is mentally and physically capable of handling a firearm within the guidelines set forth by the Board and the Attorney General.

(j) The Board and the Attorney General are authorized to prescribe reasonable rules to implement this section, including rules for periodic requalification with the firearm and for the maintenance of records relating to persons issued a firearm registration permit by the Board.

(k) All fees collected pursuant to G.S. 74C-9(e)(7) and (8) shall be expended, under the direction of the Board, for the purpose of defraying the expense of administering the firearms provisions of this Chapter.

(*l*) The Board and the Attorney General shall establish a training program for certified trainers to be conducted by agencies and institutions approved by the Board and the Attorney General. The Board or the Attorney General shall have the authority to promulgate all rules necessary to administer the provisions of this subsection.

(1) The Board and the Attorney General shall also establish renewal requirements for certified trainers. The Board may require all certified trainers to complete continuing education courses approved by the Board before renewal of their certifications.

(2) No certified firearms trainer shall certify a licensee or registrant unless the licensee or registrant has successfully completed the firearms training requirements set out above in subsection (h) of this section.

(m) The Board and the Attorney General shall establish a training program for unarmed security guards to be conducted by agencies and institutions approved by the Board and the Attorney General. The Board and the Attorney General shall have the authority to promulgate all rules necessary to administer the provisions of this subsection.

(n) A private investigator shall be permitted to carry a concealed weapon during the performance of his or her duties as a private investigator upon: (i) obtaining a concealed weapon permit issued pursuant to G.S. 14-415.11; (ii) successfully completing the firearms training course approved by the Board and the Attorney General; and (iii) having a notation affixed to the face of the firearms registration card designating that the armed private investigator is allowed to carry a concealed weapon. A private investigator who does not carry a weapon during the course of his or her duties as a private investigator but who wishes to carry a concealed weapon while not engaged in private investigative duties shall be permitted to do so upon completion of the requirements set forth in Article 54B of Chapter 14 of the General Statutes. (1979, c. 818, s. 2; 1983, c. 67, s. 3; 1989, c. 759, s. 11; 2001-487, s. 64(h); 2007-511, s. 8; 2009-328, s. 10.)

Effect of Amendments. — Session Laws 2009-328, s. 10, effective October 1, 2009, added the last two sentences in subsection (a).

OPINIONS OF ATTORNEY GENERAL

The definition of an armed security guard as set forth in subdivision (a)(1) includes a private investigator who carries a weapon. See opinion of Attorney General to James F. Kirk, Administrator, N.C. Private Protective Services Board, 60 N.C.A.G. 12 (1990).

§ 74C-14: Repealed by Session Laws 2009-328, s. 11, effective October 1, 2009.

§ 74C-15. Pocket identification cards issued to licensees and trainees.

(a) Upon the issuance of a license or trainee permit, a pocket identification card of design, size, and content approved by the Board shall be issued by the Board without charge to each licensee or trainee. The holder must have this card in his possession at all times when he is on duty and working within the scope of his employment. When a licensee or trainee to whom a card has been issued terminates his position as a licensee or trainee, the card must be surrendered to the Director of the Board within 10 working days thereafter.

(b) Repealed by Session Laws 1989, c. 759, s. 12. (1979, c. 818, s. 2; 1989, c. 759, s. 12; 2001-487, s. 64(i).)

§ 74C-16. Prohibited acts.

(a), (b) Repealed by Session Laws 1989, c. 759, s. 13.

(c) It shall be unlawful for anyone not licensed or registered as required under this Chapter to:

(1) Advertise or to hold himself out to be a licensee;

(2) Advertise or to hold himself out to perform services for which a license is required when, in fact, the individual is not licensed or registered in accordance with this Chapter.

(3) Repealed by Session Laws 1989, c. 759, s. 13.

(d) through (f) Repealed by Session Laws 1989, c. 759, s. 13. (1979, c. 818, s. 2; 1983, c. 794, s. 5; 1987, c. 657, ss. 7, 8; 1989, c. 759, s. 13.)

§ 74C-17. Enforcement.

(a) The Board is authorized to apply in its own name to any judge of the superior court of the General Court of Justice for an injunction in order to prevent any violation or threatened violation of the provisions of this Chapter.

(b) Any person, firm, association, or corporation or their agents and employees violating any of the provisions of this Chapter or knowingly violating any rule promulgated to implement this Chapter shall be guilty of a Class 1 misdemeanor. The Attorney General, or his representative, shall have concurrent jurisdiction with the district attorneys of this State to prosecute violations of this Chapter.

(c) In lieu of revocation or suspension of a license or permit under G.S. 74C-12, a civil penalty of not more than two thousand dollars ($2,000) may be assessed by the Board against any person or business who violates any provision of this Chapter or any rule of the Board adopted pursuant to this Chapter. In determining the amount of any penalty, the Board shall consider the degree and extent of harm caused by the violation. The clear proceeds of civil penalties provided for in this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(d) Proceedings for the assessment of civil penalties under this section shall be governed by Chapter 150B of the General Statutes. If the person assessed a civil penalty fails to pay the penalty to the Board, the Board may institute an action in the superior court of the county in which the person resides or has his principal place of business to recover the unpaid amount of the penalty. An action to recover a civil penalty under this section shall not relieve any party from any other penalty prescribed by law. (1979, c. 818, s. 2; 1983, c. 794, s. 6; 1989, c. 759, s. 14; 1993, c. 539, s. 557; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 98.)

Legal Periodicals. — For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'," see 68 N.C.L. Rev. 1035 (1990).

CASE NOTES

Board's Authority to Assess Civil Penalty Not Unconstitutional. — The authority of the Board under subsection (c) of this section to assess a civil penalty of up to $2,000 in lieu of revocation or suspension of a license is not an unconstitutional attempt to confer a judicial power on a state agency. The provision authorizing civil penalties is reasonably necessary to the Board in fulfilling its duties to require that those who hold themselves out as providing private protective services to citizens must meet high standards of training and professionalism. North Carolina Private Protective Servs. Bd. v. Gray, Inc., 87 N.C. App. 143, 360 S.E.2d 135 (1987).

§ 74C-18. Reciprocity; temporary permit.

(a) To the extent that other states which provide for licensing of any private protective services profession provide for similar action for citizens of this State, the Board, in its discretion, may grant a private protective services license to a nonresident who holds a valid private protective services license of the same type from another state upon satisfactory proof furnished to the Board that the standards of licensure in such other states are at least substantially equivalent to those prevailing in this State. Applicants shall make application to the Board on the form prescribed by the Board for all applicants, shall comply with the provisions of G.S. 74C-10, and shall pay the fees required of all applicants.

(b) The Director, in his discretion and subject to the approval of the Board, may issue a temporary permit to a nonresident who has complied with the provisions of G.S. 74C-10 and who is validly licensed in another state to engage in a private protective service activity incidental to a specific case originating in another state. A temporary permit may be issued for a period of no more than 30 days and may be renewed. A temporary permit may contain such restrictions which the Board, in its discretion, deems appropriate. (1979, c. 818, s. 2; 1983, c. 67, s. 4; 1989, c. 759, s. 15; 2001-487, s. 64(j).)

§ 74C-19. Severability.

If any provision of this Chapter or the application thereof to any person or circumstance is for any reason held invalid, such invalidity shall not affect other provisions or applications of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable. (1979, c. 818, s. 2.)

§ 74C-20: Repealed by Session Laws 1983, c. 673, s. 9.

§ 74C-21. Law enforcement officer provisions.

(a) No law enforcement officer of the United States, this State, any other state, or any political subdivision of a state shall be licensed as a private detective or security guard and patrol licensee under this Chapter.

(b) An off-duty law enforcement officer may be employed during his off-duty hours by a licensed security guard and patrol company on an employer-employee basis. An off-duty law enforcement officer shall not wear his police officer's uniform or use the police equipment while working for a security guard and patrol company.

(c) A law enforcement officer may provide security guard and patrol services on an individual employer-employee basis to a person, firm, association, or corporation that is not engaged in a security guard and patrol profession. (1989, c. 759, s. 16.)

CASE NOTES

Cited in State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992).

§ 74C-22. Continuing education.

The Board may require individuals holding a license, registration, certificate, or permit to complete continuing education courses approved by the Board before renewal. The Board shall establish, by rule, the number of hours of continuing education necessary for renewal and any other requirements for completion of continuing education courses. The Board shall have the authority to approve continuing education courses and shall consider the continuing education course criteria, including the course curriculum, the qualifications of the instructor, the potential benefit to the industry, and any other criteria the Board deems appropriate. (2007-511, s. 9.)

Editor's Note. — Session Laws 2007-511, s. 13, made this section effective October 1, 2007.

§ 74C-23. Acquisition or change of ownership or control of licensed firm, association, or corporation.

In the event a company, firm, or corporation licensed under this Chapter transfers ownership, control, or a majority of assets to another person, firm, association, or corporation, the person, firm, association, or corporation acquiring control or ownership shall have the following responsibilities:

(1) Notify the Director of the acquisition or change of ownership or control by registered mail within five business days from the date of the transaction.

(2) Describe the transaction that has occurred by providing the following information:
  a. The name and address of the registered agent of the party acquiring control or ownership or otherwise succeeding the licensee.
  b. The name and address of the acquiring party, including each individual owner of any interest in the party or, if the party is a corporation, the name and address of each officer of the corporation and member of the board of directors.
  c. Any change in location of any branch office.
  d. Any change in insurance or bonding limits.

(3) Return to the Director all licenses held by the licensee within five business days from the date of the transaction if the acquiring party does not continue to operate the business under its previous name and license.

(4) Provide to the Director within 60 calendar days from the date of the transaction the following:
  a. A list of all registrants or licensees affected by the transaction.
  b. Written confirmation of completion of any changes necessary for the acquiring party to comply with the requirements of this Chapter or any applicable rules adopted by the Board on a form approved by the Director. (2009-328, s. 12.)

Editor's Note. — Session Laws 2009-328, s. 18, made this section effective October 1, 2009.

§§ 74C-24 through 74C-29: Reserved for future codification purposes.

ARTICLE 2.

Private Protective Services Education Fund.

§ 74C-30. Private Protective Services Education Fund created; payments to Fund; management; use of funds.

(a) There is hereby created and established a special fund to be known as the "Private Protective Services Education Fund" (hereinafter Fund) which shall be set aside and maintained in the Office of the State Treasurer. The Fund shall be used in the manner provided in this Article for the education of licensees and registrants as deemed appropriate by the Board.

(b) Repealed by Session Laws 2009-328, s. 13, effective October 1, 2009.

(c) In addition to the fees provided for elsewhere in this Chapter, the Board shall charge the following fees which shall be deposited into the Fund:

(1) Repealed by Session Laws 2007-511, s. 10.

(2) The Board shall charge each new applicant for a licensee or trainee permit fifty dollars ($50.00), provided that for purposes of this Article a new applicant is hereby defined as an applicant who did not possess a license or trainee permit on July 1, 1983; and

(3) The Board is authorized to charge each licensee and trainee an additional amount, not to exceed fifty dollars ($50.00), on July 1 of any

year in which the balance of the Fund is less than twenty-five thousand dollars ($25,000), provided that any amount so assessed will be only so much as is needed to raise the level of the Fund to twenty-five thousand dollars ($25,000).

(d) The State Treasurer shall invest and reinvest the moneys in the Fund in a manner provided by law. The Board, in its discretion, may use the Fund for any of the following purposes:

(1) To advance education and research in the private protective services field for the benefit of those licensed or registered under the provisions of this Chapter and for the improvement of the industry.

(2) To underwrite educational seminars, training centers and other educational projects for the use and benefit generally of licensees, registrants, and trainees.

(3) To sponsor, contract for and to underwrite any and all additional educational training and research projects of a similar nature having to do with the advancement of the private protective services field in North Carolina. The Board shall have the authority to sponsor courses given by private individuals, associations, or corporations. However, the Board shall only grant funds as necessary to offset the actual cost of the educational course. Any individual, association, or corporation receiving grant money from the Board shall make the course available to the industry at large. Any individual, association, or corporation receiving grant money from the Board and advertising the course to the industry is required to include in its advertising the following statement: "The course is being given in whole or in part by a grant from the Private Protective Services Board."

(e) By a unanimous vote of the Board, funds in the Fund in excess of fifty thousand dollars ($50,000) may be converted to offset the operating expenses of the Board. However, in converting the funds, the Board shall make findings of fact by a written order or resolution supporting the need to make the conversion. (1983, c. 673, s. 2; 1985, c. 597, ss. 10, 11; 2007-511, s. 10; 2009-328, s. 13.)

Editor's Note. — Session Laws 2009-328, s. 13, effective October 1, 2009, substituted "Education" for "Recovery" in the Article heading.

Effect of Amendments. — Session Laws 2009-328, s. 13, effective October 1, 2009, in the section catchline, substituted "Education" for "Recovery"; in subsection (a), in the first sentence, substituted "Education" for "Recovery", and rewrote the second sentence; deleted former subsection (b), which read: "Nothing contained in this Article shall limit the authority of the Board to take disciplinary action against any licensee or trainee under this Chapter, nor shall the repayment in full or all obligations to the Fund by any licensee or trainee nullify or modify the effect of any other disciplinary proceeding brought under this Chapter."; in subsection (d), rewrote the introductory language; in subdivision (d)(1), inserted "or registered"; and, in subdivision (d)(2), inserted "registrants" near the end.

§§ 74C-31 through 74C-33: Repealed by Session Laws 2009-328, s. 14, effective October 1, 2009.

Chapter 74D.

Alarm Systems.

Article 1.

Alarm Systems Licensing Act.

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Article 2.

Alarm Systems Education Fund.

74D-30. Alarm Systems Education Fund created; payment to Fund; management; use of funds.
74D-31 through 74D-33. [Repealed.]

ARTICLE 1.

Alarm Systems Licensing Act.

§ 74D-1. Title.

This act may be cited as the "Alarm Systems Licensing Act." (1983, c. 786, s. 1.)

Editor's Note. — Session Laws 1985, c. 561, s. 7, designated G.S. 74D-1 through 74D-13 as Article 1 of Chapter 74D.

Session Laws 2007-323, s. 15.2, provides: "The Private Protective Services and Alarm Systems Licensing Boards shall pay the appropriate State agency for the use of physical facilities and services provided to those Boards by the State." For prior similar provisions, see Session Laws 1999-237, s. 19.4, Session Laws 2001-424, s. 23.2, and Session Laws 2005-276, s. 15.2.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'." For prior similar provisions, see Session Laws 2001-424, s. 1.2, and Session Laws 2005-276, s. 1.2.

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium." For prior similar provisions, see Session Laws 2001-424, s. 36.3, and Session Laws 2005-276, s. 46.3.

Session Laws 2007-323, s. 32.5 is a severability clause. For prior similar provisions, see Session Laws 2001-424, s. 36.5, and Session Laws 2005-276, s. 46.5.

OPINIONS OF ATTORNEY GENERAL

Licensing Required. — The Alarm Systems Licensing Act requires that businesses which install and service retail storefront alarms be licensed. See opinion of Attorney General to Mr. James F. Kirk, Administrator, Alarm Systems Licensing Board, 55 N.C.A.G. 89 (1986).

§ 74D-2. License requirements.

(a) License Required. — No person, firm, association, corporation, or department or division of a firm, association or corporation, shall engage in or hold itself out as engaging in an alarm systems business without first being licensed in accordance with this Chapter. A department or division of a firm, association, or corporation may be separately licensed under this Chapter if the distinct department or division, as opposed to the firm, association, or corporation as a whole, engages in an alarm systems business. The department or division shall ensure strict confidentiality of private security information, and the private security information of the department or division must, at a minimum, be physically separated from other premises of the firm, association, or corporation. For purposes of this Chapter an "alarm systems business" is defined as any person, firm, association or corporation that does any of the following:

(1) Sells or attempts to sell an alarm system device by engaging in a personal solicitation at a residence or business to advise, design, or consult on specific types and specific locations of alarm system devices.

(2) Installs, services, monitors, or responds to electrical, electronic or mechanical alarm signal devices, burglar alarms, monitored access control, or cameras used to detect burglary, breaking or entering, intrusion, shoplifting, pilferage, theft, or other unauthorized or illegal activity. This provision shall not apply to a locking device that records entry and exit data and does not transmit the data in real time to an on-site or off-site monitoring location, provided the installer is duly licensed by the North Carolina Locksmith Licensing Board.

(b) Repealed by Session Laws 1989, c. 730, s. 1.

(c) Qualifying Agent. — A business entity that engages in the alarm systems business is subject to all of the requirements listed in this subsection with respect to a qualifying agent. For purposes of this Chapter, a "qualifying agent" is an individual in a management position who is licensed under this Chapter and whose name and address have been registered with the Board. The requirements are:

(1) The business entity shall employ a designated resident qualifying agent who meets the requirements for a license issued under and who is, in fact, licensed under the provisions of this Chapter, unless otherwise approved by the Board. Provided, however, that this approval shall not be given unless the business entity has and continuously maintains in this State a registered agent who shall be an individual resident in this State. Service upon the registered agent appointed by the business entity of any process, notice or demand required by or permitted by law to be served upon the business entity by the Alarm Systems Licensing Board shall be binding upon the business entity and the licensee. Nothing herein contained shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon a business entity in any other manner or hereafter permitted by law.

(2) Repealed by Session Laws 2009-328, s. 15, effective October 1, 2009.

(3) In the event that the qualifying agent upon whom the business entity relies in order to do business ceases to perform his duties as qualifying agent, the business entity shall notify the board in writing within 10 working days. The business entity must obtain a substitute qualifying agent within 90 days after the original qualifying agent ceases to serve as qualifying agent.

(4) The license certificate shall list the name of the qualifying agent. No licensee shall serve as the qualifying agent for more than one business entity without the prior approval of the Board.

(5) Repealed by Session Laws 2009-328, s. 15, effective October 1, 2009.

(d) Criminal Record Check. — An applicant must meet all of the following requirements and qualifications determined by a background investigation conducted by the Board in accordance with G.S. 74D-2.1 and upon receipt of an application:

(1) The applicant is at least 18 years of age.

(2) The applicant is of good moral character and temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits: conviction by any local, State, federal, or military court of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving the illegal use, possession, sale, manufacture, distribution or transportation of a controlled substance, drug, narcotic, or alcoholic beverages; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking or entering, burglary, larceny, or of any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this subsection, "conviction" means and includes the entry of a plea of guilty, plea of no contest, or a verdict rendered in open court by a judge or jury.

(3) The applicant has the necessary training, qualifications and experience to be licensed.

(e) Examination. — The Board may require the applicant to demonstrate the applicant's qualifications by examination.

(f) Confidentiality. — Except for purposes of administering the provisions of this section and for law enforcement purposes, the home address or telephone number of an applicant, licensee, or the spouse, children, or parents of an applicant or licensee is confidential under G.S. 132-1.2, and the Board shall not disclose this information unless the applicant or licensee consents to the disclosure. The provisions of this subsection shall not apply when a licensee's home address or telephone number is also the licensee's business address and telephone number. Violation of this subsection shall constitute a Class 3 misdemeanor. (1983, c. 786, s. 1; 1985, c. 561, s. 1; 1989, c. 730, s. 1; 1991 (Reg. Sess., 1992), c. 953, s. 1; 1999-446, s. 2; 2002-147, s. 4; 2009-328, s. 15; 2009-557, s. 1.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. — Session Laws 2009-328, s. 15, effective October 1, 2009, rewrote the section catchline; in subsection (a), added the subsection catchline; in subsection (c), added the introductory paragraph; in subdivision (c)(1), substituted "The business entity shall" for "No business entity shall do business under this Chapter unless the business entity has in its" at the beginning; deleted former subdivision (c)(2), which read: "For the purposes of this Chapter, a 'qualifying agent' means an individual in a management position who is licensed under this Chapter and whose name and address have been registered with the board"; deleted former subdivision (c)(5), relating to criminal record checks; in subsection (d), rewrote the introductory language, and made related stylistic and punctuation changes throughout; in subsection (e), added the subsection catchline; and, in subsection (f), added the subsection catchline, and made minor stylistic and gender neutral changes.

Session Laws 2009-557, s. 1, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date, rewrote subsection (a); in subdivision (c)(3), substituted "90 days" for "30 days" and deleted "unless the board, in its discretion, and upon written request of the business entity, extends this period for good cause for a period of time not to exceed three months" at the end; substituted "the qualifying agent" for "at least one designated qualifying agent" at the end of the first sentence in subdivision (c)(4); substituted "by examination" for "by oral or written examination, or both" at the end of subsection (d); and made minor stylistic and gender neutral changes.

OPINIONS OF ATTORNEY GENERAL

Businesses Which Install and Service Retail Storefront Alarms. — The Alarm Systems Licensing Act requires that businesses which install and service retail storefront alarms be licensed under this Chapter. See opinion of Attorney General to Mr. James F. Kirk, Administrator, Alarm Systems Licensing Board, 55 N.C.A.G. 89 (1986).

CASE NOTES

Cited in Decker v. UNUM Provident Corp., — F.3d —, 2004 U.S. App. LEXIS 1268 (4th Cir. Jan. 28, 2004).

§ 74D-2.1. Criminal background checks.

(a) Authorization. — Upon receipt of an application for a license or registration, the Board shall conduct a background investigation to determine whether the applicant meets the requirements for a license or registration as set out in G.S. 74D-2(d). The Department of Justice may provide a criminal record check to the Board for a person who has applied for a new or renewal license or registration through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of a new applicant, and the Department of Justice shall provide a criminal record check based upon the applicant's fingerprints. The Board may request a criminal record check from the Department of Justice for a renewal applicant based upon the applicant's fingerprints in accordance with policy adopted by the Board. The Board shall provide any additional information required by the Department of Justice and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection.

The Board may require a new or renewal applicant to obtain a criminal record report from one or more reporting services designated by the Board to provide criminal record reports. Applicants are required to pay the designated reporting service for the cost of these reports.

(b) Confidentiality. — The Board shall keep all information obtained pursuant to this section confidential in accordance with applicable State law and federal guidelines, and the information shall not be a public record under Chapter 132 of the General Statutes. (2009-328, s. 16.)

Editor's Note. — Session Laws 2009-328, s. 18, made this section effective October 1, 2009.

§ 74D-3. Exemptions.

The provisions of this Chapter shall not apply to:

(1) A person, firm, association or corporation that sells or manufactures alarm systems, unless the person, firm, association or corporation makes personal solicitations at a residence or business to advise, design, or consult on specific types and specific locations of alarm system devices, installs, services, monitors, or responds to alarm systems at or from a protected premises or a premises to be protected

and thereby obtains knowledge of specific application or location of the alarm system. A person licensed under this Chapter may hire a consultant to troubleshoot a location or installation for a period of time not to exceed 48 hours in a one-month period if the licensee submits a report to the Board within 30 days from the date of the consultation designating the consultant as a temporary consultant;

(2) Installation, servicing or responding to fire alarm systems or any alarm device which is installed in a motor vehicle, aircraft or boat;

(3) Installation of an alarm system on property owned by or leased to the installer;

(4) An alarm monitoring company located in another state which demonstrates to the Board's satisfaction that it does not conduct any business through a personal representative present in this State but which solicits and conducts business solely through interstate communication facilities such as telephone messages, earth satellite relay stations and the United States postal service; and

(5) A person or business providing alarm systems services to a State agency or local government if that person or business has been providing those services to the State agency or local government for more than five years prior to the effective date of this Chapter, and the State agency or local government joins with the person or business in requesting the application of this exemption. (1983, c. 786, s. 1; 1987, c. 11; 1989, c. 730, s. 2; 1991 (Reg. Sess., 1992), c. 953, s. 2; 2009-557, s. 2.)

Effect of Amendments. — Session Laws 2009-557, s. 2, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date, in subdivision (1), substituted "the person, firm, association or corporation makes personal solicitations at a residence or business to advise, design, or consult" for "such persons, firm, association or corporation makes personal inspections of interiors of residences or businesses to advise" in the first sentence, added the second sentence, and made minor stylistic changes.

OPINIONS OF ATTORNEY GENERAL

Businesses Which Install and Service Retail Storefront Alarms. — The Alarm Systems Licensing Act requires that businesses which install and service retail storefront alarms be licensed under this Chapter. See opinion of Attorney General to Mr. James F. Kirk, Administrator, Alarm Systems Licensing Board, 55 N.C.A.G. 89 (1986).

§ 74D-4. Alarm Systems Licensing Board.

(a) The Alarm Systems Licensing Board is hereby established.

(b) The Board shall consist of seven members: the Attorney General or his designee; two persons appointed by the Governor, one of whom shall be licensed under this Chapter and one of whom shall be a public member; two persons appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121, one of whom shall be licensed under this Chapter and one of whom shall be a public member; and two persons appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, one of whom shall be licensed under this Chapter and one of whom shall be a public member.

(c) Each member shall be appointed for a term of three years and shall serve until a successor is installed. No member shall serve more than two complete three-year consecutive terms. The term of each member, other than the Attorney General or his designee, who is serving on August 7, 1989, shall terminate on June 30, 1989. Of the appointments made by the General

Assembly upon the recommendation of the President of the Senate to begin on July 1, 1989, one member shall be for a term of one year and one member shall be for a term of three years. Of the appointments made by the General Assembly upon the recommendation of the Speaker of the House of Representatives, one member shall be appointed for a term of two years and one member shall be appointed for a term of three years. Thereafter all terms shall be for three years.

(d) A vacancy on the Board shall be filled for the unexpired term by the original appointing authority. Vacancies in legislative appointments shall be filled under G.S. 120-122. A vacancy may be created by removal of a Board member, either at the pleasure of the original appointing authority or by the remaining members of the Board for misconduct, incompetence or neglect of duty. A Board member may only be removed by remaining board members pursuant to a hearing at which the member subject to removal has an opportunity to be heard.

(e) Board members who are also State officers or employees shall receive no per diem compensation for serving on the Board, and shall only receive the travel allowances set forth in G.S. 138-6. All other Board members shall receive reimbursement in accordance with G.S. 93B-5(b) and, notwithstanding G.S. 93B-5(a), shall receive as compensation for their services per diem not to exceed one hundred dollars ($100.00) for each day during which they are engaged in the official business of the Board. The Board shall set the per diem compensation of Board members who are not also State officers or employees.

(f) The Board shall elect a chairman and a vice-chairman from its membership by majority vote at the first meeting of its fiscal year. The vice-chairman shall serve as chairman of the screening committee and shall also serve as chairman in the chairman's absence. At no time shall both the positions of chairman and vice-chairman be held by either an industry representative or a nonindustry representative.

(g) The Board shall meet at the call of the chairman or a majority of the members of the Board. The Board shall adopt rules governing the call and conduct of its meetings. A majority of the current Board membership constitutes a quorum. (1983, c. 786, s. 1; 1985, c. 561, s. 4; 1985 (Reg. Sess., 1986), c. 1026, s. 18; 1989, c. 730, s. 3; 1991 (Reg. Sess., 1992), c. 953, s. 3; 1995, c. 490, s. 6.)

Editor's Note. — Session Laws 1989, c. 500, s. 59 provides: "The Private Protective Services and Alarm Systems Licensing Boards are responsible for adjusting fees as necessary within the statutory limits to ensure that both boards are operated on a self-supporting fee-funded basis."

Session Laws 1995, c. 490, which amended this section, in s. 65 provides that this act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began.

Session Laws 1999-237, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities during, the 1999-2001 biennium."

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999.'"

Session Laws 1999-237, s. 30.4 contains a severability clause.

§ 74D-5. Powers of the Board.

(a) In addition to the powers conferred upon the Board elsewhere in this Chapter, the Board shall have the power to:

(1) Promulgate rules necessary to carry out and administer the provisions of this Chapter including the authority to require the submission of reports and information by licensees under this Chapter;

(2) Determine minimum qualifications and establish minimum education, experience, and training standards for applicants and licensees under this Chapter;

(3) Conduct investigations regarding alleged violations and make evaluations as may be necessary to determine if licensees and registrants under this Chapter are complying with the provisions of this Chapter;

(4) Adopt and amend bylaws, consistent with law, for its internal management and control;

(5) Investigate and approve individual applicants to be licensed or registered according this Chapter;

(6) Deny, suspend, or revoke any license issued or to be issued under this Chapter to any applicant or licensee who fails to satisfy the requirements of this Chapter or the rules established by the Board. The denial, suspension, or revocation of such license shall be in accordance with Chapter 150B of this General Statutes of North Carolina;

(7) Issue subpoenas to compel the attendance of witnesses and the production of pertinent books, accounts, records, and documents. The district court shall have the power to impose punishment pursuant to G.S. 5A-21 et seq. for acts occurring in matters pending before the Board which would constitute civil contempt if the acts occurred in an action pending in court; and

(8) Contract for services as necessary to carry out the functions of the Board.

(b) The chairman of the Board or his representative designated to be a hearing officer may conduct any hearing called by the board for the purpose of denial, suspension, or revocation of a license or registration under this Chapter. (1983, c. 786, s. 1; 1987, c. 827, s. 1; 1999-456, s. 21.)

§ 74D-5.1. Position of Director created.

The position of Director of the Alarm Systems Licensing Board is hereby created within the Department of Justice. The Attorney General shall appoint a person to fill this full-time position. The Director's duties shall be to administer the directives contained in this Chapter and the rules promulgated by the Board to implement this Chapter and to carry out the administrative duties incident to the functioning of the Board in order to actively police the alarm systems industry to insure compliance with the law in all aspects. The Director may issue a temporary grant or denial of a request for registration subject to final action by the Board at its next regularly scheduled meeting. (1985, c. 561, s. 3; 1991 (Reg. Sess., 1992), c. 953, s. 4; 1999-456, s. 22; 2001-487, s. 65(a).)

§ 74D-5.2. Investigative powers of the Attorney General.

The Attorney General for the State of North Carolina shall have the power to investigate or cause to be investigated any complaints, allegations, or suspicions of wrongdoing or violations of this Chapter involving individuals licensed, or to be licensed, under this Chapter. Any investigation conducted pursuant to this section is deemed confidential and is not subject to review under G.S. 132-1 until the investigation is complete and a report is presented to the Board. However, the report may be released to the licensee after the investigation is complete but before the report is presented to the Board. (1985, c. 561, s. 5; 2009-557, s. 3.)

Effect of Amendments. — Session Laws 2009-557, s. 3, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date, added the last two sentences of the section.

§ 74D-6. Denial of a license or registration.

Upon a finding that the applicant meets the requirements for licensure or registration under this Chapter, the Board shall determine whether the applicant shall receive the license or registration applied for. The grounds for denial include:

(1) Commission of some act which, if committed by a registrant or licensee, would be grounds for the suspension or revocation of a registration or license under this Chapter;

(2) Conviction of a crime involving fraud;

(3) Lack of good moral character or temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits: conviction by any local, State, federal, or military court of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverages; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking or entering, burglary or larceny or of any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this subsection "conviction" means and includes the entry of a plea of guilty, plea of no contest, or a verdict rendered in open court by a judge or jury;

(4) Previous denial under this Chapter or previous revocation for cause;

(5) Knowingly making any false statement or misrepresentation in an application made to the Board for a license or registration. (1983, c. 786, s. 1; 1985, c. 561, s. 2; 1991 (Reg. Sess., 1992), c. 953, s. 5.)

§ 74D-7. Form of license; term; assignability; renewal; posting; branch offices; fees.

(a) The license when issued shall be in a form determined by the Board and shall state all of the following:

(1) The name of the licensee.

(2) The name under which the licensee is to operate.

(3) The number and expiration date of the license.

(b) The license shall be issued for a term of two years. Each license must be renewed before expiration of the term of the license. Following issuance, the license shall at all times be posted in a conspicuous place in the principal place of business of the licensee. A license issued under this Chapter is not assignable.

(c) No licensee shall engage in any business regulated by this Chapter under a name other than the licensee name or names which appear on the certificate issued by the Board.

(d) Any branch office of an alarm systems business shall obtain a branch office certificate. A separate certificate stating the location and licensed qualifying agent shall be posted at all times in a conspicuous place in each branch office. Every business covered under the provisions of this Chapter shall file in writing with the Board the addresses of each of its branch offices. All licensees of a branch office shall notify the Board in writing before the establishment, closing, or changing of the location of any branch office. A licensed qualifying agent may be responsible for more than one branch office of an alarm systems business with the prior approval of the Board. Temporary approval may be granted by the Director, upon application of the qualifying agent, for a period of time not to exceed 10 working days after the adjournment of the next regularly scheduled meeting of the Board unless the Board determines that the application should be denied.

(e) The Board may charge the following fees, which must be expended, under the direction of the Board, to defray the expense of administering this Chapter:

(1) A nonrefundable initial license application fee in an amount not to exceed one hundred fifty dollars ($150.00).

(2) A new or renewal license fee in an amount not to exceed five hundred dollars ($500.00).

(3) A late license renewal fee to be paid in addition to the renewal fee due in an amount not to exceed one hundred dollars ($100.00), if the license has not been renewed on or before the expiration date of the license.

(4) A new or renewal registration fee in an amount not to exceed fifty dollars ($50.00) plus any fees charged to the board for background checks by the State Bureau of Investigation.

(5) A fee for reregistration of an employee who changes employment to another licensee, not to exceed ten dollars ($10.00).

(6) A branch office certificate fee not to exceed one hundred fifty dollars ($150.00).

(7) A fee not to exceed fifty dollars ($50.00) for each reconsideration of a license or registration permit that has been filed or returned to the applicant for correctable errors.

(8) A late registration fee, to be paid in addition to the registration renewal fee, not to exceed twenty dollars ($20.00) for an application submitted no more than 30 days after the expiration of the registration permit. A registration application submitted more than 30 days after the registration has expired shall be registered as a new applicant. (1983, c. 786, s. 1; 1989, c. 730, s. 4; 1991 (Reg. Sess., 1992), c. 953, s. 6; 2001-487, s. 65(b); 2004-201, s. 1; 2009-557, s. 4.)

Effect of Amendments. — Session Laws 2009-557, s. 4, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date, in the introductory paragraph of subsection (a), substituted "in a form" for "in such form as may be" and added "all of the following" at the end; deleted "and" at the end of subdivision (a)(2) and substituted periods for the former semicolons at the end of subdivisions (a)(1) and (a)(2); substituted "in writing before" for "in writing, within 10 working days after" in the fourth sentence of subsection (d); rewrote the introductory language of subsection (e), which read: "The Board may charge fees as follows:"; inserted "new or renewal" in subdivision (e)(4); added subdivision (e)(8); and deleted the former last sentence of subsection (e) which read: "All fees collected pursuant to this section shall be expended, under the direction of the Board, for the purpose of defraying the expense of administering this Chapter."

§ 74D-8. Registration of persons employed.

(a)(1) All licensees of an alarm systems business shall register with the Board within 30 days after the employment begins, all of the licensee's employees that are within the State, unless in the discretion of the Director, the time period is extended for good cause. To register an employee, a licensee shall submit to the Board as to the employee: set(s) of classifiable fingerprints on standard F.B.I. applicant cards; recent color photograph(s) of acceptable quality for identification; and statements of any criminal records as deemed appropriate by the Board.

(2) Except during the period allowed for registration in subdivision (a)(1) of this section, no alarm systems business may employ any employee unless the employee's registration has been approved by the Board as set forth in this section.

(b) The Director shall be notified in writing of the termination of any employee registered under this Chapter within 20 days after the termination.

(c) The Board shall issue a registration card to each employee of a licensee who is registered under this Chapter. The registration card shall expire two years after its date of issuance and shall be renewed before the expiration of the term of the registration. If a registered person changes employment to another licensee, the registration card may remain valid; however, persons changing employment must pay the fee authorized by G.S. 74D-7(e)(5).

(d) If all required documents, properly completed, have been submitted to the Board no later than 20 days after an employee begins employment, the employer of each applicant for registration shall give the applicant a copy of the complete application which the employee can use until a registration card issued by the Board is received. (1983, c. 786, s. 1; 1985, c. 561, s. 6; 1989, c. 730, s. 5; 1991 (Reg. Sess., 1992), c. 953, s. 7; 2001-487, s. 65(c); 2009-557, s. 5.)

Effect of Amendments. — Session Laws 2009-557, s. 5, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date, in subdivision (a)(1), substituted "30 days" for "20 days" in the first sentence, and substituted "as deemed appropriate by the Board" for "obtained from the appropriate authority in each area where the employee has resided within the immediately preceding 48 months" at the end of the last sentence.

§ 74D-8.1. Apprenticeship registration permit.

(a) The Board may issue an apprenticeship registration permit to an applicant who is 16 or 17 years old and currently enrolled in high school if the applicant holds a valid drivers license and submits at least three letters of recommendation stating that the applicant is of good moral character as provided in G.S. 74D-2(d)(2). The letters of recommendation shall be from persons who are not related to the individual, and at least one of the letters shall be from an official at the school where the applicant is currently enrolled.

(b) There shall be no fee for an apprenticeship registration permit, and the permit shall expire when the holder attains the age of 18 years. The denial, suspension, or revocation of an apprenticeship registration permit shall be in accordance with the provisions of Chapter 150B of the General Statutes.

(c) The applicant shall not perform services as authorized under this Chapter until after the Board has reviewed his or her application and issued him or her an apprenticeship registration permit. The holder of an apprenticeship registration permit shall be accompanied by a licensee or registered employee while engaged in activities authorized under this Chapter. (1999-446, s. 3.)

§ 74D-9. Certificate of liability insurance required; form and approval; suspension for noncompliance.

(a) through (c) Repealed by Session Laws 1985, c. 561, s. 8.

(d) No license shall be issued under this act unless the applicant files with the Board evidence of a policy of liability insurance which policy must provide for the following minimum coverage: fifty thousand dollars ($50,000) because of bodily injury or death of one person as a result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his employment; subject to said limit for one person, one hundred thousand dollars ($100,000) because of bodily injury or death of two or more persons as the result of the negligent act or acts of the principal insured or his agent operating in the course and scope of his or her agency; twenty thousand dollars ($20,000) because of injury to or destruction of property of others as the result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his or her agency.

(e) An insurance carrier shall have the right to cancel such policy of liability insurance upon giving written notice to the Board within a reasonable time before the effective date of the cancellation. Provided, however, that such cancellation shall not affect any liability on the policy which accrued prior thereto. The policy of liability shall be approved by the Board as to form, execution, and terms thereon.

(f) Every licensee shall at all times maintain on file with the Board a certificate of insurance required by this Chapter in full force and effect and upon failure to do so, the license of such licensee shall be automatically suspended and shall not be reinstated until an application therefor, in the form prescribed by the Board, is filed together with a proper insurance certificate. (1983, c. 786, s. 1; 1985, c. 561, s. 8; 1989, c. 730, s. 6; 1991 (Reg. Sess., 1992), c. 953, s. 8.)

§ 74D-10. Suspension or revocation of licenses and registrations; appeal.

(a) The Board may, after notice and an opportunity for hearing, suspend or revoke a license or registration issued under this Chapter if it is determined that the licensee or registrant has:

(1) Made any false statement or given any false information in connection with any application for a license or registration, or for the renewal or reinstatement of a license or registration.

(2) Violated any provision of this Chapter.

(3) Violated any rule promulgated by the Board pursuant to the authority contained in this Chapter.

(4) Been convicted of any crime involving moral turpitude or any other crime involving violence or the illegal use, carrying, or possession of a dangerous weapon.

(5) Failed to correct business practices or procedures that have resulted in a prior reprimand by the Board.

(6) Impersonated or permitted or aided and abetted any other person to impersonate a law-enforcement officer of the United States, this State, or any of its political subdivisions.

(7) Engaged in or permitted any employee to engage in any alarm systems business when not lawfully in possession of a valid license issued under the provisions of this Chapter.

(8) Committed an unlawful breaking or entering, assault, battery, or kidnapping.

(9) Committed any other act which is a ground for the denial of an application for a license or registration under this Chapter.

(10) Failed to maintain the certificate of liability required by this Chapter.

(11) Any judgment of incompetency by a court having jurisdiction under Chapter 35A or former Chapter 35 of the General Statutes or commitment to a mental health facility for treatment of mental illness, as defined in G.S. 122C-3(21), by a court having jurisdiction under Article 5 of Chapter 122C of the General Statutes.

(12) Accepted payment in advance for services not performed within a reasonable time period.

(13) A lack of temperate habits or good moral character. The acts that are prima facie evidence of lack of temperate habits or good moral character under G.S. 74D-6(3) are prima facie evidence of the same under this subdivision.
(14) Been previously denied a license or registration under this Chapter or previously had a license or registration revoked for cause.
(15) Engaged in the alarm systems profession under a name other than the name under which the license was obtained under the provisions of this Chapter.
(16) Advertised or solicited business using a name other than that in which a license was issued.
(17) Failed or refused to reasonably cooperate with the Board or its agents during an investigation of any complaint, allegation, suspicion of wrongdoing, or violation of this Chapter.
(18) Failed to properly make any disclosure or provide documents or information required by this Chapter or by the Board.
(19) Engaged in conduct that constitutes dereliction of duty or otherwise deceives, defrauds, or harms the public in the course of professional activities or services.
(20) Demonstrated a lack of financial responsibility.

(b) The revocation or suspension of license or registration by the Board as provided in subsection (a) shall be in writing, stating the grounds upon which the Board decision is based. The aggrieved person shall have the right to appeal from such decision as provided in Chapter 150B of the General Statutes. (1983, c. 786, s. 1; 1985, c. 561, s. 9; 1987, c. 550, s. 21; c, 827; s. 1; 1989, c. 730, s. 7; 1991 (Reg. Sess., 1992), c. 953, s. 9; 2009-557, s. 6.)

Effect of Amendments. — Session Laws 2009-557, s. 6, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date, in subsection (a), in subdivision (a)(13), deleted "of" preceding "good moral" in the first sentence; added subdivisions (a)(14) through (a)(20) and made minor stylistic changes.

§ 74D-11. Enforcement.

(a) The Board is authorized to apply in its own name to any judge of the Superior Court of the General Court of Justice for an injunction in order to prevent any violation or threatened violation of the provisions of this Chapter.

(b) Any person, firm, association, corporation, or department or division of a firm, association or corporation, or their agents and employees violating any of the provisions of this Chapter or knowingly violating any rule promulgated to implement this Chapter shall be guilty of a Class 1 misdemeanor. The Attorney General, or his representative, shall have concurrent jurisdiction with the district attorneys of this State to prosecute violations of this Chapter.

(c) The regulation of alarm systems businesses shall be exclusive to the Board; however, any city or county shall be permitted to require an alarm systems business operating within its jurisdiction to register and to supply information regarding its license, and may adopt an ordinance to require users of alarm systems to obtain revocable permits when alarm usage involves automatic signal transmission to a law-enforcement agency.

(d) In lieu of revocation of suspension of a license or registration under G.S. 74D-10, a civil penalty of not more than two thousand dollars ($2,000) may be assessed by the Board against any person who violates any provision of this Chapter, or any rule of the Board adopted pursuant to this Chapter. In determining the amount of any penalty, the Board shall consider the degree and extent of harm caused by the violation. The clear proceeds of all penalties collected under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(e) Proceedings for the assessment of civil penalties shall be governed by Chapter 150B of the General Statutes. If the person assessed a penalty fails to pay the penalty to the Board, the Board may institute an action in the superior court of the county in which the person resides or has his principal place of business to recover the unpaid amount of the penalty. An action to recover a civil penalty under this section shall not relieve any party from any other penalty prescribed by law.

(f) The sale, installation, or service of an alarm system by an unlicensed or unregistered person shall constitute a threat to the public safety, and any contract for the sale, installation, or service of an alarm system shall be deemed void and unenforceable. (1983, c. 786, s. 1; 1989, c. 730, s. 8; 1991 (Reg. Sess., 1992), c. 953, s. 10; 1993, c. 539, s. 558; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 127; 2009-557, s. 7.)

Effect of Amendments. — Session Laws 2009-557, s. 7, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date, added subsection (f).

§ 74D-12. Severability.

If any provision of this Chapter or the application thereof to any person or circumstance is for any reason held invalid, such invalidity shall not affect other provisions or applications of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable. (1983, c. 786, s. 1.)

§ 74D-13. Transfer of funds.

All fees collected pursuant to Chapter 74C of the General Statutes from alarm systems businesses which have not been expended upon January 1, 1984, shall be transferred to the Board by the Private Protective Services Board for the purpose of defraying the expenses of administering this act. (1983, c. 786, s. 1.)

§ 74D-14. Proof of licensure to maintain or commence action.

An alarm systems business may not maintain any action in any court of the State for the collection of compensation for performing an act for which a license or registration is required by this Chapter without alleging and proving that the alarm systems business is appropriately licensed and the employee or agent of the alarm systems business is appropriately registered upon entering into a contract with the consumer. An alarm systems installation, maintenance, or monitoring contract entered into with a consumer shall be void if the consumer confirms through records maintained by the Board that the alarm systems business is not properly licensed or the consumer establishes through records maintained by the Board that the person enticing the consumer to enter into the contract is not properly registered by the Board. The sale, installation, or service of an alarm system by an unlicensed or unregistered employee shall be deemed an unfair and deceptive trade practice and shall be actionable under Chapter 75 of the General Statutes. (2009-557, s. 8.)

Editor's Note. — Session Laws 2009-557, s. 12, made this section effective October 1. 2009, and applicable to licenses or registrations issued or renew on or after that date.

§§ 74D-15 through 74D-29: Reserved for future codification purposes.

ARTICLE 2.

Alarm Systems Education Fund.

§ 74D-30. Alarm Systems Education Fund created; payment to Fund; management; use of funds.

(a) There is hereby created and established a special fund to be known as the "Alarm Systems Education Fund" (hereinafter Fund) which shall be set aside and maintained in the office of the State Treasurer. The Fund shall be used in the manner provided in this Article for the education of licensees and registrants.

(b) Repealed by Session Laws 2009-557, s. 10, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date.

(c) In addition to the fees provided for elsewhere in this Chapter, the Board shall charge the following fees which shall be deposited into the Fund:

(1) On July 1, 1985, the Board shall charge every licensee on that date a fee of fifty dollars ($50.00);

(2) The Board shall charge each new applicant for a license fifty dollars ($50.00), provided that for purposes of this Article a new applicant is hereby defined as an applicant who did not possess a license on July 1, 1985; and

(3) The Board is authorized to charge each licensee an additional amount, not to exceed fifty dollars ($50.00), on July 1 of any year in which the balance of the Fund is less than twenty-five thousand dollars ($25,000).

(d) The State Treasurer shall invest and reinvest the moneys in the Fund in a manner provided by law. The Board in its discretion, may use the Fund for any of the following purposes:

(1) To advance education and research in the alarm systems field for the benefit of those licensed under the provisions of this Chapter and for the improvement of the industry,

(2) To underwrite educational seminars, training centers and other educational projects for the use and benefit generally of licensees, and

(3) To sponsor, contract for and to underwrite any and all additional educational training and research projects of a similar nature having to do with the advancement of the alarm systems field in North Carolina. (1985, c. 561, s. 7; 2009-557, s. 10.)

Editor's Note. — Session Laws 2009-557, s. 9, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date, substituted "Education Fund" for "Recovery Fund" in the Article heading.

Effect of Amendments. — Session Laws 2009-557, s. 10, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date, substituted "Alarm Systems Education Fund" for "Alarm Systems Recovery Fund" in the section heading and first sentence of subsection (a); rewrote the second sentence of subsection (a); deleted former subsection (b) which read: "Nothing contained in this Article shall limit the authority of the Board to take disciplinary action against any licensee under this Chapter, nor shall the repayment in full of all obligations to the Fund by any licensee nullify or modify the effect of any other disciplinary proceeding brought under this Chapter"; substituted "twenty-five thousand dollars ($25,000)" for "one hundred thousand dollars ($100,000)" at the end of subdivision (c)(3); and, in the introductory paragraph of subsection (d), deleted "provided that sufficient liquidity shall be maintained to satisfy claims authorized by the Board" from the end of the first sentence, deleted the former second sentence, which read: "The proceeds from such investments shall be deposited to the credit of the Fund," and substituted "the Fund" for "any and all of the proceeds from such investments" in the present second sentence; and made a minor stylistic change.

§§ 74D-31 through 74D-33: Repealed by Session Laws 2009-557, s. 11, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date.

§§ 74D-31 through 74D-33: Repealed by Session Laws 2009-557, s. 11, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date.

§ 74D-30. Alarm Systems Education Fund created; payment to Fund; management; use of funds.

(a) There is hereby created and established a special fund to be known as the "Alarm Systems Education Fund" (hereinafter Fund) which shall be set aside and maintained in the office of the State Treasurer. The Fund shall be used in the manner provided in this Article for the education of licensees and registrants.

(b) Repealed by Session Laws 2009-557, s. 10, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date.

(c) In addition to the fees provided for elsewhere in this Chapter, the Board shall charge the following fees which shall be deposited into the Fund:

(1) On July 1, 1985, the Board shall charge every licensee on that date a fee of fifty dollars ($50.00).

(2) The Board shall charge each new applicant for a license fifty dollars ($50.00), provided that for purposes of this Article a new applicant is hereby defined as an applicant who did not possess a license on July 1, 1985; and

(3) The Board is authorized to charge each licensee an additional amount, not to exceed fifty dollars ($50.00), on July 1 of any year in which the balance of the Fund is less than twenty-five thousand dollars ($25,000).

(d) The State Treasurer shall invest and reinvest the moneys in the Fund in a manner provided by law. The Board in its discretion, may use the Fund for any of the following purposes:

(1) To advance education and research in the alarm systems field for the benefit of those licensed under the provisions of this Chapter and for the improvement of the industry;

(2) To underwrite educational seminars, training centers and other educational projects for the use and benefit generally of licensees; and

(3) To sponsor, contract for and to underwrite any and all additional educational training and research projects of a similar nature having to do with the advancement of the alarm systems field in North Carolina. (1985, c. 561, s. 1; 2009-557, s. 10.)

Editor's Note. — Session Laws 2009-557, s. 9, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date, substituted "Education Fund" for "Recovery Fund" in the article heading.

Effect of Amendments. — Session Laws 2009-557, s. 10, effective October 1, 2009, and applicable to licenses or registrations issued or renewed on or after that date, substituted "Alarm Systems Education Fund" for "Alarm Systems Recovery Fund" in the section heading and first sentence of subsection (a); deleted the second sentence of subsection (a); repealed subsection (b), which read: "Nothing contained in this Article shall limit the authority of the Board to take disciplinary action against any licensee under this Chapter, nor shall the repayment in full of all obligations to the Fund by any licensee nullify or modify the effect of any other disciplinary proceeding brought under this Chapter"; substituted "twenty-five thousand dollars ($25,000)" for "one hundred thousand dollars ($100,000)" at the end of subdivision (c)(3); and, in the introductory paragraph of subsection (d), deleted "provided that sufficient liquidity shall be maintained to satisfy claims authorized by the Board" from the end of the first sentence, deleted the former second sentence, which read: "The proceeds from such investments shall be deposited to the credit of the Fund," and substituted "the Fund for" for "any and all of the proceeds from such investments" in the present second sentence, and made a minor stylistic change.

Chapter 74E.

Company Police Act.

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§ 74E-1. Title.

This Chapter is the "Company Police Act" and may be cited by that name. (1991 (Reg. Sess., 1992), c. 1043, s. 1.)

Local Modification. — Ashe: (As to Chapter 74E) 2008-78, s. 2.

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 1043, ss. 1 and 8, enacted this Chapter and repealed Chapter 74A, respectively. Where appropriate, the historical citations and annotations under sections of repealed Chapter 74A have been placed under corresponding sections of this Chapter.

Session Laws 2005-231, s. 12, provides: "When this act becomes law, all certificates issued to police agencies at private institutions of higher education and commissions issued to their police officers pursuant to Chapter 74E of the General Statutes shall automatically convert to certification and commissions issued pursuant to this act and shall be administered in conformity with this act. Notwithstanding any of the provisions of Chapter 74G of the General Statutes, as enacted by this act, or the provisions of Chapter 74E of the General Statutes, the board of trustees of any educational institution that, on the effective date of this act, has a company police agency licensed pursuant to Chapter 74E of the General Statutes, may elect to continue to have its officers certified under Chapter 74E of the General Statutes rather than pursuant to Chapter 74G of the General Statutes, as enacted by this act, by making a written request to the Attorney General no later than October 1, 2005."

Legal Periodicals. — For note, "State v. Pendleton: Impermissible Delegations to Religious Institutions: Is Campbell University an Armed Church?," see 18 Campbell L. Rev. 409 (1996).

CASE NOTES

Constitutionality. — Former Chapter 74A was unconstitutional as applied to the delegation of police powers to Campbell University. State v. Pendleton, 339 N.C. 379, 451 S.E.2d 274 (1994), cert. denied, 515 U.S. 1121, 115 S. Ct. 2276, 132 L. Ed. 2d 280 (1995).

Record revealed sufficient evidence to support the superior court's determination that a university was a religious institution; as such, the provisions of G.S. 74E-1 et seq., as applied, were unconstitutional. State v. Jordan, 155 N.C. App. 146, 574 S.E.2d 166, 2002 N.C. App. LEXIS 1621 (2002).

§ 74E-2. Policy and scope.

(a) The purpose of this Chapter is to ensure a minimum level of integrity, proficiency, and competence among company police agencies and company police officers. To achieve this purpose, the General Assembly finds that a Company Police Program needs to be established. As part of the Company Police Program, the Attorney General is given the authority to certify an agency as a company police agency and to commission an individual as a company police officer.

(b) A hospital, a State institution, or a corporation engaged in providing on-site police security personnel services for persons or property may apply to the Attorney General to be certified as a company police agency. A company police agency may apply to the Attorney General to commission an individual designated by the agency to act as a company police officer for the agency. (1991 (Reg. Sess., 1992), c. 1043, s. 1; 2005-231, s. 2.)

Editor's Note. — Session Laws 2005-231, s. 12, provides: "When this act becomes law, all certificates issued to police agencies at private institutions of higher education and commissions issued to their police officers pursuant to Chapter 74E of the General Statutes shall automatically convert to certification and commissions issued pursuant to this act and shall be administered in conformity with this act. Notwithstanding any of the provisions of Chapter 74G of the General Statutes, as enacted by this act, or the provisions of Chapter 74E of the General Statutes, the board of trustees of any educational institution that, on the effective date of this act, has a company police agency licensed pursuant to Chapter 74E of the General Statutes, may elect to continue to have its officers certified under Chapter 74E of the General Statutes rather than pursuant to Chapter 74G of the General Statutes, as enacted by this act, by making a written request to the Attorney General no later than October 1, 2005."

CASE NOTES

Cited in State v. Jordan, 155 N.C. App. 146, 574 S.E.2d 166, 2002 N.C. App. LEXIS 1621 (2002).

§ 74E-3. Liability insurance policy or certificate of self-insurance required; suspension of company police agency certification for failure to comply.

(a) An applicant for certification as a company police agency must file with the Attorney General either a copy of a liability insurance policy that meets the requirements of this section or a certificate of self-insurance designating assets sufficient to satisfy the coverage requirements of this section if the applicant is a nonpublic entity. The policy or certificate of self-insurance must provide not less than one million dollars ($1,000,000) of coverage per incident for personal injury or property damage resulting from a negligent act of the applicant or an agent or employee of the applicant operating in the course and scope of employment or under color of law. The form, execution, and terms of a liability insurance policy must meet the requirements of the Attorney General.

(b) An insurance carrier that issues a liability insurance policy required by this section may cancel the policy upon giving 30 days' written notice to both the company police agency and the Attorney General. The written notice must be given by certified mail, return receipt requested. Cancellation of a liability insurance policy does not affect any liability on the policy that accrued prior to the effective cancellation date.

(c) A company police agency that is a nonpublic entity must maintain the liability insurance policy or certificate of self-insurance required by this section in effect at all times. The Attorney General shall suspend the certification of a company police agency that fails to maintain a liability insurance policy or certificate of self-insurance when required to do so by this section. A certification suspended for this reason may not be reinstated until the person whose certification was suspended files with the Attorney General an application for reinstatement and either the required liability insurance policy or certificate of self-insurance. (1991 (Reg. Sess., 1992), c. 1043, s. 1.)

§ 74E-4. Powers of Attorney General.

The Attorney General has the following powers in addition to those conferred elsewhere in this Chapter:

(1) To establish minimum education, experience, and training standards and establish and require written or oral examinations for an applicant for certification as a company police agency, a certified company police agency, an applicant for commission as a company police officer, or a commissioned company police officer.

(2) To require a company police agency or a company police officer to submit reports or other information.

(3) To inspect records maintained by a company police agency.

(4) To conduct investigations regarding alleged violations of this Chapter or a rule adopted under this Chapter and to make evaluations as may be necessary to determine if a company police agency or a company police officer is complying with this Chapter or a rule adopted under this Chapter.

(5) To deny, suspend, or revoke a certification as a company police agency or a commission as a company police officer for failure to meet the requirements of or comply with this Chapter or a rule adopted under this Chapter, in accordance with Article 3 of Chapter 150B of the General Statutes.

(6) To appear in the name of the Company Police Program and apply to the courts having jurisdiction for injunctions to prevent a violation of this Chapter or a rule adopted under this Chapter.

(7) To delegate the authority to administer this Chapter.

(8) To require that the Criminal Justice Standards Division provide administrative support staff for the Company Police Program.

(9) To adopt rules needed to implement this Chapter, in accordance with Chapter 150B of the General Statutes. (1871-2, c. 138, ss. 51, 52; Code, ss. 1988, 1989; Rev., ss. 2605, 2606; 1907, c. 128, s. 1; C.S., s. 3484; 1923, c. 23; 1933, c. 61; 1943, c. 676, ss. 1, 4; 1947, c. 390; 1963, c. 1165, s. 2; 1965, cc. 297, 581; 1977, c. 148, s. 4; 1991 (Reg. Sess., 1992), c. 1043, s. 1.)

CASE NOTES

A railroad policeman appointed pursuant to former G.S. 60-83 was prima facie a public officer, but the question of whether a particular act was done as an employee of the railroad company or as a public officer was a question to be determined from the nature of the act, whether it related to vindication and enforcement of public justice or whether it was in the scope of duties owed to the company by reason of employment. Tate v. Southern Ry., 205 N.C. 51, 169 S.E. 816 (1933) (decided under former § 60-83).

§ 74E-5. Records.

(a) The Attorney General is the legal custodian of all books, papers, documents, or other records and property of the Company Police Program.

(b) Any papers, documents, or other records that become the property of the Company Police Program and are placed in a company police officer's personnel file maintained by the Attorney General are subject to the same restrictions concerning disclosure as set forth in Chapters 126, 153A, and 160A of the General Statutes for other personnel records.

(c) Notwithstanding the provisions of subsection (b), the Attorney General may disclose the contents of any records maintained under the authority of this Chapter to the Criminal Justice Education and Training Standards Commission, the Sheriff's Education and Training Standards Commission, or any other criminal justice agency for certification or employment purposes. (1991 (Reg. Sess., 1992), c. 1043, s. 1.)

§ 74E-6. Oaths, powers, and authority of company police officers.

(a) Requirements. — An individual who is commissioned as a company police officer must take the oath of office required of a law enforcement officer before the individual assumes the duties of a company police officer. The person in each company police agency who is responsible for the agency's company police officers must be commissioned as a company police officer.

(b) Categories. — The following three distinct classifications of company police officers are established:

(1) Campus Police Officers — Only those company police officers who are employed by any college or university that is a constituent institution of The University of North Carolina or any private college or university that is licensed or exempted from licensure as prescribed by G.S. 116-15, and who are employed by a campus police agency that was licensed pursuant to this Chapter prior to the enactment of Chapter 74G of the General Statutes.

(2) Railroad Police Officers — Those company police officers who are employed by a certified rail carrier and commissioned as company police officers under this Chapter.

(3) Special Police Officers — All company police officers not designated as a campus police officer or railroad police officer.

(c) All Company Police. — Company police officers, while in the performance of their duties of employment, have the same powers as municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions on any of the following:

(1) Real property owned by or in the possession and control of their employer.

(2) Real property owned by or in the possession and control of a person who has contracted with the employer to provide on-site company police security personnel services for the property.

(3) Any other real property while in continuous and immediate pursuit of a person for an offense committed upon property described in subdivisions (1) or (2) of this subsection.

Company police officers shall have, if duly authorized by the superior officer in charge, the authority to carry concealed weapons pursuant to and in conformity with G.S. 14-269(b)(4) and (5).

(d) Campus Police. — Campus police officers have the powers contained in subsection (c) of this section and also have the powers in that subsection upon that portion of any public road or highway passing through or immediately adjoining the property described in that subsection, wherever located. The board of trustees of any college or university that qualifies as a campus police agency pursuant to this Chapter may enter into a mutual aid agreement with the governing board of a municipality or, with the consent of the county sheriff, a county to the same extent as a municipal police department pursuant to Chapter 160A.

(e) Railroad Police. — Railroad police officers have the powers contained in subsection (c) and also have the powers and authority granted by federal law or by a regulation promulgated by the United States Secretary of Transportation. Notwithstanding any of the provisions of this Chapter, the limitations on the power to make arrests contained in subsection (c) above, shall not be applicable to railroad police officers commissioned by the Attorney General pursuant to the authority of this Chapter.

(f) Repealed by Session Laws 2005-231, s. 3, effective July 28, 2005.

(g) Exclusive Authority. — Notwithstanding any other provision of law, the authority granted to company police officers shall be limited to the provisions of this Chapter. (1871-2, c. 138, s. 53; Code, s. 1990; Rev., s. 2607; 1907, c. 128, s. 2; c. 462; c. 470, ss.3, 4; C.S., ss. 3483, 3485; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1943, c. 676, s. 2; 1959, c. 124, s. 1; 1963, c. 1165, s. 2; 1965, c. 872; 1969, c. 844, s. 8; 1977, c. 148, s. 4; 1981, c. 884, s. 4; 1987, c. 469; 1989, c. 518, s. 1; 1991 (Reg. Sess., 1992), c. 1043, s. 1; 1997-441, s. 1; 1999-68, s. 3; 2005-231, s. 3; 2006-259, s. 5(b).)

Editor's Note. — Session Laws 2005-231, s. 12, provides: "When this act becomes law, all certificates issued to police agencies at private institutions of higher education and commissions issued to their police officers pursuant to Chapter 74E of the General Statutes shall automatically convert to certification and commissions issued pursuant to this act and shall be administered in conformity with this act. Notwithstanding any of the provisions of Chapter 74G of the General Statutes, as enacted by this act, or the provisions of Chapter 74E of the General Statutes, the board of trustees of any educational institution that, on the effective date of this act, has a company police agency licensed pursuant to Chapter 74E of the General Statutes, may elect to continue to have its officers certified under Chapter 74E of the General Statutes rather than pursuant to Chapter 74G of the General Statutes, as enacted by this act, by making a written request to the Attorney General no later than October 1, 2005."

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 417 (1998).

CASE NOTES

Cited in State v. Jordan, 155 N.C. App. 146, 574 S.E.2d 166, 2002 N.C. App. LEXIS 1621 (2002).

OPINIONS OF ATTORNEY GENERAL

Jurisdiction of Company Police Officers Limited to Real Property of Employer. — Company police officers are limited to exercising law enforcement authority only on the real property of their employer; unless the company police officers are in continuous and immediate pursuit of a person for an offense committed upon this real property, the officers lack the territorial jurisdiction to take law enforcement actions on the streets and highways in and around this real property; thus, assuming an agreement between North Carolina Special Police (NCSP) and a town was lawful, the NCSP officers lacked law enforcement authority on the streets and private businesses in the town. See opinion of Attorney General to Mr. G. Dewey Hudson, District Attorney, Fourth Prosecutorial District, 2001 N.C. AG LEXIS 4 (2/23/2001).

Jurisdiction of Company or Special Police to Make Arrests Off Campus Grounds. — Special policemen appointed pursuant to former Chapter 74A have territorial limits placed upon their power to arrest as set forth in this section. See opinion of Attorney General to Mr. William S. Mason, Jr., Business Manager, Pembroke State University, 40 N.C.A.G. 164 (1970), issued under former Chapter 74A.

§ 74E-7. Badges, uniforms, weapons, and vehicles.

Company police agencies shall be responsible for ensuring that all employees, whether or not commissioned, comply with the provisions of this Chapter and the rules adopted under this Chapter, including those provisions pertaining to the wearing of badges and uniforms, the carrying of weapons, and the operation of vehicles. (1871-2, c. 138, s. 54; Code, s. 1991; Rev., s. 2608; C.S., s. 3486; 1963, c. 1165, s. 2; 1991 (Reg. Sess., 1992), c. 1043, s. 1.)

§ 74E-8. Minimum standards for company police officers.

Applicants for commission as a company police officer and a commissioned company police officer must meet and maintain the same minimum preemployment and in-service standards as are required for State law enforcement officers by the North Carolina Criminal Justice Education and Training Standards Commission, and must meet and maintain any other preemployment and in-service requirements set by the Attorney General. (1991 (Reg. Sess., 1992), c. 1043, s. 1.)

§ 74E-9. Compensation of company police officers.

The compensation of a company police officer shall be paid by the company police agency for which the officer is commissioned, as may be agreed on between them. (1871-2, c. 138, s. 55; Code, s. 1992; Rev., s. 2609; C.S., s. 3487; 1963, c. 1165, s. 2; 1991 (Reg. Sess., 1992), c. 1043, s. 1.)

§ 74E-10. Expiration, renewal, and termination of agency certification or officer commission.

(a) Agency. — Unless sooner suspended or revoked by the Attorney General, a company police agency's certification expires on June 30 following the date it is issued. A company police agency may renew the certification upon payment of the appropriate fee and compliance with this Chapter and the rules adopted under this Chapter. An entity whose company police agency's certification was denied or revoked for a violation of this Chapter or a rule adopted under this Chapter is not eligible to apply again for that certification for three years.

(b) Officer. — Unless sooner suspended or revoked by the Attorney General, a company police officer's commission expires on June 30 following the date it is issued. A company police officer may renew a commission upon payment of the appropriate fee and compliance with this Chapter and the rules adopted under this Chapter. The Attorney General shall immediately revoke the commission of a company police officer when any of the following occurs:

(1) Termination of employment with the company police agency for which the officer is commissioned.
(2) Termination, suspension, or revocation of the certification of the company police agency for which the officer is commissioned.
(3) Failure to meet in-service training requirements as required by this Chapter or the rules adopted under this Chapter.
(4) Violation of this Chapter or a rule adopted under this Chapter.

An individual whose company police officer's commission was denied or revoked for a violation of this Chapter or a rule adopted under this Chapter is not eligible to apply again for a commission for three years. (1871-2, c. 138, s. 56; Code, s. 1993; Rev., s. 2610; C.S., s. 3488; 1943, c. 676, s. 3; 1959, c. 124, s. 2; 1963, c. 1165, s. 2; 1977, c. 148, s. 5; 1991 (Reg. Sess., 1992), c. 1043, s. 1.)

§ 74E-11. Immunity.

Neither the Attorney General nor any of the Attorney General's employees may be held criminally or civilly liable for any acts or omissions in carrying out the provisions of this Chapter or for the acts or omissions of agencies or officers certified or commissioned under this Chapter. (1991 (Reg. Sess., 1992), c. 1043, s. 1.)

§ 74E-12. Fees.

The Attorney General may charge fees for the items listed in the following table, not to exceed the amounts listed in the table:

Item	Maximum Fee
Application for certification as a company police agency	$250
Annual renewal of certification as a company police agency	$200
Application for reinstatement of certification as a company police agency	$1,000
Application for commission as a company police officer	$100
Annual renewal of commission as a company police officer	$50
Application for reinstatement of commission as a company police officer	$150

The fees imposed under this section are not refundable. Fees collected under this section shall be applied to the cost of administering this Chapter. (1991 (Reg. Sess., 1992), c. 1043, s. 1.)

§ 74E-13. Penalties and enforcement.

(a) No private person, firm, association, or corporation, and no public institution, agency, or other entity shall engage in, perform any services as, or in any way hold itself out as a company police agency or engage in the recruitment or hiring of company police officers without having first complied with the provisions of this Chapter. Any person, firm, association, or corporation, or their agents and employees violating any of the provisions of this Chapter shall be guilty of a Class 1 misdemeanor.

(b) The Company Police Program may apply in its own name to the superior court for an injunction to prevent any violation or threatened violation of this Chapter or a rule adopted under this Chapter, and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed because of the violation. The venue for an action brought under this subsection shall be in any county selected by the Attorney General.

(c) This section does not relieve a company police agency from any civil liability for the acts of its company police officers in exercising or attempting to exercise the powers conferred by this Chapter. (1991 (Reg. Sess., 1992), c. 1043, s. 1; 1993 (Reg. Sess., 1994), c. 767, s. 26.)

Local Modification. — City of Winston-Salem: 2005-110, s. 1 (As to applicability provisions see 2005-110, ss. 2, 3).

	Maximum Fee
Application for certification as a company police agency	$250
Annual renewal of certification as a company police agency	$200
Application for reinstatement of certification as a company police agency	$1,000
Application for commission as a company police officer	$160
Annual renewal of commission as a company police officer	$50
Application for reinstatement of commission as a company police officer	$150

The fees imposed under this section are not refundable. Fees collected under this section shall be applied to the cost of administering this Chapter. (1991 (Reg. Sess., 1992), c. 1043, s. 1.)

§ 74E-13. Penalties and enforcement.

(a) No private person, firm, association, or corporation, and no public institution, agency, or other entity shall engage in, perform any services as, or in any way hold itself out as, a company police agency, or engage in the recruitment or hiring of company police officers without having first complied with the provisions of this Chapter. Any person, firm, association, or corporation, or their agents and employees violating any of the provisions of this Chapter shall be guilty of a Class 1 misdemeanor.

(b) The Company Police Program may apply in its own name to the superior court for an injunction to prevent any violation or threatened violation of this Chapter or a rule adopted under this Chapter, and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed because of the violation. The venue for an action brought under this subsection shall be in any county selected by the Attorney General.

(c) This section does not relieve a company police agency from any civil liability for the acts of its company police officers in exercising or attempting to exercise the powers conferred by this Chapter. (1991 (Reg. Sess., 1992), c. 1043, s. 1; 1993 (Reg. Sess., 1994), c. 767, s. 25.)

Local Modification. — City of Winston-Salem: 2005-110, s. 1 (As to applicability, see ... sions see 2005-110, s. 2).

Chapter 74F.

Locksmith Licensing Act.

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74F-17. Injunctions.
74F-18. Criminal history record checks of applicants for licensure or apprentice designation.

§ 74F-1. Short title.

This act shall be known as the North Carolina Locksmith Licensing Act. (2001-369, s. 1.)

Editor's Note. — Session Laws 2001-369, s. 2, provides: "Any person who submits proof to the Board that the person has been actively engaged as a locksmith in this State for at least two consecutive years prior to the effective date of this act and pays the required fee for the issuance of a license under G.S. 74F-9, enacted by Section 1 of this act, shall be licensed without having to satisfy the requirements of G.S. 74F-7(3), enacted by Section 1 of this act. All persons who do not make application to the Board within one year of the effective date of this act shall be required to complete all requirements prescribed by the Board and to otherwise comply with the provisions of Chapter 74F, enacted by Section 1 of this act."

Session Laws 2001-369, s. 3, as amended by Session Laws 2002-63, s. 1, provides that G.S. 74F-5 and G.S. 74F-6, as enacted in Section 1 of the act, are effective when the act becomes law. The remainder of the act becomes effective January 1, 2003.

§ 74F-2. Purpose.

Locksmiths have the knowledge and tools to bypass or neutralize security devices in vehicles, homes, and businesses. The laws of this State do not protect citizens from the unscrupulous use and abuse of this knowledge and these tools by persons who are untrained or have criminal intent. Therefore, the licensing of locksmiths is necessary to protect public health, safety, and welfare. (2001-369, s. 1.)

§ 74F-3. Licenses required.

No person shall perform or offer to perform locksmith services in this State unless the person has been licensed under the provisions of this Chapter. A violation of this section is a Class 3 misdemeanor unless the conduct is covered under some other provision of law providing greater punishment. (2001-369, s. 1.)

§ 74F-4. Definitions.

The following definitions apply in this Chapter:

(1) Apprentice. — A person who has been issued an apprenticeship designation by the Board.

(1a) Board. — The North Carolina Locksmith Licensing Board.

(2) Code book. — A compilation, in any form, of key codes and combinations.
(3) License. — A certificate issued by the Board recognizing the person named therein as having met the requirements to perform locksmith services as defined in this Chapter.
(4) Locksmith. — A person who has been issued a license by the Board.
(5) Locksmith services. — Repairing, rebuilding, rekeying, repinning, servicing, adjusting, or installing locks, mechanical or electronic locking devices, access control devices, egress control devices, vaults, and safe-deposit boxes for compensation or other consideration, including services performed by safe technicians.
(6) Locksmith tools. — Any tools that are designed or used to open a mechanical or electrical locking device in a way other than that which was intended by the manufacturer. (2001-369, s. 1; 2003-350, ss. 1, 2.)

Editor's Note. — Subdivisions (01) and (1) have been renumbered as subdivisions (1) and (1a), respectively, at the direction of the Revisor of Statutes.

§ 74F-5. North Carolina Locksmith Licensing Board.

(a) Composition and Terms. — The Board shall consist of nine members who shall serve staggered terms. Three members shall represent the public. The initial Board members shall be appointed on or before January 1, 2002, as follows:

(1) The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint three locksmiths, two of whom shall serve terms of four years and one of whom shall serve a term of three years. At least one of the locksmiths shall represent a recognized locksmith organization in the State.
(2) The General Assembly, upon the recommendation of the Speaker of the House of Representatives, shall appoint three locksmiths, one of whom shall serve a term of four years, one of whom shall serve a term of three years, and one of whom shall serve a term of two years. At least one of the locksmiths shall represent a recognized locksmith organization in the State.
(3) The Governor shall appoint three public members, one of whom shall serve a term of three years and two of whom shall serve terms of two years.

Upon the expiration of the terms of the initial Board members, each member shall be appointed for a term of three years and shall serve until a successor is appointed. No member may serve more than two consecutive terms.

(b) Qualifications. — The locksmith members shall have at least five years' experience in locksmith services and shall be engaged in that business for the duration of their term on the Board. The locksmith members initially appointed to the Board shall immediately become licensed as locksmiths by complying with the provisions of this Chapter. Public members of the Board shall not be trained or experienced in locksmith services, have a financial interest in a locksmith business, or be the spouse of a person who is so trained or experienced or has such an interest. All members of the Board shall reside in this State and shall represent various geographical areas of the State.

(c) Vacancies. — A vacancy shall be filled in the same manner as the original appointment, except that all unexpired terms in seats appointed by the General Assembly shall be filled in accordance with G.S. 120-122. Appointees to fill vacancies shall serve the remainder of the unexpired term and until their successors have been duly appointed and qualified.

(d) Removal. — The Board may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings as a licensee shall be disqualified from participating in the official business of the Board until the charges have been resolved.

(e) Compensation. — Each member of the Board shall receive per diem and reimbursement for travel and subsistence as provided in G.S. 93B-5.

(f) Officers. — The officers of the Board shall be a chair, a vice-chair, and other officers deemed necessary by the Board to carry out the purposes of this Chapter. All officers shall be elected annually during the first meeting of the calendar year by the Board for one-year terms and shall serve until their successors are elected and qualified.

(g) Meetings. — The Board shall hold at least two meetings each year to conduct business and to review the standards and rules for issuing licenses under this Chapter. The Board shall adopt rules governing the calling, holding, and conducting of regular and special meetings. A majority of Board members shall constitute a quorum. (2001-369, s. 1.)

§ 74F-6. Powers of the Board.

The Board shall have the power and duty to:

(1) Administer and enforce the provisions of this Chapter.

(2) Adopt rules as may be necessary to carry out the provisions of this Chapter.

(3) Examine and determine the qualifications and fitness of applicants for licensure and renewal of licensure.

(4) Issue, renew, deny, suspend, or revoke licenses or apprenticeship designations and conduct any disciplinary actions authorized by this Chapter.

(5) Set fees as provided in G.S. 74F-9.

(6) Establish and approve continuing education requirements for persons licensed under this Chapter.

(7) Receive and investigate complaints from members of the public.

(8) Conduct investigations for the purpose of determining whether violations of this Chapter or grounds for disciplining licensees exist.

(9) Conduct administrative hearings in accordance with Article 3A of Chapter 150B of the General Statutes.

(10) Maintain a record of all proceedings conducted by the Board and make available to licensees and other concerned parties an annual report of all Board action.

(11) Maintain a list of the names and addresses of all persons licensed by the Board.

(12) Employ and fix the compensation of personnel that the Board determines is necessary to carry out the provisions of this Chapter and incur other expenses necessary to perform the duties of the Board.

(13) Adopt and publish a code of ethics.

(14) Adopt a seal containing the name of the Board for use on all licenses and official reports issued by the Board.

(15) Employ an attorney to assist or represent the Board in enforcing this Chapter.

(16) Request that the Department of Justice conduct criminal history record checks of applicants for licensure and apprenticeships pursuant to G.S. 114-19.15. (2001-369, s. 1; 2003-350, ss. 3, 4; 2004-177, s. 1.)

§ 74F-7. Qualifications for license.

An applicant shall be licensed as a locksmith if the applicant meets all of the following qualifications:

(1) Is of good moral and ethical character, as evidenced in part by a criminal history record check conducted in accordance with G.S. 74F-18.
(2) Is at least 18 years of age.
(3) Successfully completes an examination administered by the Board that measures the knowledge and skill of the applicant in locksmith services and the laws applicable to licensed locksmiths.
(4) Pays the required fee under G.S. 74F-9. (2001-369, s. 1; 2003-350, s. 5.)

Editor's Note. — Session Laws 2001-369, s. 2, provides: "Any person who submits proof to the Board that the person has been actively engaged as a locksmith in this State for at least two consecutive years prior to the effective date of this act and pays the required fee for the issuance of a license under G.S. 74F-9, enacted by Section 1 of this act, shall be licensed without having to satisfy the requirements of G.S. 74F-7(3), enacted by Section 1 of this act. All persons who do not make application to the Board within one year of the effective date of this act shall be required to complete all requirements prescribed by the Board and to otherwise comply with the provisions of Chapter 74F, enacted by Section 1 of this act."

§ 74F-7.1. Apprentices.

(a) An applicant may receive an apprentice designation if the applicant meets all of the following requirements:
(1) Is of good moral and ethical character, as evidenced in part by a criminal history record check conducted in accordance with G.S. 74F-18.
(2) Is at least 18 years of age.
(3) Pays the required fee under G.S. 74F-9.

(b) After an applicant has satisfied the requirements in subsection (a) of this section, the apprentice may practice as an apprentice locksmith under the supervision of a licensed locksmith. The Board shall issue each apprentice a colored badge card that identifies the individual as an apprentice and includes the apprentice designation. The Board shall establish requirements for apprentice supervision.

(c) An apprentice may have the apprentice designation for no longer than three years. On or before the three-year period expires, the apprentice shall take the locksmith licensure examination administered by the Board. If the apprentice fails to take the examination within the three-year period or fails the examination and does not retake the examination on or before the three-year period expires, the apprentice shall not receive licensure and shall not be granted another apprenticeship.

(d) If an apprentice terminates employment with a licensed locksmith under which the apprentice originally received his or her apprenticeship, the apprentice shall find employment with another licensed locksmith to maintain the apprentice designation and shall pay a transfer fee pursuant to G.S. 74F-9.

Each licensed locksmith shall have no more than two apprentices at one time. However, a licensed locksmith shall have a 90-day grace period within which to accommodate more than two apprentices if the apprentice is newly hired as a result of a previous termination of employment or the inability of a licensed locksmith to supervise the apprentice. The licensed locksmith shall contact the Board once the locksmith terminates the additional apprentice, and the licensed locksmith shall be legally responsible for the apprentice's work until the Board is notified otherwise. (2003-350, s. 6.)

Editor's Note. — This section was originally enacted as G.S. 74F-7A. It has been renumbered at the direction of the Revisor of Statutes.

§ 74F-8. Licensure based on experience; licensure of non-resident; reciprocity.

(a) The Board may grant, upon application and payment of proper fees, a license to a person who resides in this State and has at least three years' experience as a licensed locksmith in another state whose standards of competency are substantially equivalent to those provided in this Chapter.

(b) The Board may grant, upon application and payment of proper fees, a license to a nonresident if the person meets the requirements of this Chapter or the person resides in a state that recognizes licenses issued by the Board. (2001-369, s. 1.)

§ 74F-9. Fees.

The Board shall establish fees not exceeding the following amounts:

(1) Issuance of a license	$100.00
(2) Renewal of a license	$100.00
(3) Examination	$200.00
(4) Reinstatement	$150.00
(5) Late fees	$150.00
(6) Apprentice fee	$100.00
(7) Apprentice transfer fee	$25.00.

(2001-369, s. 1; 2003-350, s. 7.)

Editor's Note. — Session Laws 2001-369, s. 2, provides: "Any person who submits proof to the Board that the person has been actively engaged as a locksmith in this State for at least two consecutive years prior to the effective date of this act and pays the required fee for the issuance of a license under G.S. 74F-9, enacted by Section 1 of this act, shall be licensed without having to satisfy the requirements of G.S. 74F-7(3), enacted by Section 1 of this act. All persons who do not make application to the Board within one year of the effective date of this act shall be required to complete all requirements prescribed by the Board and to otherwise comply with the provisions of Chapter 74F, enacted by Section 1 of this act."

Session Laws 2002-159, s. 88, provides: "Notwithstanding G.S. 12-3.1(a)(2), the North Carolina Locksmith Licensing Board may adopt its initial fees as authorized by G.S. 74F-9 without prior consultation with the Joint Legislative Commission on Governmental Operations. The North Carolina Locksmith Licensing Board shall report on the amount and purpose of its initial fees to the Joint Legislative Commission on Governmental Operations prior to the next meeting of the Joint Legislative Commission on Governmental Operations following the adoption of the initial fees."

§ 74F-10. Issuance, renewal, replacement, and transfer of licenses.

(a) The Board shall issue a license, upon payment of the license fee, to any applicant who has satisfactorily met the requirements of this Chapter as administered by the Board. Licenses shall show the full name of the person and an identification number and shall be signed by the chair and one other officer of the Board.

(b) All licenses shall expire three years after the date they were issued unless renewed. All applications for renewal shall be filed with the Board and shall be accompanied by the renewal fee as required by G.S. 74F-9. A license that has expired for failure to renew may be reinstated after the applicant pays the late and reinstatement fees as required by G.S. 74F-9.

(c) The Board shall replace any license that is lost, destroyed, or mutilated subject to rules established by the Board.

(d) A license may not be transferred or assigned. (2001-369, s. 1.)

§ 74F-11. Photo identification.

Every person licensed under this Chapter shall be issued a photo identification card by the Board. The card shall display a current photograph of the person, the person's name, address, and telephone number. The licensee shall have the photograph identification card available for inspection while performing locksmith services. (2001-369, s. 1.)

§ 74F-12. Posting licenses; advertisements.

(a) Every locksmith issued a license under this Chapter shall display the license prominently in the locksmith's place of business.

(b) Every person advertising locksmith services performed by the person shall include in the advertisement the identification number that is printed on the license issued by the Board. (2001-369, s. 1.)

§ 74F-13. Responsibilities of employers.

Every licensee under this Chapter shall provide to the Board the names of each person employed by the licensee who either performs locksmith services or has access to locksmith tools. The licensee shall notify the Board within 30 days of any change in the information provided pursuant to this section. (2001-369, s. 1.)

§ 74F-14. Customer identification.

When opening a locked door to any vehicle or residential or commercial property, a licensee shall make a reasonable effort to verify that the customer is the legal owner of the vehicle or property or is authorized by the legal owner to gain access to the vehicle or property. (2001-369, s. 1.)

§ 74F-15. Disciplinary procedures.

The Board may deny or refuse to renew, suspend, or revoke a license or apprenticeship designation if the licensee, apprentice, or applicant:

(1) Gives false information to or withholds information from the Board in procuring or attempting to procure a license.
(2) Has been convicted of or pled guilty or no contest to any of the crimes listed in G.S. 74F-18(a)(2).
(3) Has demonstrated gross negligence, incompetency, or misconduct in performing locksmith services.
(4) Has willfully violated any of the provisions of this Chapter. (2001-369, s. 1; 2003-350, s. 8.)

§ 74F-16. Exemptions.

The provisions of this Chapter do not apply to:

(1) An employee of a licensed locksmith when acting under the control and supervision of the licensed locksmith.
(2) A person working as an apprentice pursuant to G.S. 74F-7.1.
(3) A person or business required to be licensed or registered by the North Carolina Alarm Systems Licensing Board pursuant to Chapter 74D of the General Statutes, when acting within the scope and course of the alarm systems license or registration.
(4) An employee of a towing service or an automotive repair business providing services in the normal course of its business, a repossessor,

a taxi cab service, a motor vehicle dealer as defined in G.S. 20-286(11), or a motor club as defined in G.S. 58-69-1 when opening automotive locks in the normal course of their duties, so long as the employee does not represent himself or herself as a locksmith.

(5) A property owner, or the owner's employee, when providing locksmith services on the property owner's property, so long as the owner or employee does not represent himself or herself as a locksmith. For purposes of this section, "property" means, but is not limited to, a hotel, motel, apartment, condominium, commercial rental property, and residential rental property.

(6) A merchant, or retail or hardware store, when it lawfully duplicates keys or installs, services, repairs, rebuilds, reprograms, rekeys, or maintains locks in the normal course of its business, so long as the merchant or store does not represent itself as a locksmith.

(7) A member of a law enforcement agency, fire department, or other government agency who, when acting within the scope and course of the member's employment with the agency or department, opens locked doors to vehicles, homes, or businesses.

(8) A salesperson while demonstrating the use of locksmith tools to persons licensed under this Chapter.

(9) A general contractor licensed under Article 1 of Chapter 87 of the General Statutes when acting within the scope and course of the general contractor license, or an agent or subcontractor of a licensed general contractor when acting within the ordinary course of business.

(10) A person or business when lawfully installing or maintaining a safety lock device on a wastewater system when the safety lock device is required by permit or requested by the owner of the wastewater system, provided the person or business does not represent itself as a locksmith. For purposes of this subdivision, "wastewater system" has the same meaning as in G.S. 130A-334.

(11) Any person or firm that sells gun safes or locking devices for firearms when acting within the scope and course of the sale of gun safes or locking devices for firearms.

(12) A person while performing a locksmith service in an emergency situation without receiving any compensation for this service and who does not advertise those services. (2001-369, s. 1; 2003-350, ss. 9, 10, 10.1.)

§ 74F-17. Injunctions.

The Board may apply to the superior court for an order enjoining violations of this Chapter. Upon a showing by the Board that any person has violated this Chapter, the court may grant injunctive relief. (2001-369, s. 1.)

§ 74F-18. Criminal history record checks of applicants for licensure or apprentice designation.

(a) Definitions. — The following definitions shall apply in this section:

(1) Applicant. — A person applying for licensure as a locksmith pursuant to G.S. 74F-7 or apprentice designation pursuant to G.S. 74F-7.1.

(2) Criminal history. — A history of conviction of a state or federal crime, whether a misdemeanor or felony, that bears on an applicant's fitness for licensure to practice locksmithing. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary

Substitutes; Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act in Article 5 of Chapter 90 of the General Statutes and alcohol-related offenses including sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5. In addition to the North Carolina crimes listed in this subdivision, such crimes also include similar crimes under federal law or under the laws of other states.

(b) All applicants for licensure or apprentice designation shall consent to a criminal history record check. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny licensure or apprentice designation to an applicant. The Board shall ensure that the State and national criminal history of an applicant is checked. The Board shall be responsible for providing to the North Carolina Department of Justice the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories of Criminal Histories, and any additional information required by the Department of Justice. The Board shall keep all information obtained pursuant to this section confidential. The Board shall collect any fees required by the Department of Justice and shall remit the fees to the Department of Justice for expenses associated with conducting the criminal history record check.

(c) If an applicant's criminal history record check reveals one or more convictions listed under subdivision (a)(2) of this section, the conviction shall not automatically bar licensure. The Board shall consider all of the following factors regarding the conviction:

(1) The level of seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of the conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
(6) The person's prison, jail, probation, parole, rehabilitation, and employment records since the date the crime was committed.
(7) The subsequent commission by the person of a crime listed in subdivision (a)(2) of this section.

If, after reviewing these factors, the Board determines that the applicant's criminal history disqualifies the applicant for licensure, the Board may deny licensure or apprentice designation of the applicant. The Board may disclose to the applicant information contained in the criminal history record check that is relevant to the denial. The Board shall not provide a copy of the criminal history record check to the applicant. The applicant shall have the right to appear before the Board to appeal the Board's decision. However, an appearance before the full Board shall constitute an exhaustion of administrative remedies in accordance with Chapter 150B of the General Statutes.

(d) Limited Immunity. — The Board, its officers, and employees, acting in good faith and in compliance with this section, shall be immune from civil liability for denying licensure or apprentice designation to an applicant based on information provided in the applicant's criminal history record check. (2003-350, s. 11; 2004-177, s. 2.)

Chapter 74G.
Campus Police Act.

Sec.

74G-1. Title.
74G-2. Policy and scope.
74G-3. Liability insurance policy or certificate of self-insurance required; suspension of campus police agency certification for failure to comply.
74G-4. Powers of Attorney General.
74G-5. Records.
74G-6. Oaths, powers, and authority of campus police officers.
74G-7. Badges, uniforms, weapons, and vehicles.
74G-8. Minimum standards for campus police officers.
74G-9. Compensation of campus police officers.
74G-10. Expiration, renewal, and termination of agency certification or officer commission.
74G-11. Immunity.
74G-12. Fees.
74G-13. Penalties and enforcement.

§ 74G-1. Title.

This Chapter is the "Campus Police Act" and may be cited by that name. (2005-231, s. 1.)

§ 74G-2. Policy and scope.

(a) The purpose of this Chapter is to protect the safety and welfare of students, faculty, and staff in institutions of higher education by fostering integrity, proficiency, and competence among campus police agencies and campus police officers. To achieve this purpose, the General Assembly finds that a Campus Police Program needs to be established. As part of the Campus Police Program, the Attorney General is given the authority to certify a private, nonprofit institution of higher education, other than those described by G.S. 116-15(d), as a campus police agency and to commission an individual as a campus police officer.

(b) The purpose of this Chapter is also to assure, to the extent consistent with the State and federal constitutions, that this protection is not denied to students, faculty, and staff at private, nonprofit institutions of higher education originally established by or affiliated with religious denominations. To achieve this purpose, the General Assembly finds that:

(1) Most of the State's private, nonprofit institutions of higher education were originally established by or affiliated with religious denominations;

(2) These institutions have made and continue to make significant contributions in education to the State and the nation;

(3) These institutions admit students regardless of their spiritual or religious beliefs;

(4) These institutions' principal mission is educational;

(5) All of these institutions are accredited by the Commission on Colleges of the Southern Association of Colleges and Schools and as such have independent governing boards of trustees;

(6) The principal State power conferred on campus police by this Chapter is the power of arrest;

(7) This power is important to protect the safety and welfare of students, faculty, and staff at these institutions;

(8) In exercising the power of arrest, these officers apply standards established by State and federal law only; and

(9) The exercise of this power is reviewable by the General Court of Justice and the federal courts.

(c) Public educational institutions operating under the authority of the Board of Governors of The University of North Carolina or the State Board of Community Colleges and private educational institutions that are licensed by the Board of Governors of The University of North Carolina pursuant to G.S. 116-15 or that are exempt from licensure by the Board of Governors pursuant to G.S. 116-15(c) may apply to the Attorney General to be certified as a campus police agency. A campus police agency may apply to the Attorney General to commission an individual designated by the agency to act as a campus police officer for the agency. (2005-231, s. 1.)

§ 74G-3. Liability insurance policy or certificate of self-insurance required; suspension of campus police agency certification for failure to comply.

(a) An applicant for certification as a campus police agency must file with the Attorney General either a copy of a liability insurance policy that meets the requirements of this section or a certificate of self-insurance designating assets sufficient to satisfy the coverage requirements of this section if the applicant is a nonpublic entity. The policy or certificate of self-insurance must provide not less than one million dollars ($1,000,000) of coverage per incident for personal injury or property damage resulting from a negligent act of the applicant or an agent or employee of the applicant operating in the course and scope of employment or under color of law. The form, execution, and terms of a liability insurance policy must meet the requirements of the Attorney General.

(b) An insurance carrier that issues a liability insurance policy required by this section may cancel the policy upon giving 30 days' written notice to both the campus police agency and the Attorney General. The written notice must be given by certified mail, return receipt requested. Cancellation of a liability insurance policy does not affect any liability on the policy that accrued prior to the effective cancellation date.

(c) A campus police agency that is a nonpublic entity must maintain the liability insurance policy or certificate of self-insurance required by this section in effect at all times. The Attorney General shall suspend the certification of a campus police agency that fails to maintain a liability insurance policy or certificate of self-insurance when required to do so by this section. A certification suspended for this reason may not be reinstated until the person whose certification was suspended files with the Attorney General an application for reinstatement and either the required liability insurance policy or certificate of self-insurance. (2005-231, s. 1.)

§ 74G-4. Powers of Attorney General.

The Attorney General has the following powers in addition to those conferred elsewhere in this Chapter:

(1) To establish minimum education, experience, and training standards and establish and require written or oral examinations for an applicant for certification as a campus police agency, a certified campus police agency, an applicant for commission as a campus police officer, or a commissioned campus police officer.

(2) To require a campus police agency or a campus police officer to submit reports or other information.

(3) To inspect records maintained by a campus police agency.

(4) To conduct investigations regarding alleged violations of this Chapter or a rule adopted under this Chapter and to make evaluations as may be necessary to determine if a campus police agency or a campus

police officer is complying with this Chapter or a rule adopted under this Chapter.

(5) To deny, suspend, or revoke a certification as a campus police agency or a commission as a campus police officer for failure to meet the requirements of or comply with this Chapter or a rule adopted under this Chapter, in accordance with Article 3 of Chapter 150B of the General Statutes.

(6) To appear in the name of the Campus Police Program and apply to the courts having jurisdiction for injunctions to prevent a violation of this Chapter or a rule adopted under this Chapter.

(7) To delegate the authority to administer this Chapter.

(8) To require that the Criminal Justice Standards Division provide administrative support staff for the Campus Police Program.

(9) To adopt rules needed to implement this Chapter, in accordance with Chapter 150B of the General Statutes. (2005-231, s. 1.)

§ 74G-5. Records.

(a) The Attorney General is the legal custodian of all books, papers, documents, or other records and property of the Campus Police Program.

(b) Any papers, documents, or other records that become the property of the Campus Police Program and are placed in a campus police officer's personnel file maintained by the Attorney General are subject to the same restrictions concerning disclosure as set forth in Chapters 126, 153A, and 160A of the General Statutes for other personnel records.

(c) Notwithstanding the provisions of subsection (b) of this section, the Attorney General may disclose the contents of any records maintained under the authority of this Chapter to the Criminal Justice Education and Training Standards Commission, the Sheriff's Education and Training Standards Commission, or any other criminal justice agency for certification or employment purposes. (2005-231, s. 1.)

§ 74G-6. Oaths, powers, and authority of campus police officers.

(a) Requirements. — An individual who is commissioned as a campus police officer must take the oath of office required of a law enforcement officer before the individual assumes the duties of a campus police officer. The person in each campus police agency who is responsible for the agency's campus police officers must be commissioned as a campus police officer.

(b) Powers and Authority of Officers. — Campus police officers, while in the performance of their duties of employment, have the same powers as municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions on any of the following:

(1) Real property owned by or in the possession and control of the institution employing the officer.

(2) Any portion of any public road or highway passing through the real property described in subdivision (1) of this subsection or immediately adjoining it, wherever located.

(3) Any other real property while in continuous and immediate pursuit of a person for an offense committed upon property described in subdivision (1) or (2) of this subsection.

In exercising the powers conferred by this subsection, campus police officers shall apply the standards established by the law of this State and the United States.

(c) Powers and Authority of Institutions. — The governing body of any private educational institution that has a campus police agency may:

(1) Enter into joint agreements with the governing board of any municipality to extend the law enforcement authority of campus police officers into any or all of the municipality's jurisdiction and to determine the circumstances in which this extension of authority may be granted;

(2) Enter into joint agreements with the governing board of any county and, with the consent of the sheriff, to extend the law enforcement authority of campus police officers into any or all of the county's jurisdiction and to determine the circumstances in which this extension of authority may be granted; and

(3) Enter into joint agreements with the governing board of any other public or private educational institution that has a campus police agency pursuant to this Chapter or pursuant to G.S. 116-40.5 to extend the law enforcement authority of its campus police officers into any or all of the other institution's jurisdiction and to determine the circumstances as to which its extension of authority may be granted.

(d) Concealed Weapons. — Campus police officers shall have, if duly authorized by their campus police agency and by the sheriff of the county in which the campus police agency is located, the authority to carry concealed weapons pursuant to and in conformity with G.S. 14-269(b)(5).

(e) Public Institutions Option. — Notwithstanding any of the provisions of this Chapter, the board of trustees of any constituent institution of The University of North Carolina may elect to have its officers certified under Chapter 17C and Chapter 116 of the General Statutes, and the board of trustees of any community college may elect to have its officers certified under Chapter 17C and Chapter 115D of the General Statutes rather than requesting certification as a campus police agency and campus police commission pursuant to the provisions of this Chapter.

(f) Exclusive Authority. — Notwithstanding any other provision of law, the authority granted to campus police officers certified under this Chapter shall be limited to the provisions of this Chapter. (2005-231, s. 1.)

§ 74G-7. Badges, uniforms, weapons, and vehicles.

Campus police agencies shall be responsible for ensuring that all employees, whether or not commissioned, comply with the provisions of this Chapter and the rules adopted under this Chapter, including those provisions pertaining to the wearing of badges and uniforms, the carrying of weapons, and the operation of vehicles. (2005-231, s. 1.)

§ 74G-8. Minimum standards for campus police officers.

Applicants for commission as a campus police officer and a commissioned campus police officer must meet and maintain the same minimum preemployment and in-service standards as are required for State law enforcement officers by the North Carolina Criminal Justice Education and Training Standards Commission and must meet and maintain any other preemployment and in-service requirements set by the Attorney General. (2005-231, s. 1.)

§ 74G-9. Compensation of campus police officers.

The compensation of a campus police officer shall be paid by the campus police agency for which the officer is commissioned, as may be agreed on between them. (2005-231, s. 1.)

§ 74G-10. Expiration, renewal, and termination of agency certification or officer commission.

(a) Agency. — Unless sooner suspended or revoked by the Attorney General, a campus police agency's certification expires on June 30 of the calendar year following the date it is issued. A campus police agency may renew the certification upon payment of the appropriate fee and compliance with this Chapter and the rules adopted under this Chapter. An entity whose campus police agency's certification was denied or revoked for a violation of this Chapter or a rule adopted under this Chapter is not eligible to apply again for that certification for three years.

(b) Officer. — Unless sooner suspended or revoked by the Attorney General, a campus police officer's commission expires on June 30 of the calendar year following the date it is issued. A campus police officer may renew a commission upon payment of the appropriate fee and compliance with this Chapter and the rules adopted under this Chapter. The Attorney General shall immediately revoke the commission of a campus police officer when any of the following occurs:

(1) Termination of employment with the campus police agency for which the officer is commissioned.
(2) Termination, suspension, or revocation of the certification of the campus police agency for which the officer is commissioned.
(3) Failure to meet in-service training requirements as required by this Chapter or the rules adopted under this Chapter.
(4) Violation of this Chapter or a rule adopted under this Chapter.

An individual whose campus police officer's commission was denied or revoked for a violation of this Chapter or a rule adopted under this Chapter is not eligible to apply again for a commission for three years. (2005-231, s. 1.)

§ 74G-11. Immunity.

Neither the Attorney General nor any of the Attorney General's employees may be held criminally or civilly liable for any acts or omissions in carrying out the provisions of this Chapter or for the acts or omissions of agencies or officers certified or commissioned under this Chapter. (2005-231, s. 1.)

§ 74G-12. Fees.

The Attorney General may charge fees for the items listed in the following table, not to exceed the amounts listed in the table:

Item	Maximum Fee
Application for certification as a campus police agency	$ 250.00
Annual renewal of certification as a campus police agency	$ 200.00
Application for reinstatement of certification as a campus police agency	$ 1,000
Application for commission as a campus police officer	$ 100.00
Annual renewal of commission as	$ 50.00

Item	Maximum Fee
a campus police officer	
Application for reinstatement of commission as a campus police officer	$ 150.00

The fees imposed under this section are not refundable. Fees collected under this section shall be applied to the cost of administering this Chapter. (2005-231, s. 1.)

§ 74G-13. Penalties and enforcement.

(a) No private person, firm, association, or corporation, and no public institution, agency, or other entity shall engage in, perform any services as, or in any way hold itself out as a campus police agency or engage in the recruitment or hiring of campus police officers without having first complied with the provisions of this Chapter. Any person, firm, association, or corporation or their agents and employees violating any of the provisions of this Chapter shall be guilty of a Class 1 misdemeanor.

(b) The Campus Police Program may apply in its own name to the superior court for an injunction to prevent any violation or threatened violation of this Chapter or a rule adopted under this Chapter, and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed because of the violation. The venue for an action brought under this subsection shall be in any county selected by the Attorney General.

(c) This section does not relieve a campus police agency from any civil liability for the acts of its campus police officers in exercising or attempting to exercise the powers conferred by this Chapter. (2005-231, s. 1.)

Chapter 75.

Monopolies, Trusts and Consumer Protection.

Article 1.

General Provisions.

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75-2. Any restraint in violation of common law included.
75-2.1. Monopolizing and attempting to monopolize prohibited.
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75-8. Continuous violations separate offenses.
75-9. Duty of Attorney General to investigate.
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75-12. Refusal to furnish information; false swearing.
75-13. Criminal prosecution; district attorneys to assist; expenses.
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75-15. Actions prosecuted by Attorney General.
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75-17. Lender may not require borrower to deal with particular insurer.
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75-21 through 75-26. [Reserved.]
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75-29. Unfair and deceptive trade names; use of term "wholesale" in advertising, etc.
75-30, 75-30.1. [Repealed.]
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Article 6.

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ARTICLE 1.

General Provisions.

§ 75-1. Combinations in restraint of trade illegal.

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy shall be guilty of a Class H felony. (1913, c. 41, s. 1; C.S., s. 2559; 1981, c. 764, s. 2.)

Cross References. — For provision declaring certain agreements between employers and labor organizations to be illegal combinations in restraint of trade, see G.S. 95-79. As to illegal combinations in restraint of trade by contractors, subcontractors, and suppliers in dealing with governmental agencies, see G.S. 133-23 through 133-33.

Legal Periodicals. — For note on the law of unfair competition in North Carolina, see 46 N.C.L. Rev. 856 (1968).

For comment, "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For note on price discrimination in North Carolina, see 53 N.C.L. Rev. 135 (1974).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

For article discussing North Carolina antitrust and consumer protection law, see 60 N.C.L. Rev. 207 (1982).

For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

For article discussing unfair methods of competition, deceptive trade practices, and unfair trade practices, see 5 Campbell L. Rev. 119 (1982).

For note, "The Need for Antitrust Legislation Tailored to the Specific Concerns of Bank-Nonbank Director Interlocks," see 1982 Duke L.J. 938 (1982).

For survey of 1982 commercial law, see 61 N.C.L. Rev. 1018 (1983).

For note, "Real Estate Finance—Subordination Causes: North Carolina Subordinates Substance to Form—MCB Ltd. v. McGowan," see 23 Wake Forest L. Rev. 575 (1988).

For article, "Misrepresentation in North Carolina," see 70 N.C.L. Rev. 323 (1992).

For article, "Non-UCC Statutory Provisions Affecting Warranty Disclaimers and Remedies in Sales of Goods," see 71 N.C.L. Rev. 1011 (1993).

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade

Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

CASE NOTES

I. General Consideration.
II. Partial Restraint of Trade.
III. Agreement Not to Compete.
IV. Pleading and Practice.
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VIII. Destroying or Injuring Competition in Order to Fix Prices.
IX. Division of Territory.
X. Resale Price Maintenance.
XI. Elimination of Competition.

I. GENERAL CONSIDERATION.

Editor's Note. *— Some of the following notes were decided under former G.S. 75-5 regarding prohibited acts.*

History of Chapter. — See Shute v. Shute, 176 N.C. 462, 97 S.E. 392 (1918).

Common Law. — At common law in England, and later in this country, only combinations or agreements which operate to the prejudice of the public by unduly or unreasonably restricting competition or restraining trade are illegal. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Under the common law at a remote period in England, the term "contract in restraint of trade" meant an individual's voluntary contractual restraint on his right to carry on his trade or calling. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Federal precedent is instructive in interpreting Chapter 75 due to the similarity between provisions of Chapter 75 and the federal antitrust law. North Carolina Steel, Inc. v. National Council on Comp. Ins., 123 N.C. App. 163, 472 S.E.2d 578 (1996), aff'd in part and rev'd in part, 347 N.C. 627, 496 S.E.2d 369 (1998).

The common law on restraint of trade is determinative of at least the minimum scope of this section. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973); United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

This section was based upon Section 1 of the Sherman Act, 15 U.S.C. § 1 (1971). Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973); Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied and appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

The North Carolina antitrust enforcement mechanism almost completely mirrors its federal counterpart, especially with respect to the availability of treble damages. Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978), cert. denied, 454 U.S. 878, 102 S. Ct. 359, 70 L. Ed. 2d 188, rehearing denied, 454 U. S. 1117, 102 S. Ct. 692, 70 L. Ed. 2d 654 (1981), aff'd, 640 F.2d 484 (4th Cir. 1981).

This Chapter establishes an action for unfair or deceptive acts or practices in or affecting commerce. The jury determines the facts, and based on the jury's findings of fact the court must determine as a matter of law whether the defendants engaged in an unfair or deceptive trade practice. Strickland v. A & C Mobile Homes, 70 N.C. App. 768, 321 S.E.2d 16 (1984), cert. denied, 313 N.C. 336, 327 S.E.2d 899 (1985).

Unfair or Deceptive Trade Practice Based on Conduct Proscribed by Chapter 95. — Although Chapter 95, relating to labor, is regulatory in nature, this fact does not prevent the finding of an unfair or deceptive trade practice based on the conduct proscribed by Chapter 95. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

Law Applying Sherman Act Instructive in Determining Full Reach of Section. — The body of law applying the Sherman Act, although not binding upon the Supreme Court in applying this section, is nonetheless instructive in determining the full reach of this section. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973); Hester v. Martindale-Hubbell, Inc., 493 F. Supp. 335 (E.D.N.C. 1980), aff'd, 659 F.2d 433 (4th Cir. 1981); Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied and appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Chapter 75 does not apply to the sale of securities; partnership interests qualified as securities because the investment contracts of plaintiffs (1) involved an investment of money, (2) in a common enterprise, and (3) involved an expectation of profit solely from the efforts of others. Andrews v. Fitzgerald, 823 F. Supp. 356 (M.D.N.C. 1993).

Statutes on monopolies and trusts are addressed to the sale and movement in commerce of goods, wares, merchandise and other things of value. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

And cases arising under such statutes ordinarily involve a vendor and a purchaser. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Thus, the prohibited acts are usually connected with a purchase and sale. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Law of Civil Conspiracy Is Applicable. — This State's substantive law of civil conspiracy also applies in the context of this section. Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied and appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Federal copyright law preemption under 17 U.S.C.S. § 301(a) requires: (1) that state law rights are claimed in works that are within the subject matter of the copyright, and (2) the state law is subject to preemption only if the state law cause of action lacks an extra element that would make the state law action qualitatively different than a federal law copyright infringement claim; therefore, where a copyright holder sued an alleged infringer for its use without prior approval of a certain dragonfly image on its website, the infringer's unfair and deceptive trade practices claim under G.S. 75-1.1 was preempted by federal copyright law because there was no extra element in the G.S. 75-1.1 action that made it qualitatively different from a federal copyright claim. Iconbazaar, L.L.C. v. Am. Online, Inc., 308 F. Supp. 2d 630, 2004 U.S. Dist. LEXIS 3840 (M.D.N.C. 2004).

Preemption by Soft Drink Act. — North Carolina unfair practices laws are preempted by the Soft Drink Act (15 U.S.C. § 3501-03) to the extent that they would proscribe wholesaling restrictions imposed by bottlers to prevent transshipment. Owens v. Pepsi Cola Bottling Co., 330 N.C. 666, 412 S.E.2d 636 (1992).

Federal Law Held to Preempt Plaintiffs' Claim. — The plaintiffs' state claims, alleging that the defendants' filing of each proof of claim, containing a disguised attorney fee, violated the North Carolina Fair Debt Collection Practices Act, G.S. 75-50 to 75-56, and the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1 to 75-35, were preempted by federal law, as obstacles to the accomplishment of the full purposes and objectives of federal bankruptcy law; the plaintiffs' alleged state law causes of action were based on the defendant's choice of process in a federal court proceeding, filing a proof of claim versus a fee application, and involved procedures found in the Code and Part III of the Bankruptcy Rules and of uniquely federal concern. Tate v. NationsBanc Mtg. Corp., 253 Bankr. 653, 2000 Bankr. LEXIS 1168 (Bankr. W.D.N.C. 2000).

Conflict with Admiralty Law. — The standard for awarding treble damages under Chapter 75 conflicts with the requirements for awarding punitive damages under admiralty law. Unlike admiralty law, Chapter 75 does not require a showing of gross negligence, actual malice, or reckless or wanton misconduct. A practice is deceptive and treble damages must be awarded under Chapter 75 if the trade practice has the capacity or tendency to deceive. Chapter 75, therefore, allows recovery under a much lower standard than required by admiralty law. Therefore, subcontractor's punitive damages claim under North Carolina's Unfair and Deceptive Trade Practice Act was dismissed. Delta Marine, Inc. v. Whaley, 813 F. Supp. 414 (E.D.N.C. 1993).

Subject Matter Jurisdiction. — District court had subject matter jurisdiction under 28 U.S.C.S. § 1334, over a borrower's claim that a securitization trustee, who held title to a mortgage loan given by a bankrupt lender to the borrower, violated North Carolina usury law and the Unfair and Deceptive Trade Practices Act; the borrower (1) was an obligor whose claim was barred by the clear terms of the stipulation and consent order of the bankruptcy court, (2) failed to successfully challenge the order in bankruptcy court, and (3) was thus bound by the order establishing that the case was related to the bankruptcy case for purposes of subject matter jurisdiction under 28 U.S.C.S. § 1334(b). Sowell v. U.S. Bank Trust Nat'l Ass'n, 317 B.R. 319, 2004 U.S. Dist. LEXIS 26521 (E.D.N.C. 2004).

Monopoly Defined. — In the modern and wider sense monopoly denotes a combination, organization, or entity so extensive and unified that its tendency is to suppress competition, to acquire a dominance in the market, and to secure the power to control prices to the public harm with respect to any commodity which people are under a practical compulsion to buy. State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936).

Elements of Trade Conspiracy. — The substantive law of trade conspiracies requires some consciousness of commitment to a common scheme. Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied and appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

An actionable conspiracy to restrain trade must operate to the prejudice of the public, in keeping with the common law's "Rule of Reason." United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Impact on Competitive Conditions Proper Focus. — The proper focus is not whether plaintiff-victim and defendant-conspirator were in actual competition with each other, but is upon the challenged restraint's impact on competitive conditions. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Restraint is unreasonable and void if greater than required for protection of the promisee or if it imposes an undue hardship upon the person who is restricted. Owing to the possibility that a person may be deprived of his livelihood, the courts are less disposed to uphold restraints in contracts of employment than to uphold them in contracts of sale. Starkings Court Reporting Servs., Inc. v. Collins, 67 N.C. App. 540, 313 S.E.2d 614 (1984).

Combination is not objectionable if the restraint is such only as to afford fair protection to the parties thereto and not broad enough to interfere with the interest of the public. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

The reasonableness of a restraining covenant is a matter of law for the court to decide. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

And Depends on Circumstances of Particular Case. — The reasonableness of the restraint depends upon the circumstances of the particular case. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

A contract establishing a price discrimination is not illegal per se. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Contracts to Assure Adequate Supply for Definite Price over Specified Period. — Business contracts by which a buyer assures himself of adequate supplies for a definite price over a specified period of time thus providing protection against future price increases are quite common and are not illegal per se. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Agreement Not to Sell to Particular Individual. — A complaint alleging that defendants conspired and agreed not to sell plaintiff ice, and that as a result thereof plaintiff's business was ruined, fails to state a cause of action, this and the following sections not being applicable. Lineberger v. Colonial Ice Co., 220 N.C. 444, 17 S.E.2d 502 (1941).

A contract between public utilities, approved by the Utilities Commission, is not violative of this section, if the Commission could have lawfully made an order to the same effect upon application and after hearing in an adverse proceeding. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Partial and Reasonable Restraints Upheld. — Contracts in restraint of trade were formerly held to be invalid as against public policy, but the more modern doctrine sustains them when the restraint is only partial and reasonable. The test is to consider whether it is such only as will afford a fair protection to the interests of the party in favor of whom it is given, and not so large or extensive as to interfere with the interests of the public. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Contracts tending only to partially restrain trade are enforceable where: (1) They are founded on a valuable consideration; (2) the restrictions imposed are reasonably necessary to protect the legitimate interest of the covenantee; and (3) the limitations or restrictions are reasonable as to time and area. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

Reasonableness of Restraints As to Time. — Covenants in restraint of trade are not unreasonable as to time if their duration is no longer than reasonably necessary to afford fair protection to the covenantee and not so long as to be injurious to the public. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

Where the duration of the restraint is limited as to time, the mere length of the period of time during which the restraint is to operate, standing alone, is never sufficient to render the restrictive covenant not to compete ipso facto unenforceable. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

A period of 25 years is not an unduly long time to expect property purchased for gasoline service station purposes to continue to be applied to such use. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

Sufficiency of Consideration for Contract in Restraint of Trade. — A contract in restraint of trade, like any other contract, must be supported by a consideration, but, unless the contract be a fraud upon the party sought to be restrained or nudum pactum, courts ordinarily will not inquire into the adequacy of the consideration. It is sufficient that the contract shows on its face a legal and valuable consideration; but whether it is adequate or inadequate to the restraint imposed must be determined by the parties themselves upon their own view of all the circumstances attending the particular transaction. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Trade Practices Law Has No Application to Labor Contracts. — North Carolina's unfair and deceptive trade practices law regulates conduct between businesses and between sellers or lenders and consumers; it has no application to contracts between employers and employees. Roberson v. Dale, 464 F. Supp. 680 (M.D.N.C. 1979).

Refusal of legal directory publisher to publish attorney's "professional card" and failure of ABA and North Carolina State Bar to prevent publisher from refusing to do so was not in violation of this section and G.S. 75-1.1. See Hester v. Martindale-Hubbell, Inc., 659 F.2d 433 (4th Cir. 1981), cert. denied, 455 U.S. 981, 102 S. Ct. 1489, 71 L. Ed. 2d 691 (1982).

Threats to Retaliate Unless Competition Withdrawn. — Threats by one ice company that it would sell ice in the town of a second ice company, if that company continued to supply ice to a rival of the first company were not prohibited by former G.S. 75-5. Smith v. Morganton Ice Co., 159 N.C. 151, 74 S.E. 961 (1912).

Breach of warranty alone is not a violation of Chapter 75. Warren v. Guttanit, Inc., 69 N.C. App. 103, 317 S.E.2d 5 (1984).

Contributory negligence is not a defense to a Chapter 75 violation, and thus the trial judge did not err in failing to submit that issue to jury considering an unfair or deceptive trade practices claim. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985); United States Fire Ins. Co. v. Nationwide Mut. Ins. Co., 735 F. Supp. 1320 (E.D.N.C. 1990).

The provisions of the monopoly statutes apply to railroads just as they do to individuals and other corporations. Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

Applicability of Chapter to Unfair Insurance Practices. — This Chapter is applicable to the sale of insurance, as Chapter 58 does not provide the exclusive remedy for those damaged by unfair trade practices in the insurance industry. Phillips v. Integon Corp., 70 N.C. App. 440, 319 S.E.2d 673 (1984).

In an action in which an insured alleged that an insurer failed to pay the full amount due under a commercial insurance policy for damage to property in violation of G.S. 58-63-15(11) and the Unfair and Deceptive Trade Practices Act (UDTPA), G.S. 75-1 et seq., the court analyzed the claim for unfair and deceptive acts or practices in the business of insurance as one brought pursuant to the UDTPA because only the Commissioner of Insurance could pursue an action pursuant to G.S. 58-63-15(11). Amatulli & Sons, LLC v. Great N. Ins. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 1589 (W.D.N.C. Jan. 8, 2008).

Refusal of Insurers to Provide Chiropractic Treatment as Workers' Compensation Coverage. — Plaintiff chiropractors, alleging that defendant insurance companies had interfered with their contractual rights by refusing to honor employers' choices of chiropractors as providers of health care treatment to employees under the Workers' Compensation Act, that defendants had misrepresented to employer insureds that their workers' compensation policies did not provide coverage for chiropractic treatment, and that defendants had conspired among themselves and with members of the medical profession to deprive plaintiffs of business opportunities by refusing to pay for chiropractic services provided in compliance with the Act, an illegal restraint of trade in violation of this section and 15 U.S.C. § 1, could not maintain their action in superior court without first seeking relief from the Industrial Commission. North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988), remanding case to the trial court for entry of an order staying plaintiffs' action pending a determination of the underlying workers' compensation issues by the Commission.

Insurer's Letter Denying Further Coverage. — Letter in which an insurer, which had paid to an insured an amount that exceeded a jury's determination of the insured's amount of loss, informed the insured that the insured's claim for further payment under a commercial insurance policy for damage to insured property was rejected due to the insured's failure to document its claim properly was insufficient to support the insured's unfair and deceptive trade practices claim under G.S. 75-1 et seq. Amatulli & Sons, LLC v. Great N. Ins. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 1589 (W.D.N.C. Jan. 8, 2008).

A contract whereby plaintiff invested $75,000 and was to receive in exchange, stock in a company to be formed by defendant was not within the scope of Chapter 75. Ward v. Zabady, 85 N.C. App. 130, 354 S.E.2d 369, cert. denied, 320 N.C. 177, 358 S.E.2d 71 (1987).

Grant of Municipal Franchise. — A private sale of public utilities by the city authorities to an electrical power plant with a grant of a municipal franchise does not create or tend towards a monopoly. Allen v. Town of Reidsville, 178 N.C. 513, 101 S.E. 267 (1919).

Cable Television Systems. — Municipal ownership and operation of cable television systems does not violate the provisions of this Chapter. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989).

City's refusal to grant cable television franchises to private applicants did not violate the exclusive emoluments and monopoly clauses of N.C. Const., Art. I, §§ 32 and 34, or the anti-monopoly and unfair trade practices provisions of Chapter 75. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989).

Ordinance Restricting Sale of Commodity. — A municipal ordinance prohibiting the sale of milk within the city without a permit is not invalid as tending to create a monopoly although the permit "may be suspended or revoked at any time for cause." State v. Kirkpatrick, 179 N.C. 747, 103 S.E. 65 (1920).

Exclusive Sale for Specified Period. — A contract made in good faith between a vendor and purchaser of a certain particular make or character of a manufactured product that restricts the former from selling articles of the same make or kind to other dealers within the town wherein the purchaser conducts his mercantile business, and which requires the expenditure of large sums of money and much time in advertising the goods and popularizing them on the local market, does not come within the intent and meaning of this Chapter; and in vendor's action for the purchase price the seller may recover damages as a counterclaim for breach of the seller's contract in that respect. Mar-Hof Co. v. Rosenbacker, 176 N.C. 330, 97 S.E. 169 (1918).

The refusal by wholesalers of ice to sell to a retailer on the same terms as those offered to other retailers in the city was not a violation of former G.S. 75-5, it not appearing that the parties were business competitors. Rice v. Asheville Ice Co., 204 N.C. 768, 169 S.E. 707 (1933).

Agreement Contravening Section. — A single instrument whereby the owner of lands leased same to an oil company rent free, and the oil company subleased the property back to the owner rent free, upon agreement that only the petroleum products of the oil company should be sold at the filling station, was held void, since the only consideration was the promise of the oil company to sell its products to the owner and the promise of the owner to handle such products to the exclusion of similar merchandise of competitors, which agreement was in contravention of former G.S. 75-5, and this result was not affected by a recital in the writing that the owner signed same as part of consideration for a deed to the property executed by a third person. Arey v. Lemons, 232 N.C. 531, 61 S.E.2d 596 (1950).

An exclusive dealership in one make of automobile in a particular city, while it necessarily involves a limited monopoly to sell this product of the manufacturer in the area covered thereby, is not invalid as an unreasonable restraint on trade, the agreement not being between competitors but imposing restraint upon a manufacturer and in favor of its dealer. Waldron Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961).

Charging Wholesale Prices While Fixing Retail Prices. — Evidence presented by plaintiff, to the effect that defendant wholesaler was charging its wholesale prices to plaintiff and at the same time setting plaintiff's retail prices, thus putting plaintiff at a competitive disadvantage, when viewed in the light most favorable to plaintiff, was sufficient to establish per se violations of both subdivisions (b)(2) and (b)(7) of this section. Baynard v. Service Distrib. Co., 78 N.C. App. 796, 338 S.E.2d 622 (1986).

Terminated Negotiations. — District court declined to reconsider its decision awarding the chemical and oil companies summary judgment on the polymer manufacturer's unfair and deceptive trade practices claim arising from the parties' terminated contract negotiations where the manufacturer failed to establish negligent misrepresentation or any other conduct that was immoral, unethical, oppressive, unscrupulous, or substantially injurious. Tolaram Polymers, Inc. v. Shell Chem. Co., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16058 (M.D.N.C. Aug. 16, 2002).

Motion for Directed Verdict Properly Granted. — In sublessee's claims of civil conspiracy, unfair and deceptive trade practices, and punitive damages regarding the termination of a lease (1) submission of the civil conspiracy claim to the jury was not justified by the evidence, as the evidence showed only a suspicion or conjecture that a conspiracy in fact existed; (2) submission of the unfair and deceptive trade practices claim was not justified, as the record was devoid of evidence to support the claim; and (3) submission of the punitive damages claims was not justified because the evidence did not support the underlying claims of civil conspiracy and unfair and deceptive trade practices and because there was no evidence to support the sublessee's contentions that the landlords' and the subtenant's actions were fraudulent, willful or wanton, or malicious. Di Frega v. Pugliese, 164 N.C. App. 499, 596 S.E.2d 456, 2004 N.C. App. LEXIS 981 (2004).

Applied in Simmons v. C.W. Myers Trading Post, Inc., 307 N.C. 122, 296 S.E.2d 294 (1982); Angola Farm Supply & Equip. Co. v. FMC Corp., 59 N.C. App. 272, 296 S.E.2d 503 (1982); Williams v. State Farm Mut. Auto. Ins. Co., 67 N.C. App. 271, 312 S.E.2d 905 (1984); Norlin Indus., Inc. v. Music Arts, Inc., 67 N.C. App. 300, 313 S.E.2d 166 (1984); Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984); North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc., 740 F.2d 274 (4th Cir. 1984); Cooper v. Forsyth County Hosp. Auth., 604 F. Supp. 685 (M.D.N.C. 1985); First Value Homes, Inc. v. Morse, 86 N.C. App. 13, 359 S.E.2d 42 (1987); Southern Pines Chrysler-Plymouth, Inc. v. Chrysler Corp., 826 F.2d 1360 (4th Cir. 1987); Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196 (W.D.N.C. 1989); Nixon v. Alan Vester Auto Group, Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 10870 (M.D.N.C. Feb. 12, 2009).

Cited in Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937); Patterson v. Southern Ry., 219 N.C. 23, 12 S.E.2d 652 (1941); Harris v. Atlantic-Richfield Co., 469 F. Supp. 759 (E.D.N.C. 1978); Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979); Ratliff v. Burney, 505 F. Supp. 105 (W.D.N.C. 1981); Stearns v. Genrad, Inc., 564 F. Supp. 1309 (M.D.N.C. 1983); Lloyd v. Carnation Co., 61 N.C. App. 381, 301 S.E.2d 414 (1983);

Mackey v. Nationwide Ins. Cos., 724 F.2d 419 (4th Cir. 1984); WCCB-TV, Inc. v. Telerep, Inc., 601 F. Supp. 284 (W.D.N.C. 1984); Evans v. Mitchell, 74 N.C. App. 730, 329 S.E.2d 681 (1985); Cooper v. Forsyth County Hosp. Auth., 789 F.2d 278 (4th Cir. 1986); Newton v. Whitaker, 83 N.C. App. 112, 349 S.E.2d 333 (1986); Olivetti Corp. v. Ames Bus. Sys., 319 N.C. 534, 356 S.E.2d 578 (1987); Sampson-Bladen Oil Co. v. Walters, 86 N.C. App. 173, 356 S.E.2d 805 (1987); Myers v. Liberty Lincoln-Mercury, Inc., 89 N.C. App. 335, 365 S.E.2d 663 (1988); Pelican Watch v. United States Fire Ins. Co., 90 N.C. App. 140, 367 S.E.2d 351 (1988); Carefree Carolina Communities, Inc. v. Cilley, 90 N.C. App. 766, 370 S.E.2d 81 (1988); Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 373 S.E.2d 449 (1988); North Carolina ex rel. Long v. Alexander & Alexander Servs., Inc., 680 F. Supp. 746 (E.D.N.C. 1988); Sandcrest Outpatient Servs. v. Cumberland County Hosp. Sys., 853 F.2d 1139 (4th Cir. 1988); Carefree Carolina Communities, Inc. v. Cilley, 90 N.C. App. 766, 370 S.E.2d 81 (1988); Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 373 S.E.2d 449 (1988); Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1186 (W.D.N.C. 1988); Copley Triangle Assocs. v. Apparel Am., Inc., 96 N.C. App. 263, 385 S.E.2d 201 (1989); Adams v. Moore, 96 N.C. App. 359, 385 S.E.2d 799 (1989); Murrow Furn. Galleries, Inc. v. Thomasville Furn. Indus., Inc., 889 F.2d 524 (4th Cir. 1989); North Carolina ex rel. Long v. Alexander & Alexander Servs., Inc., 711 F. Supp. 257 (E.D.N.C. 1989); Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990); North Carolina Steel, Inc. v. National Council on Comp. Ins., 123 N.C. App. 163, 472 S.E.2d 578 (1996); Nursing Registry, Inc. v. Eastern N.C. Regional Emergency Medical Servs. Consortium, Inc., 959 F. Supp. 298 (E.D.N.C. 1997); Pisgah Contractors v. Rosen, 117 F.3d 133 (4th Cir. 1997); North Carolina Steel, Inc. v. National Council Comp. Ins., 347 N.C. 627, 496 S.E.2d 369 (1998); R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 60 F. Supp. 2d 502 (N.D.N.C. 1999); Stephenson v. Warren, 136 N.C. App. 768, 525 S.E.2d 809, 2000 N.C. App. LEXIS 139 (2000); Poor v. Hill, 138 N.C. App. 19, 530 S.E.2d 838, 2000 N.C. App. LEXIS 540 (2000); Lupton v. Blue Cross & Blue Shield of N.C., 139 N.C. App. 421, 533 S.E.2d 270, 2000 N.C. App. LEXIS 909 (2000); Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4, 2001 N.C. App. LEXIS 146 (2001); R.J. Reynolds Tobacco Co. v. Philip Morris, Inc., 199 F. Supp. 2d 362, 2002 U.S. Dist. LEXIS 8180 (M.D.N.C. 2002); Dash v. FirstPlus Home Loan Trust 1996-2, 248 F. Supp. 2d 489, 2003 U.S. Dist. LEXIS 3706 (M.D.N.C. 2003); Price v. Leasecomm Corp., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 5467 (M.D.N.C. Mar. 31, 2004); Good Hope Hosp., Inc. v. N.C. HHS, Div. of Facility Servs., 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005); Hanamint Corp. v. Alliant Mktg. Group, LLC, 481 F. Supp. 2d 444, 2007 U.S. Dist. LEXIS 16741 (M.D.N.C. 2007); Strates Shows, Inc. v. Amusements of Am., Inc., 184 N.C. App. 455, 646 S.E.2d 418, 2007 N.C. App. LEXIS 1479 (2007); Universal Furniture Int'l, Inc. v. Collezione Europa, USA, Inc., 599 F. Supp. 2d 648, 2009 U.S. Dist. LEXIS 10880 (M.D.N.C. 2009).

II. PARTIAL RESTRAINT OF TRADE.

The true test now generally applied to agreements in partial restraint of trade is whether the restraint is such as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

Agreements in Partial Restraint of Trade May Be Upheld. — Agreements in partial restraint of trade will be upheld when they are founded on valuable considerations, are reasonably necessary to protect the interest of the parties in whose favor they are imposed, and do not unduly prejudice the public interest. Waldron Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961); Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

III. AGREEMENT NOT TO COMPETE.

An individual's voluntary contractual restraint on his right to carry on his trade or calling is prima facie illegal and must be shown to be reasonable by the party seeking to enforce it. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

And Agreement Not to Compete May Be Forbidden. — Persons and corporations cannot be ordered to compete, but they properly can be forbidden to give directions, or make agreements, not to compete. State v. Craft, 168 N.C. 208, 83 S.E. 772 (1914).

Restraint Must Be Reasonable. — A limitation or restriction upon a person's right to engage in a lawful occupation or business is deemed detrimental to the public interest, unless the restraint imposed is reasonable under the proper tests. Waldron Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961).

Test as to Reasonableness. — A valid contract in partial restraint of trade, while primarily for the advantage of the purchaser of a business, inures to the benefit of the seller by enhancing the value of the goodwill and enabling him to obtain a better price for the sale of his business, the test as to territory being whether the restraint agreed upon is such as to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public;

and such will not be held to be unreasonable when they do not affect the public and go no further than to remove the danger to the purchaser of competition with the seller. Morehead Sea Food Co. v. Way, 169 N.C. 679, 86 S.E. 603 (1915).

In connection with the sale of a business, including goodwill, the validity of a covenant providing that the seller will not engage in business in competition with the buyer is determinable by these tests: (1) Is it reasonably necessary to protect the legitimate interest of the purchaser? (2) Is the limitation or restriction reasonable in respect of both time and territory? Waldron Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961).

It is the rule today that when one sells a trade or business and, as an incident of the sale, covenants not to engage in the same business in competition with the purchaser, the covenant is valid and enforceable (1) if it is reasonably necessary to protect the legitimate interest of the purchaser; (2) if it is reasonable with respect to both time and territory; and (3) if it does not interfere with the interest of the public. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968); Beasley v. Banks, 90 N.C. App. 458, 368 S.E.2d 885 (1988).

Enforceability of Covenant Not to Compete. — To be enforceable, a covenant not to compete must protect some substantial interest of the employer. Wilmar, Inc. v. Liles, 13 N.C. App. 71, 185 S.E.2d 278 (1971), cert. denied, 208 N.C. 305, 186 S.E.2d 178 (1972).

By this section, contracts in restraint of trade are made illegal in North Carolina; however, in this State a covenant not to compete is enforceable in equity if it is (1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties and (6) not against public policy. Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975); Brooks Distrib. Co. v. Pugh, 91 N.C. App. 715, 373 S.E.2d 300 (1988), rev'd on other grounds, 324 N.C. 326, 378 S.E.2d 31 (1989).

If covenants not to compete are included in contracts of employment, when the employment preexists the execution of the contracts, there must be some additional consideration to the employee to support his covenant not to compete. Wilmar, Inc. v. Liles, 13 N.C. App. 71, 185 S.E.2d 278 (1971), cert. denied, 208 N.C. 305, 186 S.E.2d 178 (1972).

A restrictive covenant not to compete which is the main purpose of a contract and not a subordinate feature is not protected as to enforceability by the exceptions afforded ancillary contracts in restraint of trade permissible in connection with the sale of a going business, a contract of employment, or a lease. Wilmar, Inc. v. Liles, 13 N.C. App. 71, 185 S.E.2d 278 (1971), cert. denied, 208 N.C. 305, 186 S.E.2d 178 (1972).

Since defendant's covenant not to compete lacked an essential element, a statement of any kind of consideration, it was invalid as a matter of law, and the trial court properly dismissed charges as to defendant. Brooks Distrib. Co. v. Pugh, 91 N.C. App. 715, 373 S.E.2d 300 (1988), rev'd on other grounds, 324 N.C. 326, 378 S.E.2d 31 (1989).

Excluded Territory Must Not Be Unreasonably Extensive. — The territory excluded from competition by an agreement such as this one must be no greater than is reasonably necessary to protect the covenantee's business interest, and if it is unreasonably extensive the entire covenant fails since equity will neither enforce nor reform an overreaching and unreasonable agreement. Beasley v. Banks, 90 N.C. App. 458, 368 S.E.2d 885 (1988).

Reasonableness of Restraints as to Time and Area Considered Together. — Although a valid covenant not to compete must be reasonable as to both time and area, these two requirements are not independent and unrelated aspects of the restraint. Each must be considered in determining the reasonableness of the other. Furthermore, neither is conclusive of the validity of the covenant, but both are important factors in settling that question. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Whether plaintiff's covenant meets the other requisites need not be determined when it is obvious that plaintiff's judgment is invalid and the covenant involved is unenforceable because the territory excluded from competition is unreasonably extensive. Beasley v. Banks, 90 N.C. App. 458, 368 S.E.2d 885 (1988).

Legitimate Business Interest. — In North Carolina a legitimate business interest is a business interest, not fictitious, which, when weighed against the public's interest in a free economic arena, is worthy of protection in order to encourage and stimulate business efforts and innovations. United Labs., Inc. v. Kuykendall, 87 N.C. App. 296, 361 S.E.2d 292 (1987), aff'd in part and rev'd in part, 322 N.C. 643, 370 S.E.2d 375 (1988).

Restrictive Stipulations in Sale of Business Usually Sustained. — Transactions involving the sale and disposition of a business, trade or profession between individuals with stipulations restrictive of competition on the part of the vendor do not, as a rule, tend to unduly harm the public and are ordinarily sustained to the extent required to afford reasonable protection to the vendee in the enjoyment of property or proprietary rights he has bought and paid for, and to enable a vendor to dispose of his property at its full and fair value. Mar-Hof Co. v. Rosenbacker, 176 N.C. 330, 97 S.E. 169 (1918).

A longer period of time in a covenant not to compete is justified where the area in which competition is prohibited is relatively small. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

The modern rule permitting the sale of goodwill recognizes that one who, by his skill and industry, builds up a business, acquires a property right in the goodwill of his patrons and that this property is not marketable unless the owner is at liberty to sell his right of competition to the full extent of the field from which he derives his profit and for a reasonable length of time. Where the contract is between individuals or between private corporations, which do not belong to the quasi-public class, there is no reason why the general rule that the seller should not be allowed to fix the time for the operation of the restriction so as to command the highest market price for the property he disposes of should apply. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Intention to Sell Goodwill. — Where a person sells a business and in connection therewith agrees not to engage in the same business in the same place, the obvious intention is to sell the goodwill of the business. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 58 S.E.2d 840 (1968).

Contracts Not to Compete Held Valid. — A provision of an agreement for the sale of a partner's interest that he would not again engage in the mercantile business in a certain town or near enough thereto to interfere with plaintiff's business was not in violation former G.S. 75-5. Wooten v. Harris, 153 N.C. 43, 68 S.E. 898 (1910).

Non-competition agreement was valid and enforceable under North Carolina law; information obtained through a salesman's efforts during the course of employment did not belong to employee; furthermore, employee's knowledge about the buying habits of customers, the cyclical nature of their ordering, and the special needs of customers was not generally available to the public. United Labs., Inc. v. Kuykendall, 322 N.C. 643, 370 S.E.2d 375 (1988).

Where employment agreement between parties prohibited employee from working anywhere within North Carolina and where employee's employment contacts were restricted to Wilminston area, employment contract did not restrict all competition between employee and employer throughout North Carolina but rather only prohibited the direct or indirect solicitation of employer's customers and accounts for specified two-year period; therefore, the noncompetition clause was reasonable as to both time and territory and its terms were enforceable. Triangle Leasing Co. v. McMahon, 327 N.C. 224, 393 S.E.2d 854 (1990).

An exchange of the defendant's fish business for stock in the plaintiff company, with an agreement not to engage in similar business for 10 years within 100 miles was valid, and not in violation of former G.S. 75-5. Morehead Sea Food Co. v. Way, 169 N.C. 679, 86 S.E. 603 (1915).

A covenant by the owner of a jewelry store not to engage in jewelry business competition with the purchaser within 10 miles of the city where the seller's jewelry store is located for a period of 10 years, is not void as being unreasonable as to time or territory. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Where non-competition covenant contained no fixed geographic restriction, but was operative for only six months following resignation or termination of independent contractor relationship and forbade participation only in companies "using a similar matrix marketing structure or handling similar products," it was not unreasonable as a matter of law. Market Am., Inc. v. Christman-Orth, 134 N.C. App. 234, 520 S.E.2d 570 (1999).

Non-competitive clause contained in independent distributor agreement was valid, as a covenant not to compete is enforceable in equity if it is: (1) in writing; (2) entered into at the time and as part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory embraced in the restrictions; (5) fair to the parties; and (6) not against public policy; and the court has held that non-competition clauses are applicable to independent contractor relationships. Market Am., Inc. v. Christman-Orth, 134 N.C. App. 234, 520 S.E.2d 570 (1999).

Covenants restricting use of property for purposes competitive with those of the covenantees have generally been held to be enforceable where they involve only partial restraints of trade, are found on sufficient consideration and are reasonably limited as to duration and area covered. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

Although the courts will not tolerate unreasonable restraints upon trade, and frown upon restrictions upon the free use of land, there is no doubt of the validity, under ordinary circumstances, of a restriction imposed by a lessor, ancillary to a leasing of part of his property, upon the remainder of the property owned or controlled. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

It appears to be well settled that the seller or lessor of property (as distinguished from business or goodwill) may be a reasonably limited restrictive promise agree to refrain from (1) himself engaging in, or (2) from disposing of his property in such a way that others can engage in, a business which would impair the value of the property to the buyer for the purpose for which he intended to use it. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

The owner of a business, who also owns land nearby, may sell or lease such land to a buyer or tenant who promises not to use it for business purposes in competition with that of the seller or lessor. Here, the restriction is limited to the use of the land transferred. Or, the owner of a tract of land or business block may sell or lease a portion thereof to one intending to use it for a particular purpose, making to him an ancillary promise not to permit the remaining part of the tract or building to be used for a competitive business purpose. These agreements are usually sustained as being reasonable, even though the purpose is to prevent competition and no business goodwill is being transferred. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

Agreement by Employee Not to Compete with Employer. — The validity of a covenant in a contract of employment providing that, upon termination of the employer-employee relationship, the employee will not engage in a business in competition with the employer, is determinable by these tests: (1) Is it founded on a valuable consideration? (2) Is it reasonably necessary to protect the legitimate interests of the employer? (3) Is the limitation or restriction reasonable in respect of both time and territory? Waldron Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961); United Labs., Inc. v. Kuykendall, 87 N.C. App. 296, 361 S.E.2d 292 (1987), aff'd in part and rev'd in part, 322 N.C. 643, 370 S.E.2d 375 (1988).

In North Carolina, agreements between employers and employees which restrain trade are valid and enforceable if they are (1) in writing, (2) made a part of the employment contract, (3) based on valuable consideration, (4) designed to protect the legitimate interests of the employer and (5) reasonable in respect to both time and territory. The question of whether an agreement meets these criteria is a matter of law for the court to decide. United Labs., Inc. v. Kuykendall, 87 N.C. App. 296, 361 S.E.2d 292 (1987), aff'd in part and rev'd in part, 322 N.C. 643, 370 S.E.2d 375 (1988).

Consideration for sale of goodwill and withdrawal from competition may be found in the general consideration for the sale of the business. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Contracts Not to Compete Held Unenforceable. — Trial court's denial of preliminary injunction for plaintiff doctor who sought enforcement of a covenant not to compete between himself and another doctor would be affirmed where the contract was void as against public policy, since enforcement would leave only one gastroenterologist to serve the community and would negatively impact upon patient consumers. Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 373 S.E.2d 449 (1988), aff'd, 324 N.C. 327, 377 S.E.2d 750 (1989).

Where, among other things, covenant not to compete prohibited employee's association with an employer anywhere in the world if the new employer indirectly competed with employer's company in the Greensboro locale, its practical effect was to limit employee's employment within the solid state electronic equipment industry only to companies that did not compete with the Greensboro branch office and surrounding area in any manner, regardless of how far away employee moved to obtain work, regardless of the position employee accepted and regardless of the protection of the company's interest at the time by the trial court's injunction on employee prohibiting disclosure of information acquired while he worked with the company; therefore, the covenant violated the public's and employee's interest in his earning a living, and the trial judge correctly denied the company's request for a preliminary injunction enforcing the noncompetition clause of the contract. Electrical S., Inc. v. Lewis, 96 N.C. App. 160, 385 S.E.2d 352 (1989), cert. denied, 326 N.C. 595, 393 S.E.2d 876 (1990).

IV. PLEADING AND PRACTICE.

A general averment without allegation of specific facts is insufficient to constitute a cause of action, under this and the following sections. State v. Standard Oil Co., 205 N.C. 123, 170 S.E. 134 (1933).

Market Power. — Defendants' motion for summary judgment was granted as to plaintiffs' G.S. 75-1 claim because plaintiffs had not presented any evidence that defendants had market power. Oceans One Eleven, LLC v. Beach Mart, Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 82416 (E.D.N.C. Oct. 15, 2008).

Burden of Proving Unreasonableness of Business Practices in Restraint of Trade. — As to business practices, not within the scope of the original common-law rule of restraint of trade but alleged to be in restraint of trade on the ground that they are unreasonable restrictions on competition, the burden is on the one asserting their illegality to prove their unreasonableness. Such restraints are not prima facie illegal and must be shown to be so. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973); United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Concerted Action Must Be Proven. — The plain language of this section requires that some concerted action in restraint of trade must be proven; unilateral action cannot violate the statute. Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied and appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

In an action that a retailer brought against a manufacturer that refused to sell its new golf products to retailers that discounted prices, a retailer could not show the concerted action necessary to establish a violation of G.S. 75-1 and G.S. 75-1.1(a) because the manufacturer's decision to institute its new product introduction policy was a unilateral action. MD Prods. v. Callaway Golf Sales Co., 459 F. Supp. 2d 434, 2006 U.S. Dist. LEXIS 72478 (W.D.N.C. 2006).

Direct proof of an express agreement is not required. On the contrary, the plaintiff may rely on an inference of a common understanding drawn from circumstantial evidence. Nevertheless, plaintiff has the burden of adducing sufficient evidence from which the jury could find illegal concerted action on the basis of reasonable inferences and not mere speculation. Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied and appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Evidence of Consideration Inadmissible. — Where agreement not to compete was not internally related to some other writing from which the necessary contract provisions could be determined, did not contain any statement of obligation flowing from the employer to the employee, and contained no reference to consideration whatsoever, evidence to show consideration was inadmissible. Brooks Distrib. Co. v. Pugh, 91 N.C. App. 715, 373 S.E.2d 300 (1988), rev'd on other grounds, 324 N.C. 326, 378 S.E.2d 31 (1989).

Evidence Necessary to Show Contract Violates Rule of Reason. — Without evidence of facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable, a contract cannot be said to be in violation of the rule of reason. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Public damage must be alleged and proven. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

But Actual Competition Need Not Be Shown. — So long as the defendant in a restraint of trade case willfully engaged in acts that are calculated to destroy competition in a particular market, it is irrelevant whether the defendant is actually engaged in the market. Only an intention and capacity to compete against is essential; actual competition need not be shown. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Reduction of Prices to Consuming Public No Defense. — Plaintiff, a carrier by truck, instituted this action against certain railroad companies, to recover damages to his business, which he alleged resulted from an unlawful conspiracy between defendants to reduce transportation rates in order to eliminate plaintiff as a competitor, with the purpose of raising rates after competition had been removed. Defendants alleged that the reduction in rates resulted in lower prices to the consuming public on the products on which the rates had been reduced. It was held that the matter alleged does not constitute a defense to the action, since the express policy of the State is against both the raising and lowering of prices by unlawful means for an unlawful purpose, and since the law is interested in preserving competition rather than obtaining for the public temporary benefits from price wars in which competition is extinguished. Patterson v. Southern Ry., 214 N.C. 38, 198 S.E. 364 (1938).

Termination of Oral Agreement Unfair. — Where lawn mower company orally agreed to purchase all of its requirements for specially designed footrest pads from manufacturer as long as quality parts were delivered at competitive prices, and defendant, without giving plaintiff an opportunity to meet competitor's lower bid, terminated the agreement and began buying pads from another supplier at a lower price, conduct constituted an unfair and deceptive trade practice. Custom Molders, Inc. v. Roper Corp., 101 N.C. App. 606, 401 S.E.2d 96, aff'd per curiam, 330 N.C. 191, 410 S.E.2d 55 (1991).

For decision using rationale for dismissal under the Sherman Act, 15 U.S.C. §§ 1 and 2, as rationale for dismissal of claims under this section, see Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196 (W.D.N.C. 1989), aff'd in part and remanded in part, 912 F.2d 463 (4th Cir. 1990).

Class Actions. — Appellate court affirmed a trial court's judgment denying a motion filed by a person who represented a class of consumers to intervene in a class action filed under G.S. 75-1 et seq., where the class representative had already objected to a proposed settlement in a timely manner at a fairness hearing and had the right to appeal the trial court's judgment approving settlement without intervening. Nicholson v. F. Hoffmann-Laroche, Ltd., 156 N.C. App. 206, 576 S.E.2d 363, 2003 N.C. App. LEXIS 71 (2003).

Transfer of claims. — In an action by a patent holder holder against an alleged infringer claiming patent infringement, as well as breach of contract and unfair trade practices under N.C. Gen. Stat. ch. 75, following the transfer of the patent holders' patent claims to a different venue, the breach of contract and unfair trade practices claims were transferred to that venue as well because the convenience of parties and witnesses and the interest of justice were best served by transferring those claims to the same venue that the patent holder's patent claims were transferred to. Carolina Archery Prods. v. Alpine Archery, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 11069 (M.D.N.C. June 15, 2004).

Standing to Bring Antitrust and Consumer Fraud Action. — Trial court erred in dismissing pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) for lack of standing a consumer's action alleging that manufacturers violated G.S. 75-1 and G.S. 75-1.1 by engaging in price fixing of ethylene propylene diene monomor elastomers (EPDM) because the consumer had standing to bring the antitrust and consumer fraud action; if the consumer could demonstrate that the increased EPDM prices affected the price of the goods he purchased, then he would have established the type of injury to indirect purchasers that the General Assembly intended to remedy by allowing indirect purchaser suits, and although a rigorous economic analysis would be required to determine whether increased prices were the result of the alleged price fixing or the result of some other factor, that was not sufficient reason to dismiss for lack of standing. Teague v. Bayer AG, — N.C. App. —, 671 S.E.2d 550, 2009 N.C. App. LEXIS 58 (2009).

Trial court erred in dismissing pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) for lack of standing a consumer's action alleging that manufacturers violated G.S. 75-1 and G.S. 75-1.1 by engaging in price fixing of ethylene propylene diene monomor elastomers (EPDM) because the consumer had standing to bring the antitrust and consumer fraud action; the factors the United States Supreme Court identified in Associated Gen. Contractors v. Carpenters, 459 U.S. 519, 74 L. Ed. 2d. 723 (1983) to determine standing under federal antitrust law do not apply in determining which indirect purchasers have standing to sue under the North Carolina antitrust statutes. Teague v. Bayer AG, — N.C. App. —, 671 S.E.2d 550, 2009 N.C. App. LEXIS 58 (2009).

V. AGREEMENT TO FIX PRICES.

Reasonableness of Agreement to Raise Price Immaterial. — An agreement among dealers in a necessary article of food, to raise its price, is an indictable offense at the common law, and evidence that dealers controlling a large part of the supply of milk in a town having by agreement raised its price, testimony is irrelevant that a dealer not a party to the agreement had also raised the price of his milk to his customers, or whether the agreement was reasonable or necessary for the article to yield a profit in its sale. State v. Craft, 168 N.C. 208, 83 S.E. 772 (1914).

Same — Intent Immaterial. — The intent of milk dealers combining to raise the price of milk is immaterial. State v. Craft, 168 N.C. 208, 83 S.E. 772 (1914).

VI. AGREEMENT NOT TO DEAL WITH SELLER'S COMPETITORS.

Equipment purchase contract which contained a provision requiring plaintiff to sell only fuel supplied by defendant violated former G.S. 75-5(b)(2) which prohibited a seller from requiring that a purchaser not deal with a computer. Roanoke Properties v. Spruill Oil Co., 110 N.C. App. 443, 429 S.E.2d 752 (1993).

VII. PRICE DISCRIMINATION.

Not Illegal Per Se. — A contract establishing a price discrimination is not illegal per se. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Former G.S. 75-5(b)(5) was not intended to outlaw price discrimination in the secondary line, and no reasonable construction of the statute produced that result. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Discrimination Not Allowed as to Similarly Situated Patrons. — Where a public service corporation has acquired the exclusive right to furnish hydroelectric power and light to municipalities, and to other public service corporations, for distribution to consumers, including subsidiary companies that it controls, it may not discriminate among its patrons under the same or substantially similar conditions as to the rate charged, or select its customers. North Carolina Pub. Serv. Co. v. Southern Power Co., 179 N.C. 18, 101 S.E. 593 (1919), rehearing dismissed, 179 N.C. 330, 102 S.E. 625 (1920).

VIII. DESTROYING OR INJURING COMPETITION IN ORDER TO FIX PRICES.

Destruction of Business in This State of a National Concern. — Former G.S. 75-5(b)(3) made unlawful the destruction or attempted destruction of the business, i.e., the commercial activity, within North Carolina of a competitor or business rival, with the purpose of attempting to fix the price of goods when the competition is removed. In other words, it would be unlawful to attempt to destroy the business in North Carolina of a national concern, as well as a local concern unaffected by out-of-state conduct or without out-of-state contacts. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

"Willful" Defined. — "Willful" means the wrongful doing of an act without justification or excuse. State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936).

Opinion Testimony from Dealers. — Where in the prosecution for violation of former G.S. 75-5(b)(3) the State was allowed to introduce the testimony of coal dealers in the same city as to the cost of handling coal, the opinion testimony being based upon complicated and detailed facts relating to costs of buying, shipping, trucking, handling, shrinkage, labor, repairs, etc., the witnesses having had years of experience in operating their respective businesses in the city, it was held that the witnesses were experts and their opinion testimony was competent and was properly received in evidence. State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936).

Evidence Was Irrelevant Where Parties Not in Competition. — Where the parties were not in competition in the retail market for 2-liter bottles of soda, evidence that defendant attempted to force plaintiff to raise the retail price of his two-liter bottles, though applicable to plaintiff's unfair practices claim, had no relevance to his claim under former G.S. 75-5. Owens v. Pepsi Cola Bottling Co., 330 N.C. 666, 412 S.E.2d 636 (1992).

IX. DIVISION OF TERRITORY.

Division of Territory Held Unenforceable. — Under a contract dividing a county into separate territory, within which each of the respective parties was not to interfere with the business of the other in operating cotton gins, etc., the plaintiff sold the defendant a cotton ginning plant, the latter agreeing to remove the plant and not to again operate one there, the intent of the agreement was a division of territory, with the object to eliminate competition therein, and the agreement will not be enforced. Shute v. Shute, 176 N.C. 462, 97 S.E. 392 (1918).

An agreement that a retailer should handle a certain product upon condition that he should not sell like products of other manufacturers within the same price range was prohibited by former G.S. 75-5. Florsheim Shoe Co. v. Leader Dep't Store, Inc., 212 N.C. 75, 193 S.E. 9 (1937).

X. RESALE PRICE MAINTENANCE.

Contract to Sell at Label Price. — A contract of sale of merchandise for resale by the buyer, which stipulates that the buyer will not sell the merchandise except at label prices and will not sell or permit the sale of any other similar merchandise, was violative of former G.S. 75-5. Standard Fashion Co. v. Grant, 165 N.C. 453, 81 S.E. 606 (1914), writ dismissed, 239 U.S. 654, 36 S. Ct. 164, 60 L. Ed. 487 (1915).

XI. ELIMINATION OF COMPETITION.

Combination of Railroads to Eliminate Motor Truck Competition. — A combination of railroads for the purpose of reducing rates on gasoline transportation within a certain area with the intent to eliminate motor truck competition and with the further purpose of raising and fixing a higher rate on the same commodity after the elimination of competition was a violation of former G.S. 75-5. Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

Attempt to Drive Competitor Out of Business. — An indictment charging that the employees of a rival company in the sale of lawful commodities had combined together to break up their competitor's business by systematically following its salesmen from house to house and place to place and to so abuse, vilify and harass them as to deter them in their lawful business and to break up their sales; that they falsely represented that their rival company was composed of a set of thieves and liars, endeavoring to cheat and defraud the people, etc., charges a conspiracy indictable at common law. State v. Dalton, 168 N.C. 204, 83 S.E. 693 (1914).

Question of Fact Shown. — There was a genuine issue of material fact as to whether defendants' act of submitting documents to the county board of commissioners was done in an attempt willfully to destroy or injure plaintiffs' business in county and as to whether company was attempting to eliminate any competition from another company in county, and whether this act constituted an unfair or deceptive trade practice which was in commerce and proximately injured the plaintiffs. Martin Marietta Corp. v. Wake Stone Corp., 111 N.C. App. 269, 432 S.E.2d 428 (1993), aff'd, 339 N.C. 602, 453 S.E.2d 146 (1995).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim. (1969, c. 833; 1977, c. 747, ss. 1, 2.)

Cross References. — As to prohibition of falsely obtaining, selling or soliciting telephone records, see G.S. 14-113.31. As to requirements for maintenance fees for gift cards, see G.S. 66-67.5. As to the unfair trade practice of solicitation without disclosures, see G.S. 131C-21.1 and 131C-16.1.

Legal Periodicals. — For comment, "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For comment on retaliatory eviction in landlord-tenant relations, see 54 N.C.L. Rev. 861 (1976).

For note discussing the role of the jury in applying deceptive trade practices legislation, see 54 N.C.L. Rev. 963 (1976).

For comment, "Attacking the 'Forfeiture as Liquidated Damages' Clause in North Carolina Installment Land Sales Contracts as an Equitable Mortgage, Penalty and Unfair and Deceptive Trade Practice," see 7 N.C. Cent. L.J. 370 (1976).

For note discussing this section, see 12 Wake Forest L. Rev. 484 (1976).

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For comment discussing the effect of the 1977 amendment to this section, see 56 N.C.L. Rev. 547 (1978).

For survey of 1977 law on trade regulation, see 56 N.C.L. Rev. 934 (1978).

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For article, "The Ombudsman, or Citizens' Defender — The North Carolina Experience," see 10 N.C. Cent. L.J. 227 (1979).

For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For survey of 1980 commercial law, see 59 N.C.L. Rev. 1017 (1981).

For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

For article discussing North Carolina antitrust and consumer protection law, see 60 N.C.L. Rev. 207 (1982).

For comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 "Act to Clarify Landlord Eviction Remedies in Residential Tenancies," see 60 N.C.L. Rev. 885 (1982).

For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

For article discussing unfair methods of competition, deceptive trade practices, and unfair trade practices, see 5 Campbell L. Rev. 119 (1982).

For article on lawyer advertising, see 18 Wake Forest L. Rev. 503 (1982).

For note concerning intent under North Carolina's Unfair or Deceptive Acts or Practices Statute, see 18 Wake Forest L. Rev. 134 (1982).

For survey of 1982 commercial law, see 61 N.C.L. Rev. 1018 (1983).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For article discussing pendent claims for damages in actions under the Federal Racketeer Influenced and Corrupt Organizations Act, see 7 Campbell L. Rev. 299 (1985).

For note on arbitration and punitive damages, in light of Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986), see 64 N.C.L. Rev. 1145 (1986).

For note, "Bad Faith Refusal to Pay First-Party Insurance Claims: A Growing Recognition of Extra-Contract Damages," see 64 N.C.L. Rev. 1421 (1986).

For article, "Unfair and Deceptive Legislation: The Case for Finding North Carolina General Statutes Section 75-1.1 Unconstitutionally Vague as Applied to an Alleged Breach of a Commercial Contract," see 8 Campbell L. Rev. 421 (1986).

For survey of North Carolina construction law, with particular reference to unfair or deceptive acts or practices, see 21 Wake Forest L. Rev. 633 (1986).

For article, "North Carolina's Cautious Approach Toward the Imposition of Extracontract Liability on Insurers for Bad Faith," see 22 Wake Forest L. Rev. 957 (1986).

For survey of 1987 law on unfair and deceptive trade practices, see 65 N.C.L. Rev. 1169 (1987).

For article, "North Carolina Construction Law Survey II," see 22 Wake Forest L. Rev. 481 (1987).

For note, "Consumer Protection—The Unfair Trade Practice Act and the Insurance Code: Does Per Se Necessarily Preempt?," see 10 Campbell L. Rev. 487 (1988).

As to article discussing deceptive trade practices, see 67 N.C.L. Rev. 1225 (1989).

For article concerning federal preemption in state unfair competition cases, "Refusing to Rock the Boat: The Sears/Compoco Preemption Doctrine Applied to Bonito Boats v. Thunder Craft," see 25 Wake Forest L. Rev. 385 (1990).

For note, "Ellis v. Northern Star Co.: Libel in a Business Setting Subject to Mandatory Treble Damages Under North Carolina General Statutes Sections 75-1.1 and 75-16," see 69 N.C.L. Rev. 1739 (1991).

For survey on consumer law, see 70 N.C.L. Rev. 1959 (1992).

For article, "Drafting, Interpreting, and Enforcing Commercial and Shopping Center Leases," see 14 Campbell L. Rev. 275 (1993).

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

For article, "Unfair Trade Practices, Antitrust and Consumer Welfare in North Carolina," see 80 N.C.L. Rev. 1927 (2002).

For article, "Silence Is Golden: The Case for Mandatory Disclosure of Coastal Hazards and Land-Use Restrictions by Residential Sellers in North Carolina," 25 N.C. Cent. L.J. 96 (2002).

For comment, "The Sword of North Carolina's 'Unfair and Deceptive Trade Practices Act': Combating North Carolina Businesses Who Undercut Competition by Hiring Illegal Immigrants," see 29 Campbell L. Rev. 333 (2007).

CASE NOTES

I. General Consideration.
II. Trade or Commerce.
III. Unfair and Deceptive Acts.
  A. In General.
  B. Illustrative Cases.
IV. Pleading and Practice.

I. GENERAL CONSIDERATION.

Constitutionality in Application. — The language of this section provides adequate notice that conduct constituting fraud is prohibited. Therefore, this section was not unconstitutional as applied in case involving fraud in a distributor-dealer relationship. Olivetti Corp. v. Ames Bus. Sys., 81 N.C. App. 1, 344 S.E.2d 82 (1986), aff'd in part and rev'd in part on other grounds, 319 N.C. 534, 356 S.E.2d 578 (1987).

Legislative Intent. — It was the clear intention of the General Assembly in enacting this section and G.S. 75-16, among other things, to declare deceptive acts or practices in the conduct of any trade or commerce in North Carolina unlawful, to provide civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State and to enable a person injured by deceptive acts or practices to recover treble damages from a wrongdoer. Hardy v. Toler, 24 N.C. App. 625, 211 S.E.2d 809, modified on other grounds, 288 N.C. 303, 218 S.E.2d 342 (1975).

The intent of the General Assembly in enacting this section was to enable a person damaged by deceptive acts or practices to recover treble damages from the wrongdoer, and to declare deceptive acts or practices in the conduct of any trade or commerce to be unlawful, and to provide civil legal means to maintain ethical standards of dealings between persons in business and the consuming public of North Carolina. State ex rel. Edmisten v. J.C. Penney Co., 30 N.C. App. 368, 227 S.E.2d 141 (1976), rev'd on other grounds, 292 N.C. 311, 233 S.E.2d 895 (1977); Buie v. Daniel Int'l Corp., 56 N.C. App. 445, 289 S.E.2d 118, cert. denied, 305 N.C. 759, 292 S.E.2d 574 (1982).

The North Carolina Legislature must have intended that substantial aggravating circumstances be present before any practice is deemed unfair under this section, since it provided that any damages suffered by the victim are to be trebled. General United Co. v. American Honda Motor Co., 618 F. Supp. 1452 (W.D.N.C. 1985).

Scope of Chapter. — Application of this Chapter is not unfettered. The statute itself exempts both "professional services rendered by a member of a learned profession," and acts by an advertising medium unaware of their "false, misleading or deceptive character."

Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440 (1991).

This chapter authorizes the Attorney General to join as party defendants the assignees of sales contracts which were allegedly obtained in violation of it. State ex rel. Easley v. Rich Food Servs., Inc., 139 N.C. App. 691, 535 S.E.2d 84, 2000 N.C. App. LEXIS 1041 (2000).

Where the seller was not engaged in the sale of her own home, she did not carry her burden of demonstrating that the transaction was beyond the scope of N.C.G.S. ch. 75. Willen v. Hewson, 174 N.C. App. 714, 622 S.E.2d 187, 2005 N.C. App. LEXIS 2612 (2005), cert. denied, — N.C. —, 631 S.E.2d 520 (2006).

Purpose of the statute outlined in subsection (b) of this section makes clear that the act is directed toward maintaining ethical standards in dealings between persons engaged in business and to promote good faith at all levels of commerce in North Carolina. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

The apparent purpose behind the enactment of this section was the protection of the consuming public. Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985).

The more recent pronouncements from the North Carolina Supreme Court concerning the applicability of this section emphasize the consumer protection purpose of the statute. Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985).

This section is designed, in part, to address the very real local concern that North Carolina businesses not be victimized by unfair methods of competition. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

The purpose of this section is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State, and it applies to dealings between buyers and sellers at all levels of commerce. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

The law was enacted to establish an effective private cause of action for aggrieved consumers in this State, and it was needed because common law remedies had proved often ineffective. Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440 (1991).

The 1977 amendments to this section constituted a substantive revision intended to expand the potential liability for certain proscribed acts. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049 (E.D.N.C. 1980), aff'd, 649 F.2d 985 (4th Cir. 1981).

The 1977 amendment to this section, which deleted the term "trade" from the phrase "trade or commerce" and rewrote subsection (b), clearly constituted a substantive revision intended to expand the potential liability for certain proscribed acts. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Legislative Intent of 1977 Amendment. — The courts have interpreted the legislature's action in 1977 of deleting the limiting language of "dealings within the state" as a desire expand the scope of this section to the limits of North Carolina's long-arm statute. Broussard v. Meineke Disct. Muffler Shops, Inc., 945 F. Supp. 901 (W.D.N.C. 1996).

The 1977 amendments to this section are not to be applied retroactively. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049 (E.D.N.C. 1980), aff'd, 649 F.2d 985 (4th Cir. 1981).

The 1977 amendment to this section, which deleted the term "trade" from the phrase "trade or commerce" and rewrote subsection (b), clearly constituted a substantive revision intended to expand the potential liability for certain proscribed acts. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Debt Collection Activities Not Covered by Section Prior to 1977 Amendment. — Under this section as it stood before the 1977 amendment it was held that debt collection activities of a department store chain did not come within this section because such activities are not trade in the ordinary sense although they could be considered a species of commerce. State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

Breach of Contract Alone Is Insufficient. — Although a mere breach of contract does not constitute a violation of this section, a breach accompanied with aggravating circumstances, such as an intentional misrepresentation made for the purpose of deceiving another and which has the natural tendency to injure another, can violate the statute. Baldine v. Furniture Comfort Corp., 956 F. Supp. 580 (M.D.N.C. 1996).

A mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under the Unfair Trade Practices; claims regarding the existence of an agreement, the terms contained in an agreement, and the interpretation of an agreement are relegated to the arena of contract law. Broussard v. Meineke Disct. Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998).

While under North Carolina law plaintiff may maintain a breach of contract claim and an unfair and deceptive trade practices claim based on the same conduct, plaintiff must allege substantial aggravating circumstances attending the breach of contract to support a claim of unfair and deceptive trade. Charlotte Commer. Group, Inc. v. Fleet Nat'l Bank (In re Charlotte Commer. Group, Inc.), — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 5392 (M.D.N.C. Mar. 13, 2003).

Actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under G.S. 75-1.1; thus, a plaintiff must show substantial aggravating circumstances attending a breach of contract to recover under the North Carolina Unfair and Deceptive Trade Practice Act, G.S. 75-1 et seq. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Defendant argued that plaintiff's allegations did not constitute a violation of North Carolina's unfair and deceptive trade practices statute, because a mere breach of contract, even if intentional, was not sufficiently unfair or deceptive to sustain an action. VF Jeanswear Ltd. P'ship v. Molina, 320 F. Supp. 2d 412, 2004 U.S. Dist. LEXIS 10810 (M.D.N.C. 2004).

To establish a prima facie claim for unfair trade practices, the plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff. Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650, 464 S.E.2d 47 (1995).

Three-Pronged Test. — In order to establish a violation of this section, a plaintiff must meet a three-pronged test: there must be a showing of an unfair or deceptive act or practice, or an unfair method of competition; in or affecting commerce; and proximately causing actual injury to the plaintiff. Peterson v. Bozzano, 183 Bankr. 735 (Bankr. M.D.N.C. 1995).

A party claiming a violation of this section must prove: (1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or his business. Wysong & Miles Co. v. Employers of Wausau, 4 F. Supp. 2d 421 (M.D.N.C. 1998).

The elements of a claim for unfair and deceptive practices are: (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business. Furr v. Fonville Morisey Realty, Inc., 130 N.C. App. 541, 503 S.E.2d 401 (1998), cert. dismissed, 351 N.C. 41, 519 S.E.2d 314 (1999).

To prevail on a claim of unfair and deceptive trade practices a plaintiff must show: (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby. First Atl. Mgt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 507 S.E.2d 56 (1998).

Deliberate Acts of Deceit or Bad Faith Not Required. — To prevail on an unfair and deceptive trade practice claim, deliberate acts of deceit or bad faith do not have to be shown. Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920 (1998), cert. denied, 348 N.C. 282, 501 S.E.2d 918 (1998).

To prevail on an unfair trade practices claim, deliberate acts of deceit or bad faith do not have to be shown, but rather, the plaintiff must demonstrate that the act possessed the tendency or capacity to mislead, or that it created the likelihood of deception. Boyd v. Drum, 129 N.C. App. 586, 501 S.E.2d 91, 1998 N.C. App. LEXIS 663 (1998), aff'd, 350 N.C. 90, 511 S.E.2d 304 (1999).

Jurisdiction. — G.S. 1-75.4(4), as applied to defining the reach of this section, requires an in-state injury to plaintiff before plaintiff can state a valid unfair trade claim. The 'In' Porters v. Hanes Printables, Inc., 663 F. Supp. 494 (M.D.N.C. 1987).

Construction with Other Provisions. — Violation of any form of conduct listed in G.S. 58-63-15 operates as a per se instance of unfair and deceptive trade practice under this section. Murray v. Nationwide Mut. Ins. Co., 123 N.C. App. 1, 472 S.E.2d 358 (1996).

If a conclusion of law was made that a debt collector violated a provision of G.S. ch. 75, art. 2, then that violation could be a violation of G.S. 75-1.1, but a debt collector who violated a provision of G.S. ch. 75, art. 2 and thereby violated G.S. 75-1.1 was only subject to the damages and penalty provided for in G.S. 75-56 and was not subject to the damages provisions in G.S. ch. 75, art. 1. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Failure to Prove Unfair Claims Practices Does Not Necessitate Judgment Against Claim for Unfair Trade Practices. — Award of treble damages and attorney fees under the North Carolina Unfair and Deceptive Trade Practices Act was not precluded by earlier summary judgment for the insurer on insured's claim under the North Carolina Unfair Claims Settlement Practices Act; failure to prove unfair claims practices does not independently necessitate judgment as a matter of law against a related claim for unfair trade practices. High Country Arts & Craft Guild v. Hartford Fire Ins. Co., 126 F.3d 629 (4th Cir. 1997).

As an agency of the State, a city may not be sued under Chapter 75. Rea Constr. Co. v. City of Charlotte, 121 N.C. App. 369, 465 S.E.2d 342 (1996).

Section Does Not Cover Every Dispute. — This expansive and somewhat confusing language has, for obvious reasons, made this section a favorite cause of action. Nonetheless, the courts have consistently recognized that this section does not cover every dispute between two parties. Hageman v. Twin City Chrysler-Plymouth Inc., 681 F. Supp. 303 (M.D.N.C. 1988).

Application of Section to Third-Party Claimants. — North Carolina does not recognize any cause of action under either G.S. 58-63-15 or under this section for unfair or deceptive trade practices by third-party claimants against the insurance company of an adverse party. Lee v. Mutual Cmty. Sav. Bank, 136 N.C. App. 808, 525 S.E.2d 854, 2000 N.C. App. LEXIS 156 (2000).

A third party who was not the insured and who was not in privity with the insurer did not have a cause of action against the insurer under G.S. 75-1.1, based upon G.S. 58-63-15(11). Anderson v. Lancaster Aviation, Inc., 220 F. Supp. 2d 524, 2002 U.S. Dist. LEXIS 18423 (M.D.N.C. 2002).

United States District Court for the Middle District of North Carolina concluded that a student pilot who was injured during a forced landing was in privity with the insurer for purposes of stating a claim under G.S. 75-1.1, based upon G.S. 58-63-15(11), to the extent the student pilot was asserting a claim under a renter pilot extension in an insurance contract; however, the student was not in privity with respect to claims for coverage of medical expenses where the insured were not required under North Carolina law to carry certain specified insurance for their aircraft. Anderson v. Lancaster Aviation, Inc., 220 F. Supp. 2d 524, 2002 U.S. Dist. LEXIS 18423 (M.D.N.C. 2002).

North Carolina did not recognize a cause of action for third-party claimants against the insurance company of an adverse party based on unfair and deceptive trade practices under G.S. 75-1.1; since a passenger brought a claim for personal injuries against a driver's insurer before the driver's liability was established judicially, he was not a third-party beneficiary of the policy, and his claim against the insurer was properly dismissed. Craven v. Demidovich, 172 N.C. App. 340, 615 S.E.2d 722, 2005 N.C. App. LEXIS 1429 (2005), cert. denied, 360 N.C. 62, 623 S.E.2d 581 (2005).

Subsection (a) is reproduced verbatim from the Federal Trade Commission Act (FTCA), and the legislature adopted this section to parallel and supplement the FTC Act. As is evident from the statutory language, this section prohibits two separate, although related, types of conduct. The statute forbids conduct that is "unfair" and conduct that is "deceptive." Plaintiff herein claims that defendant engaged in deceptive conduct. Hageman v. Twin City Chrysler-Plymouth Inc., 681 F. Supp. 303 (M.D.N.C. 1988).

This Section Is Applicable to Full Extent Permissible. — By deleting the geographic limitation from this section, the General Assembly made this statute available to the full extent permissible under conflicts of law principles and the Constitution. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

This section is intended to apply to extra-territorial conduct where such application is not constitutionally prohibited. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Section Applicable to Trade Secrets Protection Act. — This section is applicable to violations of the Trade Secrets Protection Act (G.S. 66-152 et seq.). Drouillard v. Keister Williams Newspaper Servs., Inc., 108 N.C. App. 169, 423 S.E.2d 324 (1992), cert. denied, 333 N.C. 344, 427 S.E.2d 617 (1993).

Section Inapplicable to Foreign Injuries with Negligible Effect on North Carolina Commerce. — This section is not available to a foreign plaintiff suing a resident defendant over alleged foreign injuries having a negligible effect, if any, on North Carolina trade or commerce. The 'In' Porters v. Hanes Printables, Inc., 663 F. Supp. 494 (M.D.N.C. 1987).

To state a claim for an unfair or deceptive trade practice in or affecting commerce which would fall within the reach of this section, plaintiff must allege a substantial effect on in-state business operations. Merck & Co. v. Lyon, 941 F. Supp. 1443 (M.D.N.C. 1996).

Incidental Interstate Effect Not Excessive. — When applied to concerted multi-state conduct resulting in injury to North Carolina residents, this section may have an incidental interstate effect, but that effect is not excessive in light of the local interests served and its minimal burden upon other states which recognize the common-law action for disparagement as applicable to the operative facts. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Application of this section and G.S. 75-5(b)(3) to conduct occurring outside of North Carolina is not preempted by federal statute. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Extra-Territorial Product Disparagement. — There is no constitutional prohibition against a private cause of action under this section or former G.S. 75-5(b)(3) for the extra-territorial conduct of product disparagement directed respectively toward a North Carolina competitor or the business in North Carolina of a competitor, North Carolina having a rational interest in each situation. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Relation Between This Section and Former G.S. 75-5(b)(3). — Any act which is a violation of former G.S. 75-5(b)(3) would also be considered to be a violation of this section, since former G.S. 75-5(b)(3) simply sets out specific conduct which is considered to be illegal and an unfair competitive act. Unlike the language of this section, however, the statutory language of former G.S. 75-5(b)(3) explicitly delineates the conduct prohibited within the limitations of the statutory language. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Effect on Competition Not Required. — By its terms, this section requires that the proscribed unfair methods of competition and unfair or deceptive acts or practices be "in or affecting commerce." Nothing in the statute requires an effect on competition. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

This section does not define term "deceptive." Accordingly, the North Carolina courts have borrowed the expansive definition of "deception" that the federal courts have traditionally employed in interpreting the FTC Act. Hageman v. Twin City Chrysler-Plymouth Inc., 681 F. Supp. 303 (M.D.N.C. 1988).

An action for unfair or deceptive acts or practices is a distinct action apart from fraud, breach of contract, or breach of warranty. Since the remedy was created partly because those remedies often were ineffective, it would be illogical to hold that only those methods of measuring damages could be used. To rule otherwise would produce the anomalous result of recognizing that although this section creates a cause of action broader than traditional common-law actions, G.S. 75-16 limits the availability of any remedy to cases where some recovery at common law would probably also lie. Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, cert. denied, 311 N.C. 751, 321 S.E.2d 126 (1984).

An action for unfair and deceptive trade practices is a distinct action separate from fraud, breach of contract, and breach of warranty. United Virginia Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

And Neither Wholly Tortious Nor Contractual in Nature. — An action for unfair or deceptive acts or practices is the creation of statute. It is, therefore, sui generis, and is neither wholly tortious nor wholly contractural in nature. Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, cert. denied, 311 N.C. 751, 321 S.E.2d 126 (1984).

A violation of G.S. 58-63-15 constitutes an unfair and deceptive trade practice in violation of this section as a matter of law. Miller v. Nationwide Mut. Ins. Co., 112 N.C. App. 295, 435 S.E.2d 537 (1993), cert. denied, 335 N.C. 770, 442 S.E.2d 519 (1994).

This section is separate and distinct from any contractual relationship between plaintiff and defendants. United Virginia Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

And Is Inapplicable to Breach of Contract. — A breach of contract, even if intentional, does not fall within the purview of this section. Pappas v. NCNB Nat'l Bank, 653 F. Supp. 699 (M.D.N.C. 1987).

Causes of Action Are Not Assignable. — Causes of action pursuant to this section cannot be assigned. Investors Title Ins. Co. v. Herzig, 330 N.C. 681, 413 S.E.2d 268 (1992).

The language of this section closely parallels that of Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1973 Ed.), which prohibits "unfair or deceptive acts or practices in commerce." Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975); State ex rel. Edmisten v. J.C. Penney Co., 30 N.C. App. 368, 227 S.E.2d 141 (1976), rev'd on other grounds, 292 N.C. 311, 233 S.E.2d 895 (1977).

Antitrust Matters. — This section is a comprehensive law designed to include within its reach the federal antitrust laws. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

Proof of conduct violative of the Sherman Act (15 U.S.C. § 1) is proof sufficient to establish a violation of the North Carolina Unfair Trade Practices Act. ITCO Corp. v. Michelin Tire Corp., 722 F.2d 42 (4th Cir. 1983), cert. denied, 469 U.S. 1215, 105 S. Ct. 1191, 84 L. Ed. 2d 337 (1985).

The federal decisions construing the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), may furnish some guidance to the meaning of this section, but federal court decisions are not controlling in construing this section. State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977). See also, Eastern Roofing & Aluminum Co. v. Brock, 70 N.C. App. 431, 320 S.E.2d 22 (1984).

Unlike other state trade regulation statutes, this section does not require or direct reference to the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), for its interpretation. State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

Because of the similarity in language of this section and § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)), it is appropriate for the Supreme Court to look to the federal decisions interpreting the FTC Act for guidance in construing the meaning of this section. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980); Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646, cert. denied, 323 N.C. 365, 373 S.E.2d 545 (1988).

Since the language of subsection (a) of this section is strikingly similar to that of a section of the Federal Trade Commission Act, 15 U.S.C.S. § 45(a)(1), North Carolina courts have held that federal decisions construing that act are instructive upon the meaning of this section. Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied and appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

This section is reproduced verbatim from section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1982), and the courts interpreting and applying this section have deemed it appropriate to look to the federal decisions interpreting the federal act for guidance in construing its meaning. Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985).

Federal Preemption. — National Flood Insurance Act of 1968 (NFIA), as amended, 42 U.S.C.S. § 4001 et seq., preempted plaintiff's state law claim under the North Carolina's Unfair and Deceptive Trade Practice Act relating to defendant flood insurer's claims handling of plaintiff's flood insurance claim; subjecting "write-your-own" flood insurance companies to North Carolina's bad faith statutes would have frustrated NFIA's objectives. Peal v. N.C. Farm Bur. Mut. Ins. Co., 212 F. Supp. 2d 508, 2002 U.S. Dist. LEXIS 19351 (E.D.N.C. 2002).

Motion to dismiss was granted on the state unfair and deceptive trade practices claim because the claim was preempted by the federal copyright act; the state claim elements were not extra elements making it different from the infringement claim. Old S. Home Co. v. Keystone Realty Group, Inc., 233 F. Supp. 2d 734, 2002 U.S. Dist. LEXIS 23867 (M.D.N.C. 2002).

Federal copyright law preemption under 17 U.S.C.S. § 301(a) requires: (1) that state law rights are claimed in works that are within the subject matter of the copyright, and (2) the state law is subject to preemption only if the state law cause of action lacks an extra element that would make the state law action qualitatively different than a federal law copyright infringement claim; therefore, where a copyright holder sued an alleged infringer for its use without prior approval of a certain dragonfly image on its website, the infringer's unfair and deceptive trade practices claim under G.S. 75-1.1 was preempted by federal copyright law because there was no extra element in the G.S. 75-1.1 action that made it qualitatively different from a federal copyright claim. Iconbazaar, L.L.C. v. Am. Online, Inc., 308 F. Supp. 2d 630, 2004 U.S. Dist. LEXIS 3840 (M.D.N.C. 2004).

Defendants' motion to strike references in plaintiff's complaint to G.S. 58-63-15(11) and G.S. 75-1.1 was granted because plaintiff's state claims were preempted by the Employee Retirement Income Security Act, 29 U.S.C.S. §§ 1001-1461; by incorporating those acts specified in G.S. 58-63-15(11), by including any acts considered "unethical" in the insurance industry and by providing trebled damages for violations, G.S. 75-1.1 provided for relief in addition to and outside of that available under 29 U.S.C.S. § 1132(a)(1)(B) and becomes that "separate vehicle" which was completely preempted and not saved under 29 U.S.C.S. § 1144(b)(2)(A). Smith v. Jefferson Pilot Fin. Ins. Co., 367 F. Supp. 2d 839, 2005 U.S. Dist. LEXIS 6865 (M.D.N.C. 2005).

In an action in which a former employee alleged that prospective employers refused to hire her based on information contained in a report that her former employer filed with a consumer reporting agency, the employee's claim for unfair and deceptive trade practices under G.S. 75-1.1 was preempted by 15 U.S.C.S. § 1681t(b)(1)(F) of the Fair Credit Reporting Act because the claim arose under state statutory law and the claim was based on action taken by the former employer while furnishing information to a consumer reporting agency. Joiner v. Revco Disc. Drug Ctrs., Inc., 467 F. Supp. 2d 508, 2006 U.S. Dist. LEXIS 89920 (W.D.N.C. 2006).

With respect to plaintiff's North Carolina Unfair and Deceptive Trade Practices Act (UDTPA), G.S. 75-1.1 et seq., claim, the Fair Credit Reporting Act (FCRA), 15 U.S.C.S. § 1681 et seq., preempted the claim to the extent the claim was based on defendant's alleged reporting of false loan information; to the extent plaintiff alleged a UDTPA claim based on the bank's alleged unfair debt collection practices, plaintiff failed to show that the bank proximately caused her damages. Ross v. Wash. Mut. Bank, 566 F. Supp. 2d 468, 2008 U.S. Dist. LEXIS 51060 (E.D.N.C. 2008).

The Petroleum Marketing Practices Act, 15 U.S.C. § 2806(a), did not preempt this section or G.S. 25-1-102(3) or the common law duty of good faith dealing as they arose in litigation involving wrongful termination of a franchise. L.C. Williams Oil Co. v. Exxon Corp., 627 F. Supp. 864 (M.D.N.C. 1985).

The provisions of the UCC are not exclusive and do not preclude an action for unfair and deceptive trade practices. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

This chapter is applicable to commercial transactions which are also regulated by the UCC. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

Relation Between This Section and G.S. 75-16. — As an essential element of a cause of action under G.S. 75-16, plaintiff must prove not only a violation of this section by the defendants, but also that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentations. Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980); Owens v. Pepsi Cola Bottling Co., 95 N.C. App. 47, 381 S.E.2d 819 (1989), modified on other grounds, 330 N.C. 666, 412 S.E.2d 636 (1992).

This section is an act for the protection of consumers and that G.S. 75-16 was intended to create an effective private remedy for aggrieved consumers. American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983).

This section and G.S. 75-16 were not intended to apply to cases involving innocent and unintentional infringement of unregistered trademarks. Sideshow, Inc. v. Mammoth Records, Inc., 751 F. Supp. 78 (E.D.N.C. 1990).

To be a prevailing party within the meaning of G.S. 75-16.1, the plaintiff must prove both an actual violation of this section and actual injury to plaintiff as a result of the violation. Evans v. Full Circle Prods., Inc., 114 N.C. App. 777, 443 S.E.2d 108 (1994).

Existing Institutional Health Service Was Exempted As Professional Health Care Provider. — Subsection (b) exempts professional services rendered by a member of a learned profession, and an existing institutional health service was exempted as a professional health care provider. Abram v. Charter Medical Corp. of Raleigh, 100 N.C. App. 718, 398 S.E.2d 331 (1990), cert. denied, 328 N.C. 328, 402 S.E.2d 828 (1991).

Political Advertisement. — Political campaign committee was not insulated from an unfair trade practices claim by a law firm for publishing a political advertisement defaming the firm and one of its members because of the fact that the ad was published during a political campaign. Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 568 S.E.2d 893, 2002 N.C. App. LEXIS 1088 (2002), cert. denied, — U.S. —, 124 S. Ct. 431, 157 L. Ed. 2d 310 (2003).

Because evidence that creates a genuine issue of material fact as to claims of fraud or negligent misrepresentation also inherently creates genuine issues of material fact sufficient to present a G.S. 75-1.1 et seq. claim to a jury, based on the evidence offered in support of plaintiff's underlying claims of fraud and negligent misrepresentation, the court was not able to conclusively determine that plaintiff could not prevail under any circumstances on its statutory claim; accordingly, genuine issues of material fact existed as to whether defendant's acts constituted a violation of G.S. 75-1.1 et seq. Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc., 243 F. Supp. 2d 386, 2003 U.S. Dist. LEXIS 1354 (M.D.N.C. 2003).

What Must Be Proved to Prevail. — In order to prevail under this section and G.S. 75-16, trustee must show that (1) the acts or practices in question are "in or affecting commerce"; (2) the acts or practices in question had the capacity or tendency to deceive or were unfair; and (3) the debtor suffered actual injury as a proximate result of credit union's acts or practices. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Recovery according to this chapter is limited to those situations when a plaintiff can show that he detrimentally relied upon a statement or misrepresentation and he suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation. Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 394 S.E.2d 643 (1990), cert. denied, 99 N.C. 587, 402 S.E.2d 824 (1991).

It was for the jury to decide whether sellers of real property who allegedly misrepresented the presence or absence of pollutants on the property had committed fraud, and it was error to grant judgment notwithstanding the verdict on that issue; if the buyers could prove fraud they could prove unfair business practices, and could also claim treble damages. State Props., LLC v. Ray, 155 N.C. App. 65, 574 S.E.2d 180, 2002 N.C. App. LEXIS 1701 (2002), cert. denied, 356 N.C. 694, 577 S.E.2d 889 (2003).

Bankruptcy trustee's claim for deceptive practices against a creditor "of last resort" that specialized in high risk loans was without merit where the creditor fully disclosed the terms of the loan and there was no other evidence of misrepresentation. Whitaker v. Mortg. Miracles, Inc. (In re Summit Place, LLC), 298 Bankr. 62, 2002 Bankr. LEXIS 1774 (Bankr. W.D.N.C. 2002).

Unfair or deceptive trade practices claim brought pursuant to G.S. 75-1.1 et seq. failed since there was a complete lack of proof as to which parties had contracted and what the terms of any such agreement were. S.B. Simmons Landscaping & Excavating, Inc. v. Boggs, — N.C. App. —, 665 S.E.2d 147, 2008 N.C. App. LEXIS 1537 (2008).

Egregious or Aggravating Circumstance Required. — Some type of egregious or aggravating circumstances must be alleged and proved before this section's provisions may be applied. Allied Distribs., Inc. v. Latrobe Brewing Co., 847 F. Supp. 376 (E.D.N.C. 1993).

A mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under the Unfair and Deceptive Trade Practices Act. The plaintiff must demonstrate substantial aggravating circumstances attending the breach. Canady v. Crestar Mtg. Corp., 109 F.3d 969 (4th Cir. 1997).

Preemption by the Copyright Act of 1976. — Where plaintiff's claims under this section were based solely upon defendant's copying of plaintiff's designs; therefore, these claims for unfair competition and unfair trade practices were preempted by the Copyright Act of 1976, 17 U.S.C. § 301. Patsy Aiken Designs, Inc. v. Baby Togs, Inc., 701 F. Supp. 108 (E.D.N.C. 1988).

In order to escape preemption under the Copyright Act of 1976, 17 U.S.C. § 301, a state law claim of unfair competition must include some qualitatively different extra element besides copying; a cause of action containing this extra element is not equivalent to any of the exclusive rights within the general scope of copyright within the meaning of G.S. 301, and is therefore not preempted. Patsy Aiken Designs, Inc. v. Baby Togs, Inc., 701 F. Supp. 108 (E.D.N.C. 1988).

The common law provides some guidance in unfair competition cases, but the Unfair Trade Practice Act was enacted in part because common-law remedies had often proved ineffective. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Common-Law Defenses Are Not Relevant. — An action for unfair deceptive acts or practices is sui generis. Therefore, traditional common-law defenses such as contributory negligence or good faith are not relevant; what is relevant is the effect of the actor's conduct on the consuming public. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

When the same course of conduct supports claims for fraud and for an unfair or deceptive trade practice under this Chapter, recovery can be had on either claim, but not on both. Wilder v. Hodges, 80 N.C. App. 333, 342 S.E.2d 57 (1986).

Actions may assert both violations under this section and fraud based on the same conduct or transaction, and plaintiffs in such actions may receive punitive damages or be awarded treble damages, but may not have both. It would be manifestly unfair to require plaintiffs in such cases to elect before the jury has answered the issues and the trial court has determined whether to treble the compensatory damages found by the jury, and such election should be allowed in the judgment. Mapp v. Toyota World, Inc., 81 N.C. App. 421, 344 S.E.2d 297, cert. denied, 318 N.C. 283, 347 S.E.2d 464 (1986).

To be actionable under this Chapter, an act of deception must have some adverse impact on the individual or entity deceived. Miller v. Ensley, 88 N.C. App. 686, 365 S.E.2d 11 (1988).

A simple breach of contract, even if intentional, does not amount to a violation of the Act; a plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act, which allows for treble damages. Bartolomeo v. S.B. Thomas, Inc., 889 F.2d 530 (4th Cir. 1989).

Plaintiff Need Not Prove Fraud, Bad Faith or Intentional Deception. — To prevail in an action under this Chapter, a purchaser of misrepresented merchandise does not have to prove fraud, bad faith or intentional deception as at common law; it is enough that the goods bought were misrepresented, assuming that the other requisites of the action are proved. Myers v. Liberty Lincoln-Mercury, Inc., 89 N.C. App. 335, 365 S.E.2d 663 (1988).

Under this section, intent of the defendant and good faith are irrelevant. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986).

Erroneous Interpretation of Law Is Not Unfair Act. — To assert in good faith a claim predicated on an erroneous interpretation of the law is not an unfair act proscribed by this section, as the remedy therefor lies in the law itself, such that such an erroneous view will not prevail. Branch Banking & Trust Co. v. Columbian Peanut Co., 649 F. Supp. 1116 (E.D.N.C. 1986).

The remedies provided pursuant to this section are equitable in nature and should not be frustrated by narrow or strict applications of procedural rules. Moretz v. Northwestern Bank, 67 N.C. App. 312, 313 S.E.2d 8, cert. denied, 311 N.C. 761, 321 S.E.2d 141 (1984).

Treble Damages Required and Attorney's Fees Permissible. — If the trial court finds that a defendant has violated the Unfair and Deceptive Trade Practices Act, it must award treble damages, and it may, in its discretion, award attorney's fees. Canady v. Crestar Mtg. Corp., 109 F.3d 969 (4th Cir. 1997).

Election of Remedies Required. — Pursuant to the doctrine of election of remedies, a party may not recover twice based on the same conduct; a trial court erred in awarding the buyers in a used car purchase transaction treble damages under both G.S. 20-348(a) and again under N.C.G.S., ch. 75. Blankenship v. Town & Country Ford, Inc., 174 N.C. App. 764, 622 S.E.2d 638, 2005 N.C. App. LEXIS 2616 (2005).

The presence of other federal or state statutory schemes may limit the scope of this section. Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985).

Securities transactions are not within the scope of this section. Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985); Skinner v. E.F. Hutton & Co., 314 N.C. 267, 333 S.E.2d 236 (1985).

The North Carolina Unfair Trade Practices Act does not apply to securities transactions. City Nat'l Bank v. American Commonwealth Fin. Corp., 801 F.2d 714 (4th Cir. 1986), cert. denied, 479 U.S. 1091, 107 S. Ct. 1301, 94 L. Ed. 2d 157 (1987).

A violation of either or both G.S. 95-47.6(2) and (9) as a matter of law constitutes an unfair or deceptive trade practice in violation of this section. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

This section applies to disputes between competitors, and not only to dealings between buyers and sellers. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Disputes between competitors in business fall under the province of this section. McDonald v. Scarboro, 91 N.C. App. 13, 370 S.E.2d 680, cert. denied, 323 N.C. 476, 373 S.E.2d 864 (1988).

This section is applicable to a covenant not to compete or to tortious interference with contract situations; it is not limited to actions involving consumers, or, when used to protect business, to areas involving fraudulent advertising or a buyer-seller relationship. United Labs., Inc. v. Kuykendall, 322 N.C. 643, 370 S.E.2d 375 (1988).

Inapplicability of Chapter to Securities Transactions. — Where plaintiffs' claim of misrepresentation arose from an allegedly fraudulent securities transaction, the claim was not actionable under this chapter. McPhail v. Wilson, 733 F. Supp. 1011 (W.D.N.C. 1990).

The Unfair Trade and Deceptive Practices Act does not apply to the employer-employee relationship. Wilson v. Wilson-Cook Medical, Inc., 720 F. Supp. 533 (M.D.N.C. 1989).

The Unfair and Deceptive Trade Practices Act covers claims arising out of employer-employee relations; therefore, where the plaintiff presented evidence that defendant deceptively used a position of confidence to solicit the plaintiff's customers and to compete with the plaintiff while still in his employment and that he concealed his behavior from the plaintiff, the plaintiff has demonstrated a genuine issue of material fact preventing summary judgment. Dalton v. Camp, 138 N.C. App. 201, 531 S.E.2d 258, 2000 N.C. App. LEXIS 613 (2000).

Hourly production workers made some attempt to establish the viability of their unfair trade practices claim, however, the employer argued convincingly to the contrary; under the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1.1, it was unlawful to engage in unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, G.S. 75-1.1(a). Although the Unfair and Deceptive Trade Practices Act was intended to benefit consumers, its protections extend to businesses in appropriate situations, but the Unfair and Deceptive Trade Practices Act did not normally extend to run-of-the-mill employment disputes and when the Supreme Court of North Carolina has allowed Unfair and Deceptive Trade Practices Act claims in employer-employee disputes, it was in circumstances not present in the instant case: for example, claims brought by employers against employees who engaged in conduct falling squarely within the Unfair and Deceptive Trade Practices Act's intended reach. Anderson v. Sara Lee Corp., 508 F.3d 181, 2007 U.S. App. LEXIS 26723 (4th Cir. 2007).

A private vendor of realty cannot be subject to liability under this section, and thus, the judge properly granted defendant summary judgment on this count. Blackwell v. Dorosko, 93 N.C. App. 310, 377 S.E.2d 814, aff'd in part and vacated and rev'd in part, 95 N.C. App. 637, 383 S.E.2d 670 (1989).

Actual Competition Not Necessary. — This section nowhere states a requirement that the plaintiff and defendant be in actual competition with each other in a particular market. Actual competition is not necessary. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Inducing a Sale Not Required. — In order for an activity to be covered by the Unfair Trade Practices Act, it need only "surround" or "affect" a sale; it need not meet the stricter standard of also inducing a sale. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Section Applicable to "Sellers". — The unfair and deceptive acts and practices forbidden by subsection (a) of this section are those involved in the bargain, sale, barter, exchange or traffic. This view is reinforced by subsection (b) of this section, a declaration of legislative intent having no counterpart in the federal act. The General Assembly, thus, is concerned with openness and fairness in those activities which characterize a party as a "seller." Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied and appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Section Inapplicable to Statements of Medical Professionals. — A statement by a medical professional, criminal or otherwise, is not governed by this section. Gaunt v. Pittaway, 139 N.C. App. 778, 534 S.E.2d 660, 2000 N.C. App. LEXIS 1036 (2000), cert. denied and appeal dismissed, 353 N.C. 262, 546 S.E.2d 401 (2000), cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001), cert. denied, 534 U.S. 950, 122 S. Ct. 345, 151 L. Ed. 2d 261 (2001).

Patient's claim against her doctor for unfair or deceptive trade practices failed because medical professionals were expressly excluded from the scope of G.S. 75-1.1(a). Phillips v. A Triangle Women's Health Clinic, Inc., 155 N.C. App. 372, 573 S.E.2d 600, 2002 N.C. App. LEXIS 1614 (2002).

Medical professionals are not "sellers" whose unfair and deceptive acts and practices are forbidden by this section. Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied and appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Medical professionals are not contemplated by North Carolina's prohibition of unfair trade practices. Cohn v. Wilkes Gen. Hosp., 767 F. Supp. 111 (W.D.N.C. 1991), aff'd, 953 F.2d 154

(4th Cir. 1991), cert. denied, 505 U.S. 1230, 112 S. Ct. 3057, 120 L. Ed. 2d 922 (1992).

Application of Section to Advertisements. — Publishing an advertisement which is neither false nor misleading is not an unfair method of competition or unfair or deceptive act or practice within the meaning of this section. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Whether puffing in the case of particular advertisement exceeds the bounds of fairness must be determined by viewing it against the background of all of the relevant facts of that case. One relevant fact concerns the market which the advertisement is designed to influence. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Application to Deception in Sale of Goods. — This statute has been construed as directed against deception in connection with the sale of goods. An illustrative list of prohibited conduct was contained in an article, “The People’s Advocate in the Marketplace — The Role of North Carolina’s Attorney General in the Field of Consumer Protection,” 6 Wake Forest Intra L. Rev. 1, 18 (1969). The construction has been substantially adopted by the Supreme Court of North Carolina. Stearns v. Genrad, Inc., 752 F.2d 942 (4th Cir. 1984).

Claims Against State Employees. — The whole thrust of this section as applied by North Carolina courts has been to afford protection from unethical acts by businesses or business persons, not to allow claims against state employees purchasing or leasing equipment for the State. Sperry Corp. v. Patterson, 73 N.C. App. 123, 325 S.E.2d 642 (1985).

Conduct “in or Affecting Commerce“ and “Unfair“ Conduct. — Where employee who had embezzled money signed a contract, note, and deed of trust in exchange for employer’s promise not to pursue criminal action, the contract, note, and deed of trust were void as against public policy and employer’s conduct was “in or affecting commerce” and “unfair.” Adams v. Jones, 114 N.C. App. 256, 441 S.E.2d 699 (1994).

Rental of residential property including a house and a trailer space was “in or affecting commerce“ for the purposes of liability under this section for unfair or deceptive trade practices. Stolfo v. Kernodle, 118 N.C. App. 580, 455 S.E.2d 869 (1995).

The private sale of a residence by an individual is not an act “in or affecting commerce,“ and is beyond the purview of this section; therefore, the trial court properly granted summary judgment as to the unfair and deceptive trade practices claim, as well as to plaintiff’s request for treble damages, because plaintiff was not engaged in the business of selling real estate. Stephenson v. Warren, 136 N.C. App. 768, 525 S.E.2d 809, 2000 N.C. App. LEXIS 139 (2000).

Debt collection activities of a major retailer are not within the reach of this section, for they are insufficiently related to the sale of goods. Stearns v. Genrad, Inc., 752 F.2d 942 (4th Cir. 1984).

This Chapter applies to the activities of a private personnel service in advertising qualified personnel. Winston Realty Co. v. G.H.G., Inc., 70 N.C. App. 374, 320 S.E.2d 286 (1984), aff’d, 314 N.C. 90, 331 S.E.2d 677 (1985).

Debt Collection Activities by Attorneys. — The North Carolina Debt Collection Act (NCDCA) contained within this chapter did not allow for a cause of action against attorneys engaged in collecting debts on behalf of their clients, although the tactics used by defendants in trying to collect delinquent assessments and their refusal to accept any payments less than $1,374 from plaintiffs, two-and-a-half times that which was legally owed, were indefensible, whether done in ignorance of, or disdain for, the law. Reid v. Ayers, 138 N.C. App. 261, 531 S.E.2d 231, 2000 N.C. App. LEXIS 606 (2000).

Sale of Personal Residence. — In order to avoid liability under this section, a defendant must fit under one of the statutory exemptions or the “homeowner’s exemption” for a private homeowner selling his or her personal residence recognized by the Court of Appeals. Stolfo v. Kernodle, 118 N.C. App. 580, 455 S.E.2d 869 (1995).

Home sellers were entitled to partial summary judgment regarding the home buyer’s unfair and deceptive practices claim against the sellers because private homeowners selling their personal residence were exempt from the purview of the North Carolina unfair and deceptive practices statute and neither the complaint nor the affidavits submitted alleged any facts showing that the sellers were engaged in a business or that the sale was a commercial land transaction that affected commerce. Birmingham v. H&H Home Consultants & Designs, Inc., 189 N.C. App. 435, 658 S.E.2d 513, 2008 N.C. App. LEXIS 646 (2008).

Application to Bulk Sale of Business’ Assets. — This section would apply to a bulk sale of a business’ assets as much as it would to a consumer sale. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Activity Regulated Under Commodity Exchange Act. — This section will not support a cause of action against a commodity broker for activity which is regulated under the Commodity Exchange Act, 7 U.S.C.S. § 1 et seq. Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978), cert. denied, 296 N.C. 583, 254 S.E.2d 32 (1979).

Recovery for Unfair Methods of Competition Perpetrated by Insurers. — Plaintiff can recover damages under this section even though unfair methods of competition perpetrated by persons engaged in the business of insurance are regulated by the insurance statutes, former G.S. 58-54.1 et seq. (see now G.S. 58-63-1 et seq.), which do not provide for civil damage actions. Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977).

Debt collection activities were not within the purview of this section. American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983).

Evidence of negligence, good faith, or lack of intent are not defenses to an action under this section. Murray v. Nationwide Mut. Ins. Co., 123 N.C. App. 1, 472 S.E.2d 358 (1996).

Who Are Protected. — This section does not protect only individual consumers, but serves to protect business persons as well. Concrete Serv. Corp. v. Investors Group, Inc., 76 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Individual consumers are not the only ones protected and provided a remedy under this section and G.S. 75-16. Olivetti Corp. v. Ames Bus. Sys., 81 N.C. App. 1, 344 S.E.2d 82 (1986), aff'd in part and rev'd in part on other grounds, 319 N.C. 534, 356 S.E.2d 578 (1987).

The private homeowner's exemption continues to exist. Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995).

Injury Must Be Proven. — As an essential element of a cause of action under G.S. 75-16, plaintiff must prove not only that defendants violated this section, but also, that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentations. Bailey v. LeBeau, 79 N.C. App. 345, 339 S.E.2d 460, modified and aff'd, 318 N.C. 411, 348 S.E.2d 524 (1986).

Actual Injury. — Although plaintiffs regained the purchase price plus interest and closing costs in a deceptive trade practice claim, a jury could find that plaintiffs' "actual injury" also consisted of the loss of use of the specific and unique property and the loss of the appreciated value of the property. Canady v. Mann, 107 N.C. App. 252, 419 S.E.2d 597, cert. granted, 332 N.C. 664, 424 S.E.2d 905 (1992).

Contributory Negligence. — Contributory negligence is not an absolute defense to an action under this Chapter. Actions under this Chapter are not based upon negligence; they are based upon "unfair or deceptive acts or practices in or affecting commerce," which the General Assembly has made unlawful. Winston Realty Co. v. G.H.G., Inc., 70 N.C. App. 374, 320 S.E.2d 286 (1984), aff'd, 314 N.C. 90, 331 S.E.2d 677 (1985).

The Legislature did not intend for violations of this Chapter to go unpublished upon a showing of contributory negligence. If unfair trade practitioners could escape liability upon showing that their victims were careless, gullible, or otherwise inattentive to their own interests, the act would soon be a dead letter. Winston Realty Co. v. G.H.G., Inc., 70 N.C. App. 374, 320 S.E.2d 286 (1984), aff'd, 314 N.C. 90, 331 S.E.2d 677 (1985).

Officer's Personal Liability for His Tortious Conduct. — A corporate official may be held personally liable for tortious conduct committed by him, though committed primarily for the benefit of the corporation. This is true in trademark infringement and unfair trade practices cases. Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145 (4th Cir. 1987).

Violation Shown. — Where plaintiff's evidence showed that defendant repeatedly denied the sale of a bulldozer when he knew it had been sold and that defendant forged a bill of sale in an attempt to extinguish plaintiff's ownership interest in the bulldozer, through his conduct defendant deprived plaintiff for three years of money he was unquestionably entitled to receive. Defendant's conduct was sufficiently aggravating to support the trial court's conclusion that defendant violated this section. Garlock v. Henson, 112 N.C. App. 243, 435 S.E.2d 114 (1993).

Violation Not Shown. — Where plaintiff had been informed that he won a truck and then was later told that he did not win, plaintiff was able to state a cause of action for breach of contract and violation of G.S. 75-32, but was not able to state a claim under this section. Jones v. Capitol Broadcasting Co., 128 N.C. App. 271, 495 S.E.2d 172 (1998).

Insured did not show grounds for reformation of the insured's replacement coverage in the insurance policy covering the insured's home after: (1) the insured's husband oversaw that coverage for many years; (2) the insured asked after the husband died that the insurance company and insurance agent continue the coverage that the husband obtained; (3) they followed the insured's instructions; and (4) the insured sought to reform the insurance policy's replacement coverage provision after fire destroyed the insured's home and the insured felt the policy did not provide sufficient replacement coverage. The insured could not show that the insurance company and insurance agent did anything more than provide the coverage requested, and the insured could not demonstrate any G.S. 75-1.1 unfair or deceptive act or practice that they engaged in. Carter v. West Am. Ins. Co., 190 N.C. App. 532, 661 S.E.2d 264, 2008 N.C. App. LEXIS 1021 (2008).

Arbitrator Had Authority to Award Treble Damages. — Although 9 U.S.C.S. § 10(a)(4) of the Federal Arbitration Act applied, where an arbitration provision in a contract between parties was ambiguous, the trial court erred in modifying the arbitrators' G.S. 75-16 award of treble damages to plaintiffs in their deceptive trade practices claim under G.S. 75-1.1; the arbitrators, not the court had the authority to construe that ambiguous provision. WMS, Inc. v. Weaver, 166 N.C. App. 352, 602 S.E.2d 706, 2004 N.C. App. LEXIS 1782 (2004), cert. denied, 359 N.C. 197, 608 S.E.2d 330 (2004).

Preemption by Fair Credit Reporting Act. — In a debtor's suit against a creditor based on her inability to obtain credit from a report of a balance due on a credit card account that was obtained by her deceased husband without the debtor's knowledge or permission, the debtor's claim against the creditor for violation of the North Carolina Unfair and Deceptive Trade Practice Act, G.S. 75-1.1 et seq., was preempted by the Fair Credit Reporting Act, 15 U.S.C.S. § 1681t. Johnson v. MBNA Am. Bank, N.A., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 10533 (M.D.N.C. Mar. 9, 2006).

Fair Debt Collection Act as Exclusive Remedy. — In a debtor's suit against a creditor based on a credit card debt from a credit card obtained by her deceased husband without the debtor's knowledge and consent, the debtor's claim for violation of the North Carolina Unfair and Deceptive Trade Practice Act, G.S. 75-1.1 et seq., based on allegedly abusive debt collection conduct failed because the North Carolina Debt Collection Act, G.S. 75-50 et seq., provided the exclusive remedy for such a claim. Johnson v. MBNA Am. Bank, N.A., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 10533 (M.D.N.C. Mar. 9, 2006).

Conclusion of Law Reviewable De Novo on Appeal. — In an unfair trade practices case that certain borrowers filed against a lender for violations of G.S. 75-1.1, an appellate court applied a de novo standard of review to a trial court's decision holding that an arbitration clause in the loan agreement of certain buyers was invalid. The trial court's determination of whether the dispute was subject to arbitration was a conclusion of law that was reviewable de novo on appeal. Tillman v. Commer. Credit Loans, Inc., 177 N.C. App. 568, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006), rev'd, 362 N.C. 93, 655 S.E.2d 362, Tillman v. Commer. Credit Loans, Inc., 177 N.C. App. 568, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006).

In an unfair trade practices case that certain borrowers filed against a lender for violations of G.S. 75-1.1, the arbitration clause in the borrowers' loan agreement was not unconscionable for lack of mutuality. Mutuality merely required consideration on each side of a contract, mutuality did not require that each of a contract's terms had to apply equally to both parties to be enforceable, and the consideration was sufficient if it was shown that there was some consideration on both sides of a contract. Tillman v. Commer. Credit Loans, Inc., 177 N.C. App. 568, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006).

Applied in Smith v. Ford Motor Co., 26 N.C. App. 181, 215 S.E.2d 376 (1975); Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379 (1975); Stone v. Paradise Park Homes, Inc., 37 N.C. App. 97, 245 S.E.2d 801 (1978); Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979); Kleinfelter v. Northwest Bldrs. & Developers, Inc., 44 N.C. App. 561, 261 S.E.2d 498 (1980); Hester v. Martindale-Hubbell, Inc., 493 F. Supp. 335 (E.D.N.C. 1980); Abernathy v. Ralph Squires Realty Co., 55 N.C. App. 354, 285 S.E.2d 325 (1982); Santana, Inc. v. Levi Strauss & Co., 674 F.2d 269 (4th Cir. 1982); Brenner v. Little Red Sch. House, Ltd., 59 N.C. App. 68, 295 S.E.2d 607 (1982); Hager v. Crawford, 60 N.C. App. 763, 299 S.E.2d 832 (1983); Population Planning Assocs. v. Mews, 65 N.C. App. 96, 308 S.E.2d 739 (1983); Borders v. Newton, 68 N.C. App. 768, 315 S.E.2d 731 (1984); Canady v. Hardin, 71 N.C. App. 156, 321 S.E.2d 474 (1984); Hall v. T.L. Kemp Jewelry, Inc., 71 N.C. App. 101, 322 S.E.2d 7 (1984); North Carolina Nat'l Bank v. Carter, 71 N.C. App. 118, 322 S.E.2d 180 (1984); State ex rel. Edmisten v. Challenge, Inc., 71 N.C. App. 575, 322 S.E.2d 658 (1984); Coble v. Richardson Corp., 71 N.C. App. 511, 322 S.E.2d 817 (1984); Union Carbide Corp. v. Sunox, Inc., 590 F. Supp. 224 (W.D.N.C. 1984); Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692 (1987); Southern Pines Chrysler-Plymouth, Inc. v. Chrysler Corp., 826 F.2d 1360 (4th Cir. 1987); Russel v. Baity, 95 N.C. App. 422, 383 S.E.2d 217 (1989); Shell Oil Co. v. Commercial Petro., Inc., 733 F. Supp. 40 (W.D.N.C. 1989); Belmont Land & Inv. Co. v. Standard Fire Ins. Co., 102 N.C. App. 745, 403 S.E.2d 924 (1991); Anders v. Hyundai Motor Am. Corp., 104 N.C. App. 61, 407 S.E.2d 618 (1991); John v. Robbins, 764 F. Supp. 379 (M.D.N.C. 1991); Colvard v. Francis, 106 N.C. App. 277, 416 S.E.2d 579 (1992); Martin Marietta Corp. v. Wake Stone Corp., 111 N.C. App. 269, 432 S.E.2d 428 (1993); Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993); Malone v. Topsail Area Jaycees, Inc., 113 N.C. App. 498, 439 S.E.2d 192 (1994); Ace Chem. Corp. v. DSI Transps., Inc., 115 N.C. App. 237, 446 S.E.2d 100 (1994); Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650, 464 S.E.2d 47 (1995); Carolina Water Serv., Inc. v. Town of Atlantic Beach, 121 N.C. App. 23, 464 S.E.2d 317 (1995); Carlson v. Branch Banking & Trust Co., 123 N.C. App. 306, 473 S.E.2d 631 (1996); Henderson v. United States Fid. & Guar. Co., 346 N.C. 741, 488 S.E.2d 234 (1997); Van Dorn Retail Mgt., Inc. v. Klaussner Furn. Indus., Inc., 132 N.C. App. 531, 512 S.E.2d 456 (1999); Cash v. State Farm Mut. Auto. Ins. Co., 137

N.C. App. 192, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000); Llera v. Security Credit Sys., 93 F. Supp. 2d 674, 2000 U.S. Dist. LEXIS 3646 (W.D.N.C. 2000); Davis Lake Cmty. Ass'n v. Feldmann, 138 N.C. App. 292, 530 S.E.2d 865, 2000 N.C. App. LEXIS 598 (2000); Becker v. Graber Bldrs., Inc., 149 N.C. App. 787, 561 S.E.2d 905, 2002 N.C. App. LEXIS 308 (2002); Tucker v. The Blvd. at Piper Glen LLC, 150 N.C. App. 150, 564 S.E.2d 248, 2002 N.C. App. LEXIS 409 (2002); S. Atl. Ltd. P'ship of Tenn., LP v. Riese, 284 F.3d 518, 2002 U.S. App. LEXIS 4747 (4th. Cir. 2002); Bynum v. Hobbs Realty, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 19499 (M.D.N.C. Apr. 4, 2002); S.E. Shelter Corp. v. BTU, Inc., 154 N.C. App. 321, 572 S.E.2d 200, 2002 N.C. App. LEXIS 1468 (2002); Static Control Components, Inc. v. Darkprint Imaging, Inc., 240 F. Supp. 2d 465, 2002 U.S. Dist. LEXIS 25255 (M.D.N.C. 2002); Collezione Europa U.S.A., Inc. v. Hillsdale House, Ltd., 243 F. Supp. 2d 444, 2003 U.S. Dist. LEXIS 1942 (M.D.N.C. 2003); Cent. Carolina Bank & Trust Co. v. Sec. Life of Denver Ins. Co., 247 F. Supp. 2d 791, 2003 U.S. Dist. LEXIS 3098 (M.D.N.C. 2003); Eli Research Inc. v. United Communs. Group, LLC, 312 F. Supp. 2d 748, 2004 U.S. Dist. LEXIS 5792 (M.D.N.C. 2004); Ramsey Group v. EGS Int'l, Inc., 329 F. Supp. 2d 630, 2004 U.S. Dist. LEXIS 19377 (W.D.N.C. 2004); McDonald Bros., Inc. v. Tinder Wholesale, LLC, 395 F. Supp. 2d 255, 2005 U.S. Dist. LEXIS 25446 (M.D.N.C. 2005).

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N.C. App. LEXIS 1259 (2002); Voelske v. Mid-South Ins. Co., 154 N.C. App. 704, 572 S.E.2d 841, 2002 N.C. App. LEXIS 1533 (2002); Blankenship v. Town & Country Ford, Inc., 155 N.C. App. 161, 574 S.E.2d 132, 2002 N.C. App. LEXIS 1599 (2002); Fisher v. Hous. Auth. of Kinston, 155 N.C. App. 189, 573 S.E.2d 678, 2002 N.C. App. LEXIS 1607 (2002); Bryan v. Bellsouth Telcoms., Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 1704 (M.D.N.C. Feb. 6, 2003); Greene v. GMC, 261 F. Supp. 2d 414, 2003 U.S. Dist. LEXIS 7313 (W.D.N.C. 2003); Hobbs Realty & Constr. Co. v. Scottsdale Ins. Co., 163 N.C. App. 285, 593 S.E.2d 103, 2004 N.C. App. LEXIS 373 (2004); GE Healthcare Fin. Servs. v. EBW Laser, Inc., 225 F.R.D. 176, 2004 U.S. Dist. LEXIS 25365 (M.D.N.C. 2004); Reinhold v. Lucas, 167 N.C. App. 735, 606 S.E.2d 412, 2005 N.C. App. LEXIS 10 (2005); Moose v. Versailles Condo. Ass'n, 171 N.C. App. 377, 614 S.E.2d 418, 2005 N.C. App. LEXIS 1199 (2005); Good Hope Hosp., Inc. v. N.C. HHS, Div. of Facility Servs., 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005); Creekside Constr. Co. v. Dowler, 172 N.C. App. 558, 616 S.E.2d 609, 2005 N.C. App. LEXIS 1783 (2005); In re Medley, — Bankr. —, 2005 Bankr. LEXIS 2290 (Bankr. M.D.N.C. Nov. 10, 2005); Hurtado USA, Inc. v. Am. Safety & Indem. Co., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 30444 (M.D.N.C. Nov. 16, 2005); Carroll v. Ferro, 179 N.C. App. 402, 633 S.E.2d 708, 2006 N.C. App. LEXIS 1904 (2006); Time Warner Entertainment-Advance/Newhouse P'ship v. Carteret-Craven Elec. Mbrshp. Corp., 451 F. Supp. 2d 736, 2006 U.S. Dist. LEXIS 64195 (E.D.N.C. 2006); Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc., 180 N.C. App. 70, 637 S.E.2d 230, 2006 N.C. App. LEXIS 2253 (2006); Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 646 S.E.2d 381, 2007 N.C. App. LEXIS 1472 (2007); Blyth v. McCrary, 184 N.C. App. 654, 646 S.E.2d 813, 2007 N.C. App. LEXIS 1626 (2007); Tillman v. Commer. Credit Loans, Inc., 362 N.C. 93, 655 S.E.2d 362, 2008 N.C. LEXIS 21 (2008); Catawba Valley Bank v. Porter, 188 N.C. App. 326, 655 S.E.2d 473, 2008 N.C. App. LEXIS 77 (2008); Higgins v. Spence & Spence, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 13096 (E.D.N.C. Feb. 21, 2008); PCS Phosphate Co. v. Norfolk Southern Corp., 520 F. Supp. 2d 705, 2007 U.S. Dist. LEXIS 73374 (E.D.N.C. Sept. 28, 2007); Kucan v. Advance Am., 190 N.C. App. 396, 660 S.E.2d 98, 2008 N.C. App. LEXIS 902 (2008); Persis Nova Constr. v. Edwards, — N.C. App. —, 671 S.E.2d 23, 2009 N.C. App. LEXIS 61 (2009); Precision Components, Inc. v. C.W. Bearing USA, Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 101324 (W.D.N.C. Dec. 16, 2008); Atkins v. Peek, — N.C. App. —, 668 S.E.2d 63, 2008 N.C. App. LEXIS 2007 (2008).

II. TRADE OR COMMERCE.

Applicability. — This section applies if the plaintiff alleges a substantial injurious effect on plaintiff's business operations in North Carolina. Broussard v. Meineke Disct. Muffler Shops, Inc., 945 F. Supp. 901 (W.D.N.C. 1996).

Trade or Commerce Context Prerequisite. — Before a practice can be declared unfair or deceptive under this section, it must first be determined that the practice or conduct which is complained of takes place within the context of this section's language pertaining to trade or commerce. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980).

On an unfair trade practices claim, the proper inquiry is not whether a contractual relationship existed between the parties, but rather whether defendants' allegedly deceptive acts affected commerce. J.M. Westall & Co. v. Windswept View of Asheville, Inc., 97 N.C. App. 71, 387 S.E.2d 67, cert. denied, 327 N.C. 139, 394 S.E.2d 175 (1990).

The General Assembly amended subsection (b) of this section to define "commerce" inclusively as "business activity, however denominated," limited only by the express exemptions set forth above. The term "business" generally imports a broad definition. Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440 (1991).

"Commerce" Comprehends An Exchange. — The use of the word "trade" interchangeably with the word "commerce" indicates that this section contemplated a narrower definition of commerce which would comprehend an exchange of some type. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980).

Although the statutory definition of commerce is expansive, it is not intended to apply to all wrongs in a business setting. HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991).

"In or Affecting Commerce". — Where in his answer defendant admitted that he was involved in business activities relating to the buying and selling of residential real estate, there was sufficient evidence that defendant's conduct was "in or affecting commerce" so as to withstand a motion for a directed verdict. Wilder v. Squires, 68 N.C. App. 310, 315 S.E.2d 63, cert. denied, 311 N.C. 769, 321 S.E.2d 158 (1984).

In an action alleging unfair trade practices, alleged misrepresentations of defendant developer's agent to plaintiff supplier relating to the delivery of building materials to a third party (the contractor) at least affected commerce and arguably were also "in commerce" for purposes of this section. J.M. Westall & Co. v. Windswept View of Asheville, Inc., 97 N.C. App. 71, 387

S.E.2d 67, cert. denied, 327 N.C. 139, 394 S.E.2d 175 (1990).

Based on evidence that the defendant solicited plaintiff's customers and obtained their business while on official business for the plaintiff, the court held that the conduct in question was "in or affecting commerce" and thus fell within the scope of this chapter. Dalton v. Camp, 138 N.C. App. 201, 531 S.E.2d 258, 2000 N.C. App. LEXIS 613 (2000).

Where employer tried to prevent salespersons from discovering the amount of money they were owed, and used his position of power to retain the commissions he owed them, but there was no showing that the employer's conduct was "in or affecting commerce," the unfair or deceptive trade practices statute was not violated. Durling v. King, 146 N.C. App. 483, 554 S.E.2d 1, 2001 N.C. App. LEXIS 973 (2001).

Matters of Internal Corporate Management Do Not Affect Commerce. — Matters of internal corporate management, such as the manner of selection of and qualifications for directors, do not affect commerce in the context of a claim of unfair and deceptive trade practices; therefore it was proper to dismiss a former employee's action under the statute against a former employer where the employer changed its bylaws to prohibit former employees from applying to serve on its board until six years had elapsed since the date of last employment. Wilson v. Blue Ridge Elec. Mbrshp. Corp., 157 N.C. App. 355, 578 S.E.2d 692, 2003 N.C. App. LEXIS 541 (2003).

While a corporate officer's breaches of fiduciary duty in causing the corporation to transfer funds to the officer based on invalid partnership and employment agreements sufficiently established an unfair or deceptive act or practice, the conduct did not affect commerce as required for liability under G.S. 75-1.1(a) since the conduct related to internal corporate affairs rather than the corporation's regular business activities. Anderson v. Brokers, Inc. (In re Brokers, Inc.), 396 B.R. 146, 2008 Bankr. LEXIS 3119 (Bankr. M.D.N.C. 2008).

Subsection (b) of this section is not broad enough to encompass all forms of business activities, but was adopted to ensure that the original intent of this section, as set forth in subsection (b) as originally enacted, was effectuated. Olivetti Corp. v. Ames Bus. Sys., 81 N.C. App. 1, 344 S.E.2d 82 (1986), aff'd in part and rev'd in part on other grounds, 319 N.C. 534, 356 S.E.2d 578 (1987).

The federal Copyright Act preempts any legal or equitable right under state law which is "equivalent" to any of the exclusive rights within the general scope of copyright, so that state law could not in fact make copyright infringement a violation of this act. Nintendo of Am., Inc. v. Aeropower Co., 34 F.3d 246 (4th Cir. 1994).

Claims Against Attorney Barred. — The plaintiff's claims of unfair and deceptive trade practices against her attorney could not be brought under this section, which expressly excludes the rendition of professional services "by a member of a learned profession" from the definition of "commerce." Sharp v. Gailor, 132 N.C. App. 213, 510 S.E.2d 702 (1999).

Claims Against Attorney Barred. — In their debt collection practice, defendants, a law firm and its president, were learned professionals, exempt under the North Carolina Debt Collection Act and the North Carolina Unfair and Deceptive Trade Practices Act; the court was unable to limit the exemption to attorneys licensed in North Carolina and no exception would be made for alleged insufficient supervision in connection with claims brought by plaintiff consumers. Godfredson v. JBC Legal Group, P.C., 387 F. Supp. 2d 543, 2005 U.S. Dist. LEXIS 17878 (E.D.N.C. 2005).

Claims by Law Firm Not Barred. — While professional services rendered by an attorney were not included in the definition of "commerce" in G.S. 75-1.1(b), a law firm was not precluded from pursuing an unfair or deceptive trade practices claim against a political campaign committee which published a political advertisement containing allegedly defamatory statements about the firm and one of its members. Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 568 S.E.2d 893, 2002 N.C. App. LEXIS 1088 (2002), cert. denied, — U.S. —, 124 S. Ct. 431, 157 L. Ed. 2d 310 (2003).

The rental of commercial property is trade or commerce within the meaning of this section. Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176, aff'd and modified, 303 N.C. 675, 281 S.E.2d 43 (1981).

The leasing of just one commercial lot satisfies the requirement of being in or affecting commerce. Wilder v. Hodges, 80 N.C. App. 333, 342 S.E.2d 57 (1986).

The leasing of a piece of real estate for use as a restaurant parking lot is a business activity. Wilder v. Hodges, 80 N.C. App. 333, 342 S.E.2d 57 (1986).

Sale or Lease of Houses as Business or Act Affecting Commerce. — While the mere purchase and sale of a residence is not an act in or affecting commerce, under this section the law is otherwise as to persons who buy, sell, or lease houses as a business. Adams v. Moore, 96 N.C. App. 359, 385 S.E.2d 799 (1989), cert. denied, 326 N.C. 46, 389 S.E.2d 83 (1990).

Where the record revealed that defendant was a licensed contractor and that he built the residence that he sold to plaintiffs, defendant's conduct is within the scope of this section. Rucker v. Huffman, 99 N.C. App. 137, 392 S.E.2d 419 (1990).

The rental of residential housing is trade or commerce under this section. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 299 N.C. 441, 241 S.E.2d 843 (1978).

G.S. ch. 75, regarding consumer protection, applied to residential rentals because the rental of residential housing was commerce pursuant to G.S. 75-1.1. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Rental of spaces in a mobile home park is "trade and commerce" within the meaning of this statute. Marshall v. Miller, 47 N.C. App. 530, 268 S.E.2d 97, modified and aff'd, 302 N.C. 539, 276 S.E.2d 397 (1981).

Employer-Employee Relationships. — Unlike buyer-seller relationships, the employer-employee relationships do not fall within the intended scope of this section. Buie v. Daniel Int'l Corp., 56 N.C. App. 445, 289 S.E.2d 118, cert. denied, 305 N.C. 759, 292 S.E.2d 574 (1982); American Marble Corp. v. Crawford, 84 N.C. App. 86, 351 S.E.2d 848, cert. denied, 319 N.C. 464, 356 S.E.2d 1 (1987); Liggett Group, Inc. v. Sunas, 113 N.C. App. 19, 437 S.E.2d 674 (1993).

Employer-employee relationships do not fall within the intended scope of G.S. 75-1.1, and it was undisputed that the employee's claims arose from his employment. Freeman v. Duke Power Co., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 14432 (M.D.N.C. Aug. 15, 2003).

Former Employee's Claims. — The former employee's claim under this section should have been submitted to a jury, where the claims referred to activities after their separation, at which time they became business competitors, and this section declares unlawful unfair methods of competition in or affecting commerce. Ausley v. Bishop, 133 N.C. App. 210, 515 S.E.2d 72 (1999).

The relationship of borrower and mortgage broker and the activities which are appurtenant to it are components of the larger concept of trade or commerce and therefore come within the purview of this section, though no tangible property of any kind moves through commerce because of this relationship, since an exchange of value does occur as a result of the process of securing a broker as the representative of the potential borrower. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980).

Private parties engaged in the sale of a residence are not involved in trade or commerce and cannot be held liable under this section. Robertson v. Boyd, 88 N.C. App. 437, 363 S.E.2d 672 (1988); Johnson v. Beverly-Hanks & Assocs., 97 N.C. App. 335, 388 S.E.2d 584 (1990), rev'd on other grounds, 328 N.C. 202, 400 S.E.2d 38 (1991).

Where the defendant was a private individual who engaged a realtor to auction a residence on his behalf and there was no evidence in the record that defendant was in the business of buying and selling residential real estate, his actions were not in or affecting commerce. Bhatti v. Buckland, 99 N.C. App. 750, 394 S.E.2d 192 (1990).

Home seller was not subject to unfair and deceptive practice liability because nothing in the record suggested that this was a commercial land transaction, and in selling her private residence, the seller was not engaged in commerce. MacFadden v. Louf, — N.C. App. —, 643 S.E.2d 432, 2007 N.C. App. LEXIS 790 (2007).

Actions of father acting as a contractor to build a house for his daughter did not rise to the harm proscribed under this Chapter. Miller v. Ensley, 88 N.C. App. 686, 365 S.E.2d 11 (1988).

Statements and Actions Leading to Job Termination of Project Manager Not in or Affecting Trade or Commerce. — Defendants, an engineering firm and a director of the firm, were entitled to summary judgment as to a project manager's claim of unfair and deceptive trade practices under G.S. 75-1.1, because the project manager failed to show that defendants' statements and actions concerning the project manager's performance had any impact beyond his employment relationship with an agency, and therefore the project manager failed to show that defendants' statements and actions were in or affecting commerce. Esposito v. Talbert & Bright, Inc., 181 N.C. App. 742, 641 S.E.2d 695, 2007 N.C. App. LEXIS 400 (2007).

Referral Fee. — Although persons selling their own private residence are exempt from Chapter 75 liability, where defendant's wife received a referral fee, defendants' transaction was within the scope of this section. Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995).

Expressly Advertising Sale of Residence to Speculators and Investors Held Commercial Transaction. — Sale of residence, lot and outbuildings by defendant who, through his agent, advertised the property by expressly appealing to investors and speculators as well as to homeseekers, was a commercial land transaction that affected commerce in a broad sense and was subject to this section. Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440 (1991).

Defendant had the burden of proving that the sale of a residence was not "in or affecting commerce" within the meaning and intent of this section. Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440 (1991).

Transactions between the debtor, as borrower, and credit union, as lender, constitute acts or practices in or affecting commerce. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

The parties' agreement, whereby the creditor loaned the debtor funds in exchange for the right to purchase stock in the debtor in the future, was a capital-raising device that did not pertain to trade or commerce, thus disallowing a claim for unfair or deceptive trade practices. Oberlin Capital, L.P. v. Slavin, 147 N.C. App. 52, 554 S.E.2d 840, 2001 N.C. App. LEXIS 1047 (2001).

Sale of Van. — Defendants violated this section and G.S. 20-71.4 when they did not give plaintiffs a written damage disclosure statement that the van had been involved in a collision to the extent that the cost of the van's repairs exceeded twenty-five percent of its fair market retail value. Wilson v. Sutton, 124 N.C. App. 170, 476 S.E.2d 467 (1996).

Use of Hidden Cameras for Television Show. — Employees of broadcast television network who secured employment with food store chain in order to wear hidden cameras to tape store practices for "Prime Time Live" network news show were engaged in conduct that was "affecting commerce" and the Unfair and Deceptive Trade Practices Act might apply. Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1224 (M.D.N.C. 1996).

Slander Per Se. — Slander per se may constitute a violation of this section. Ausley v. Bishop, 133 N.C. App. 210, 515 S.E.2d 72 (1999).

Securities Transactions. — No authority exists for imposing a duty upon securities brokers, to oversee the manner in which the funds in question were invested, and securities transactions were not subject to the UDTPA [G.S. 75-1 et seq.], because such application would create overlapping supervision, enforcement, and liability in an area of law that was already pervasively regulated by state and federal statutes and agencies. Sterner v. Penn, 159 N.C. App. 626, 583 S.E.2d 670, 2003 N.C. App. LEXIS 1540 (2003); Allison v. Lomas, 387 F. Supp. 2d 516, 2005 U.S. Dist. LEXIS 26345 (M.D.N.C. Aug. 26, 2005).

III. UNFAIR AND DECEPTIVE ACTS.

A. In General.

No precise definition of "unfair methods of competition" as used in this section is possible. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979); Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

"Unfair" and "Deceptive" Practices. — A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive. Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145 (4th Cir. 1987).

Consumer Transaction Required. — Since a consumer transaction was required to establish a violation of the North Carolina unfair or deceptive trade practices law under G.S. 75-1.1(a) and (b), a shareholder failed to establish such a violation because the shareholder only alleged actions involving internal corporate relationships, and not actions involving the buyer-seller commercial market. Anderson v. Dobson, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 84154 (W.D.N.C. Nov. 13, 2007).

Breach of Contract. — Mere breach of contract did not constitute an unfair or deceptive trade practice. Horack v. S. Real Estate Co. of Charlotte, Inc., 150 N.C. App. 305, 563 S.E.2d 47 (2002).

In a case arising from the termination of an employee where the trial judge entered an order finding as a matter of law that, where the jury found that there was a breach of contract by the employer and also found the employer engaged in two of three aggravating circumstances associated with the breach, the employer had engaged in unfair and deceptive trade practices entitling employee to treble damages, the court did not err by refusing to divide the breach of contract claim and the violation of G.S. 75-1.1 for purposes of awarding treble damages. Johnson v. Colonial Life & Accident Ins. Co., 173 N.C. App. 365, 618 S.E.2d 867, 2005 N.C. App. LEXIS 2015 (2005).

In a case arising from the termination of an employee, where the evidence showed aggravating factors in addition to a breach of contract, there was sufficient evidence to show a violation of G.S. 75-1.1. Johnson v. Colonial Life & Accident Ins. Co., 173 N.C. App. 365, 618 S.E.2d 867, 2005 N.C. App. LEXIS 2015 (2005).

Determination of Unfairness of Conduct. — Unfair competition has been referred to in terms of conduct which a court of equity would consider unfair. Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979); General United Co. v. American Honda Motor Co., 618 F. Supp. 1452 (W.D.N.C. 1985).

The determination of whether an act or practice is unfair or deceptive under this section is a question of law for the court. Gray v. North Carolina Ins. Underwriting Ass'n, 132 N.C. App. 63, 510 S.E.2d 396 (1999).

A G.S. 75-1.1 claim failed because a potential property purchaser's allegations did not show any of the other businesses engaged in conduct that amounted to an inequitable assertion of their power over the purchaser, and the complaint did not allege sufficient facts to show any of the businesses engaged in conduct that was so egregious in nature to result in immoral, unethical, oppressive behavior; rather, their conduct appeared to be nothing more than competitive business activities. S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, 189 N.C. App. 601, 659 S.E.2d 442, 2008 N.C. App. LEXIS 703 (2008).

"Unfairness" is broader than and includes the concept of "deception". Overstreet v. Brookland, Inc., 52 N.C. App. 444, 279 S.E.2d 1 (1981); Jennings Glass Co. v. Brummer, 88 N.C. App. 44, 362 S.E.2d 578 (1987), cert. denied, 321 N.C. 473, 364 S.E.2d 921 (1988).

A trade practice is deceptive if it has the capacity or tendency to deceive. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646, cert. denied, 323 N.C. 365, 373 S.E.2d 545 (1988); Backwell v. Dorosko, 95 N.C. App. 637, 383 S.E.2d 670 (1989); Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991); Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 418 S.E.2d 694 (1992), cert. denied, 332 N.C. 482, 421 S.E.2d 350 (1992).

Unfair and deceptive acts in the insurance area are not regulated exclusively by Article 63 of Chapter 58, but are also actionable under G.S. 75-1.1; there is no requirement, however, that a party bringing a claim for unfair or deceptive trade practices against an insurance company allege a violation of G.S. 58-63-15 in order to bring a claim pursuant to G.S. 75-1.1. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

A violation of former G.S. 58-54.4 (see now G.S. 58-63-15) as a matter of law constitutes an unfair or deceptive trade practice in violation of this section. Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986); North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988).

In order to establish a violation of G.S. 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs; a court may look to the types of conduct prohibited by G.S. 58-63-15(11) for examples of conduct which would constitute an unfair and deceptive act or practice. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Acts listed in G.S. 58-63-15(11) constitute a violation of G.S. 75-1.1 without the necessity of an additional showing of frequency indicating a "general business practice," as is required under G.S. 58-63-15(11)(f). Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Applicability to G.S. 66-291. — Application of G.S. 75-1.1 under the North Carolina Unfair and Deceptive Trade Practices Act was precluded in a case of noncompliance with the escrow deposit requirements of G.S. 66-291 regarding a tobacco product manufacturer selling cigarettes to consumers within North Carolina; there was enough legislative apparatus already in place without also applying the UDTPA. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 184 N.C. App. 613, 646 S.E.2d 790, 2007 N.C. App. LEXIS 1613 (2007), aff'd in part, rev'd in part, 362 N.C. 431, 666 S.E.2d 107 (2008).

Acts directly prohibited by G.S. 75-51 through G.S. 75-54 in the specific context of debt collection may also be prohibited as general business practices under the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1 et seq. DIRECTV, Inc. v. Cephas, 294 F. Supp. 2d 760, 2003 U.S. Dist. LEXIS 22297 (M.D.N.C. 2003).

North Carolina Debt Collection Act (NCDCA), G.S. 75-50 et seq., applies only when unfair and deceptive conduct occurs in the specific context of debt collection and, if the abusive conduct alleged pertains only to debt collection, the NCDCA provides a claimant's exclusive remedy; claims can only be asserted under the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1 et seq., if there is some abusive conduct alleged to have occurred outside the realm of debt collection. DIRECTV, Inc. v. Cephas, 294 F. Supp. 2d 760, 2003 U.S. Dist. LEXIS 22297 (M.D.N.C. 2003).

Claims for unfair and deceptive trade practices are not assignable. Horton v. New South Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856, 1996 N.C. App. LEXIS 240 (1996), cert. denied, 472 S.E.2d 8 (1996).

Failure to Disclose Unenforceable Lien. — The failure of the seller of a boat to disclose the existence of a lien on the boat of which the seller had knowledge at the time but correctly believed to be invalid and unenforceable, constituted a violation of the act. Standing v. Midgett, 850 F. Supp. 396 (E.D.N.C. 1993).

Unfair competition is that which a court of equity would consider unfair. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Practice generally unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious. Process Components, Inc. v. Baltimore

Aircoil Co., 89 N.C. App. 649, 366 S.E.2d 907, aff'd, 323 N.C. 620, 374 S.E.2d 116 (1988).

One need not show that he was actually deceived to prevail under the Act, as long as the actions complained of possessed the tendency or capacity to mislead, or created the likelihood of deception. Bartolomeo v. S.B. Thomas, Inc., 889 F.2d 530 (4th Cir. 1989).

Proof of actual deception is not necessary; it is enough that the statements had the capacity to deceive. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986); Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646, cert. denied, 323 N.C. 365, 373 S.E.2d 545 (1988).

An act is deceptive if it has the capacity or tendency to deceive, but proof of actual deception is not required. Bailey v. LeBeau, 79 N.C. App. 345, 339 S.E.2d 460, modified and aff'd, 318 N.C. 411, 348 S.E.2d 524 (1986).

But proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts; however, the converse is not always true. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975); La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986); Webb v. Triad Appraisal & Adjustment Serv., Inc., 84 N.C. App. 446, 352 S.E.2d 859 (1987); Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440 (1991).

Proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive acts. Olivetti Corp. v. Ames Bus. Sys., 81 N.C. App. 1, 344 S.E.2d 82 (1986), aff'd in part and rev'd in part on other grounds, 319 N.C. 534, 356 S.E.2d 578 (1987).

The statement of an intention to perform an act, when no such intention exists, constitutes misrepresentation of the promisor's state of mind, an existing fact, and as such may furnish the basis for an action for fraud if the other elements of fraud are present, and that proof of fraud necessarily constitutes a violation of the statutory prohibition against unfair and deceptive acts. Mapp v. Toyota World, Inc., 81 N.C. App. 421, 344 S.E.2d 297, cert. denied, 318 N.C. 283, 347 S.E.2d 464 (1986).

Factors Determining Unfairness or Deception. — Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, cert. denied, 311 N.C. 751, 321 S.E.2d 126 (1984); Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986); Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988); Ramsey v. Keever's Used Cars, 92 N.C. App. 187, 374 S.E.2d 135 (1988); Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

In determining whether a violation of this section has occurred, the question of whether the defendant acted in bad faith is not pertinent, and the character of the plaintiff, whether public or private, should not alter the scope of the remedy. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

In order to succeed under this section, it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception; plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986).

In determining whether a particular act or practice is deceptive, its effect on the average consumer is considered. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

A practice is unfair when it offends public policy, as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers and if it has the capacity or tendency to deceive; words or phrases, though literally true, may still be deceptive. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

A practice is "unfair" under the Unfair and Deceptive Trade Practices Act when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Alternatively, a party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position. McInerney v. Pinehurst Area Realty, Inc., 162 N.C. App. 285, 590 S.E.2d 313, 2004 N.C. App. LEXIS 123 (2004).

A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Overstreet v. Brookland, Inc., 52 N.C. App. 444, 279 S.E.2d 1 (1981); General United Co. v. American Honda Motor Co., 618 F. Supp. 1452 (W.D.N.C. 1985); Bailey v. LeBeau, 79 N.C. App. 345, 339 S.E.2d 460, modified and aff'd, 318 N.C. 411, 348 S.E.2d 524 (1986); Jennings Glass Co. v. Brummer, 88

N.C. App. 44, 362 S.E.2d 578 (1987); Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646, cert. denied, 323 N.C. 365, 373 S.E.2d 545 (1988).

Failure to disclose information may be tantamount to misrepresentation and thus an unfair or deceptive practice. Kron Medical Corp. v. Collier Cobb & Assocs., 107 N.C. App. 331, 420 S.E.2d 192, cert. denied, 333 N.C. 168, 424 S.E.2d 910 (1992), appeal dismissed, 333 N.C. 345, 426 S.E.2d 706 (1993).

The existence of unfair acts and practices must be determined from the circumstances of each case. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

Coercive tactics are within the definition of unfair practices as used in this section. Wilder v. Squires, 68 N.C. App. 310, 315 S.E.2d 63, cert. denied, 311 N.C. 769, 321 S.E.2d 158 (1984).

Duress or coercion may take the form of unlawfully inducing one to make a contract or to perform some other act against his own free will and it may be manifested by threats. Wilder v. Squires, 68 N.C. App. 310, 315 S.E.2d 63, cert. denied, 311 N.C. 769, 321 S.E.2d 158 (1984).

An inequitable assertion of power or position may be an unfair act or practice. Libby Hill Seafood Restaurants, Inc. v. Owens, 62 N.C. App. 695, 303 S.E.2d 565, cert. denied, 309 N.C. 321, 307 S.E.2d 164 (1983).

Intent and Good Faith Irrelevant. — If unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant; good faith is equally irrelevant. What is relevant is the effect of the actor's conduct on the consuming public. Wilder v. Squires, 68 N.C. App. 310, 315 S.E.2d 63, cert. denied, 311 N.C. 769, 321 S.E.2d 158 (1984).

The question of whether the defendant acted in bad faith is not pertinent. Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, cert. denied, 311 N.C. 751, 321 S.E.2d 126 (1984).

It is not necessary to prove bad faith to show an unfair or deceptive trade practice. F. Ray Moore Oil Co. v. State, 80 N.C. App. 139, 341 S.E.2d 371, cert. denied, 317 N.C. 333, 346 S.E.2d 139 (1986).

Plaintiffs need not allege intent in their Chapter 75 claim based on defendants' representations that they would build certain recreational facilities since intent is irrelevant in a Chapter 75 claim and plaintiffs need only show that defendants' actions were "unfair or deceptive acts or practices in or affecting commerce." Leake v. Sunbelt Ltd., 93 N.C. App. 199, 377 S.E.2d 285, cert. denied, 324 N.C. 578, 381 S.E.2d 774 (1989).

The fact that infringing actions were not taken with the intent to deceive the public as to the true origin of the purple dinosaur costumes, that finding alone could not immunize the defendants, costume rental store owners, from a North Carolina Unfair and Deceptive Trade Practices Act claim. Lyons Partnership, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 2001 U.S. App. LEXIS 3985 (4th Cir. 2001).

Good faith is not a defense to an alleged violation of this section. La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986), cert. denied and appeal dismissed, 319 N.C. 459, 354 S.E.2d 888 (1987).

Good faith is not a defense to allegations under this section. The effect of the actor's conduct on the marketplace is the relevant gauge as to whether unfairness or deception has occurred in a transaction. Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646, cert. denied, 323 N.C. 365, 373 S.E.2d 545 (1988).

Negligence, good faith, lack of intent, and ignorance are not defenses. That defendants may have made these misrepresentations negligently and in good faith, in ignorance of their falsity, and without intent to mislead, affords no defense to an action under this section. Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 394 S.E.2d 643 (1990), cert. denied, 99 N.C. 587, 402 S.E.2d 824 (1991).

Fraud, Bad Faith and Intentional Misrepresentations Not Required. — Whether an act or practice is unfair or deceptive is to be determined by all the facts and circumstances surrounding the transaction; a plaintiff under this section is not required to show fraud, bad faith or intentional misrepresentation. Peterson v. Bozzano, 183 Bankr. 735 (Bankr. M.D.N.C. 1995).

Insurance. — Although it is true that jurisdiction under the Insurance Unfair Trade Practices Act lies in the Commissioner's office, unfair and deceptive acts in the insurance area are not regulated exclusively by G.S. 58-63 (1991), but are also actionable under this section. Golden Rule Ins. Co. v. Long, 113 N.C. App. 187, 439 S.E.2d 599 (1993).

Trial court erred in granting summary judgment to defendant insurer on a plaintiff's cause of action under G.S. 75-1.1 with regard to the insurer's employee misappropriating the plaintiff's annuity funds because the insurer failed to present any evidence that a life insurance policy and annuity constituted securities or other capital-raising instruments that did not fall within the scope of G.S. 75-1.1. White v. Consol. Planning, Inc., 166 N.C. App. 283, 603 S.E.2d 147, 2004 N.C. App. LEXIS 1780 (2004), cert. denied, — N.C. —, 610 S.E.2d 717 (2005).

Practices by Bankruptcy Debtor. — Where a judgment established that a bankruptcy debtor committed unfair and deceptive trade practices in violation of G.S. 75-1.1 by misrepresenting the creditor's expertise and experience and by failing to repair defects in the debtor's construction of improvements at a creditor's residence, res judicata did not apply to establish non-dischargeability of the judgment debt in bankruptcy since the judgment did not establish that the misrepresentations were intentional or that the injury to the creditor was willful and malicious, but the debtor was collaterally estopped from relitigating the findings that the debtor made the misrepresentations and caused the injury. Bennett v. Smith (In re Smith), — Bankr. —, 2006 Bankr. LEXIS 3196 (Bankr. M.D.N.C. Nov. 16, 2006).

State court judgment that a Chapter 7 debtor violated the North Carolina Unfair and Deceptive Trade Practice Act, G.S. 75-1.1 et seq., by making false and misleading representations of material fact to the plaintiff with a specific intention that the plaintiff rely thereon collaterally estopped the debtor from relitigating those issues in connection with plaintiff's bankruptcy court complaint for an order that the resulting state court judgment was nondischargeable under 11 U.S.C.S. § 523(a)(2)(A). Floars v. Marshburn (In re Braswell), — Bankr. —, 2009 Bankr. LEXIS 1670 (Bankr. E.D.N.C. June 4, 2009).

Violation of Chapter 58 Article 3A Was Not Required to Prove Chapter Violation. — Excess and umbrella insurers were not required to prove a violation of Chapter 58, Article 3A, The Unfair Trade Practices Article of the Insurance Statutes, in order to show a violation of Chapter 75. United States Fire Ins. Co. v. Nationwide Mut. Ins. Co., 735 F. Supp. 1320 (E.D.N.C. 1990).

As a general rule, a practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Johnson v. Beverly-Hanks & Assocs., 328 N.C. 202, 400 S.E.2d 38 (1991); Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 418 S.E.2d 694 (1992), cert. denied, 332 N.C. 482, 421 S.E.2d 350 (1992).

Tendency or Capacity to Mislead or Likelihood of Deception Required. — To prevail on an unfair and deceptive trade practices claim plaintiffs must demonstrate the act possessed the tendency or capacity to mislead or created the likelihood of deception. Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920 (1998), cert. denied, 348 N.C. 282, 501 S.E.2d 918 (1998).

The plaintiff need not show fraud, bad faith, deliberate acts of deception or actual deception, but must show that the acts had a tendency or capacity to mislead or created the likelihood of deception. Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

Breach of Contract. — Actions for unfair or deceptive trade practices are distinct from actions for breach of contract; a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under this section. Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 418 S.E.2d 694 (1992), cert. denied, 332 N.C. 482, 421 S.E.2d 350 (1992).

A plaintiff must show substantial aggravating circumstances attending the breach to recover under the act, which allows for treble damages. Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 418 S.E.2d 694 (1992), cert. denied, 332 N.C. 482, 421 S.E.2d 350 (1992).

A mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under this section; rather, substantial aggravating circumstances attendant to the breach must be shown. Computer Decisions, Inc. v. Rouse Office Mgt. of N.C., Inc., 124 N.C. App. 383, 477 S.E.2d 262 (1996).

Effect of Absence of Valid Contract. — Because the buyers to a contract with the seller did not possess any contract rights due to the insufficiency of their consideration, they could not allege damages by virtue of any alleged unfair and deceptive acts of the seller relating to that alleged contract; further, because the buyers did not allege that the seller intended to deceive them from the outset, there was no allegation that an unfair or deceptive act by the seller induced the buyers either to pay the deposits mentioned in the alleged option contract or to leave the deposits with the seller's agent rather than withdrawing them. McLamb v. T.P. Inc., 173 N.C. App. 586, 619 S.E.2d 577, 2005 N.C. App. LEXIS 2122 (2005).

"Substantial Aggravating Circumstances" Required. — A mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under this section, and even though unfairness inheres in every breach of contract when one of the contracting parties is denied the advantage for which he contracted, North Carolina law requires a showing of "substantial aggravating circumstances" to support a claim under the Unfair Trade Practices Act. Westchester Fire Ins. Co. v. Johnson, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5001 (M.D.N.C. Jan. 6, 2000).

If a party engages in conduct that results in an inequitable assertion of his power or position, he has committed an unfair act or practice. Johnson v. Beverly-Hanks & Assocs., 328 N.C. 202, 400 S.E.2d 38 (1991).

Exclusive dealing arrangements and territorial restrictions may constitute unfair trade practices. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

In a business dispute involving asserted allegations of breach of a covenant-not-to-compete and other claims, a trial court properly granted summary judgment to plaintiff on defendants' claims asserting violation of the Unfair and Deceptive Trade Practices Act, as the employer/employee relationship does not fall within the intended scope and purpose of the Unfair and Deceptive Trade Practices Act, and a violation of a covenant-not-to-compete, essentially a breach of contract wthin the employer/employee relationship, lies outside the scope of the Unfair and Deceptive Trade Practices Act. Kinesis Adver., Inc. v. Hill, 187 N.C. App. 1, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008).

Price discrimination among those similarly situated constitutes a clear violation of North Carolina's unfair trade practice laws. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985), finding no price discrimination to be shown in the case at issue.

Limiting the growth of supply sold to distributors, while not illegal per se, may be illegal if it is used in a discriminatory manner as a means to an improper end. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

While a "no growth" designation, used punitively by supplier against distributor to freeze his allocation, could have some effect on a distributor's inclinations toward expanding either its territory or its suppliers, plaintiff distributor had the burden of showing an ability to prove at trial the "substantial" effect on the market necessary for a violation of the antitrust laws incorporated into North Carolina's Unfair Trade Practices Act. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

Vertical Restraints. — Normally when a supplier establishes territorial lines, it constitutes a vertical restraint of trade. Because there are legitimate and even beneficial policy reasons for vertical territorial restraints, they are not per se illegal, but instead are examined under a rule of reason analysis. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

Horizontal Restraints. — Situation in which competitors at the same market level decide to divide up various territories in order to minimize competition constitutes a "horizontal" restraint, which is per se illegal, even if the supplier actually is the one to implement the territorial plan, if done at the horizontal competitors' insistence. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

Unfair and deceptive acts and practices in the insurance industry are not regulated exclusively by the insurance statutes, former G.S. 58-54.1 et seq., (see now G.S. 58-63-1 et seq.) and may constitute the basis of recovery under this section. Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980).

This Chapter is applicable to the sale of insurance. Chapter 58 does not provide the exclusive remedy for those damaged by unfair trade practices in the insurance industry. Phillips v. Integon Corp., 70 N.C. App. 440, 319 S.E.2d 673 (1984).

Fixing of Insurance Rates. — This section has recently been interpreted to provide a remedy for unfair trade practices in the insurance industry. Allegations of unfair fixing of insurance rates should also be permitted to be raised under former G.S. 75-5. Although this section contains a general prohibition of unfair methods of competition and unfair or deceptive practices affecting commerce, former G.S. 75-5 lists particular acts that constitute unfair or deceptive acts. Phillips v. Integon Corp., 70 N.C. App. 440, 319 S.E.2d 673 (1984).

Failure to Settle Insurance Claim. — Defendant/insurer violated this section by "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," as well as the provisions of G.S. 58-63-15(11). Gray v. North Carolina Ins. Underwriting Ass'n, 352 N.C. 61, 529 S.E.2d 676 (2000).

Commercial Bribery. — Commercial bribery harms an employer as a matter of law, and the proper measure of damages suffered must include at a minimum the amount of the commercial bribes the third party paid, with the damages trebled based on the unfair and deceptive commercial conduct. Kewaunee Scientific Corp. v. Pegram, 130 N.C. App. 576, 503 S.E.2d 417 (1998).

North Carolina does not recognize a cause of action against the insurance company of an adverse party based on unfair and deceptive trade practices under this section. Wilson v. Wilson, 121 N.C. App. 662, 468 S.E.2d 495 (1996).

A private right of action under this section and G.S. 58-63.15 may not be asserted by a third-party claimant against the insurer of an adverse party. Wilson v. Wilson, 121 N.C. App. 662, 468 S.E.2d 495 (1996).

Because the claim under the North Carolina Debt Collection Act failed as a matter of law, the unfair and deceptive trade practices claim necessarily also failed, because the only unfair and deceptive trade practices recognized in the area of debt collection were those practices described in the Debt Collection Act. DIRECTV, Inc. v. Breedlove, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 24694 (E.D.N.C. Mar. 16, 2003).

Unfair and Deceptive Acts Not Shown. — Trial court erred in entering judgment for plaintiffs as to a claim of unfair and deceptive practices as the trial court's findings of fact did not support its conclusion that defendant knowingly participated with a former employee of plaintiff to solicit business, or usurped a business opportunity from plaintiff. Business

Cabling, Inc. v. Yokeley, — N.C. App. —, 643 S.E.2d 63, 2007 N.C. App. LEXIS 786 (2007).

Per Se Unfair and Deceptive Trade Practice Not Found. — While a violation of G.S. 143-143.10 and G.S. 143-143.13 may be a violation of G.S. 75-1.1, it is not automatically an unfair and deceptive trade practice, and a violation of 11 N.C. Admin. Code 8.0907, which is based on these statutes, is not necessarily an unfair and deceptive trade practice as a matter of law; however, a manufacturer's violations of the regulation are potentially relevant to a claim under G.S. 75-1.1. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

Unfair and Deceptive Trade Practices Claim Separate and District. — Insurance company which engaged in the act or practice of not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability had become reasonably clear, G.S. 58-63-15(11)(f), also violated G.S. 75-1.1, as a matter of law, without the necessity of an additional showing of frequency indicating a "general business practice," and allegations to that effect sufficiently stated an unfair and deceptive trade practices (UDTP) claim; while insureds' claims for breach of contract, breach of fiduciary duty, and bad faith were barred by the three-year statute of limitations, their UDTP claim was separate and distinct from the claims on the underlying insurance policy, was thus governed by the G.S. 75-16.2 four-year statute of limitations applicable to such claims, and was therefore timely. Page v. Lexington Ins. Co., 177 N.C. App. 246, 628 S.E.2d 427, 2006 N.C. App. LEXIS 862 (2006).

B. Illustrative Cases.

Fraud on Part of Realtors. — Proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive trade practices. Thus, if the plaintiffs could prove fraud on the part of realtors, which they properly alleged, then in such commercial setting they would have proved unfair and deceptive trade practices. Powell v. Wold, 88 N.C. App. 61, 362 S.E.2d 796 (1987).

Business of buying, developing and selling real estate was an activity "in or affecting commerce" for the purposes of unfair or deceptive trade practices claim. Governor's Club, Inc. v. Governors Club Ltd. P'ship., 152 N.C. App. 240, 567 S.E.2d 781, 2002 N.C. App. LEXIS 926 (2002), aff'd sub nom., 357 N.C. 46, 577 S.E.2d 620 (2003).

Amendment of Restrictive Covenants by a Developer. — Developer could not be guilty of an unfair act to support a claim of a violation of the Unfair and Deceptive Trade Practices Act [G.S. 75-1 et seq.] where it amended restrictive covenants regarding homes under terms that the homeowners and the developer had agreed upon. Since the homeowners, when purchasing their property, agreed to the developer's right to amend the restrictive covenants, there was nothing "unfair" in the developer's subsequent exercise of that right. McInerney v. Pinehurst Area Realty, Inc., 162 N.C. App. 285, 590 S.E.2d 313, 2004 N.C. App. LEXIS 123 (2004).

Homeowners' misrepresentation, fraud, and unfair business practices claims against a siding manufacturer did not survive summary judgment because there was no evidence that the siding manufacturer said or did anything, or failed to say or to do something, that influenced the homeowner's decision to clad their home with the company's siding in any relevant way. Wilson v. Dryvit Sys., 206 F. Supp. 2d 749, 2002 U.S. Dist. LEXIS 24129 (E.D.N.C. 2002).

Publishing Employee's Pursuit of Contract During Negotiations. — Employee, who worked for a publisher that under a contract printed a newsletter for a client, did not commit an unfair and deceptive act when he formed a rival publishing company, entered into contract talks with the client after the contract had expired and the publisher was still printing the newsletter on a month-to-month basis while it conducted contract renewal negotiations with the client, entered into a contract with the client for the rival publishing company to publish the client's newsletter, and then terminated his employment with the publisher. Dalton v. Camp, 353 N.C. 647, 548 S.E.2d 704, 2001 N.C. LEXIS 676 (2001).

Defendants engaged in deceptive trade practices where plaintiffs signed an offer of purchase on subdivision lot based on representation of plat that the lot was 1.88 acres and defendants then changed the plat to show the acreage as 1.41 acres and recorded it without plaintiff's knowledge. Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920 (1998), cert. denied, 348 N.C. 282, 501 S.E.2d 918 (1998).

Plaintiff could not have recovery on both fraud claim and claim under this section since they would arise from the same course of conduct. Process Components, Inc. v. Baltimore Aircoil Co., 89 N.C. App. 649, 366 S.E.2d 907 (1988).

Allegation of Constructive Fraud Sufficient to Maintain Claim. — Where plaintiff alleged defendants owed him a fiduciary duty and breached that duty when they refused to redeem a revolving fund certificate issued to him in exchange for stock, and the refusal was unreasonable and defendants manipulated the corporation's income to their benefit, plaintiff had alleged a constructive fraud sufficient to maintain a claim of unfair or deceptive trade practice. Wilson v. Wilson-Cook Medical, Inc., 720 F. Supp. 533 (M.D.N.C. 1989).

Allegation of Misrepresentation Sufficient to Maintain Claim. — Claim in complaint that defendant continuously misrepresented its position, by leading the plaintiff to believe the defendant was guarantor on note, and held all the rights and obligations associated with being a guarantor, was sufficiently stated to survive a motion to dismiss. A.C. Monk & Co. v. UBAF Arab American Bank, 875 F. Supp. 311 (E.D.N.C. 1995).

Defendant bank was entitled to summary judgment on plaintiff borrower's Unfair and Deceptive Trade Practices Act claim because, although the borrower alleged that the bank declared the mortgage in default with no notice, the borrower did not dispute that the bank performed an investigation; without any evidence of deception, the borrower could not proceed with the claim. Earhart v. Countrywide Bank, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 14925 (W.D.N.C. Feb. 25, 2009).

Fraudulent Scheme. — Where plaintiff's evidence showed not just a breach of promise, but a fraudulent scheme, i.e., a contract induced by defendant dealer's promise to allow rescission of the contract by plaintiff, which promise defendant never intended to keep, dealer's conduct clearly supported an award of punitive damages. Mapp v. Toyota World, Inc., 81 N.C. App. 421, 344 S.E.2d 297, cert. denied, 318 N.C. 283, 347 S.E.2d 464 (1986).

Trial court erred in granting a potential buyer's motion to dismiss corporations' counterclaim alleging violations of the Unfair and Deceptive Trade Practices Act, G.S. 75-1.1, because the corporations' claim that the buyer engaged in a fraudulent scheme arising from the sale of corporate assets was sufficient to establish a claim under G.S. 75-1.1; the buyer induced the corporations' owner to sign an employment agreement by promising that all compensation paid to him would be reimbursed upon closing of the asset purchase, but the buyer had no intention of closing on the sale and used the pending sale to induce the corporations to continue paying him a salary and profit-sharing bonuses. Gress v. Rowboat Co., — N.C. App. —, 661 S.E.2d 278, 2008 N.C. App. LEXIS 1074 (2008).

Trial court erred in granting a potential buyer's motion to dismiss corporations' counterclaim alleging violations of the Unfair and Deceptive Trade Practices Act (UDTPA), G.S. 75.1.1, because the corporations' allegation that the buyer engaged in a fraudulent scheme arising from the sale of corporate assets was sufficient to establish a claim under G.S. 75-1.1; the general presumption against UDTPA claims between employers and employees did not apply because the facts alleged by the corporations did not establish a true employer-employee relationship but showed a fictitious relationship that would not exist but for the parties' buyer-seller relationship. Gress v. Rowboat Co., — N.C. App. —, 661 S.E.2d 278, 2008 N.C. App. LEXIS 1074 (2008).

Applicability To Check Cashing Business That Charged Usurious Interest Rates. — Where evidence against a check cashing business established that it executed contracts for usurious loans, it used its alternative business purpose of providing Internet access to consumers as a guise to cover this illegal activity, and no evidentiary basis existed upon which a reasonable fact-finder could reach a contrary conclusion, the State's claims of usury and violations of the Consumer Finance Act were established as a matter of law; moreover, the contracts which customers had with the business were cancelled pursuant to G.S. 75-15.1, requiring all funds collected by the business pursuant to such contracts to be refunded to the customers. State ex rel. Cooper v. NCCS Loans, Inc., 174 N.C. App. 630, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005).

Debtor was allowed reasonable attorney's fees of $3,000 because the creditor's taking of a security interest in the debtor's motorcycle and charging a 19.742% per annum interest rate on the revolving line of credit exceeded 1.25% per month in violation of G.S. 24-11(c) and was an unfair and deceptive trade practice under G.S. 75-1.1. Worley v. GE Moneybank (In re Worley), — Bankr. —, 2008 Bankr. LEXIS 1893 (Bankr. E.D.N.C. June 16, 2008).

Usury. — Reorganized check cashing companies' policy of extending an immediate cash rebate and Internet usage to its customers in exchange for a one-year commitment to make bi-weekly payments in an amount equal to five times the amount of the rebate, violated G.S. 24-2.1, was usurious, and constituted an unfair and deceptive trade practice in violation of G.S. 75-1.1. The fact that the reorganized companies characterized the transactions as rebates or Internet service agreements was subterfuge to conceal the usurious rate of interest. State ex rel. Cooper v. NCCS Loans, Inc., — N.C. App. —, 620 S.E.2d 697, 2005 N.C. App. LEXIS 2392 (2005).

Distributor-Dealer Relationship. — This section was applicable to distributor-dealer relationship between defendant and plaintiff, and plaintiff dealer had standing to sue distributor under G.S. 75-16. Olivetti Corp. v. Ames Bus. Sys., 81 N.C. App. 1, 344 S.E.2d 82 (1986), aff'd in part and rev'd in part on other grounds, 319 N.C. 534, 356 S.E.2d 578 (1987).

Conversion of Business Inventory Held Subject to Security Interest. — Businessman's actions in converting the inventory of a business, when the inventory was subject to a security interest, constituted unfair or deceptive acts or practices pursuant to G.S. 75-1.1 for which the trial court awarded treble damages. United Leasing Corp. v. Guthrie, — N.C. App.

—, 666 S.E.2d 504, 2008 N.C. App. LEXIS 1666 (2008).

Even if a distributor who split the market area served by a dealership and its owners engaged in an unfair and deceptive trade practice when it sent a letter presenting the dealership and its owners with the option of either relocating their operation or constructing an exclusive facility for the distributor's automobiles, the distributor was not liable under G.S. 75-1.1 because the alleged violation did not proximately cause an injury where nothing obligated the distributor to consider the dealership and its owners for a new dealership point. S. States Imps., Inc. v. Subaru of Am., Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 43419 (E.D.N.C. May 30, 2008).

Allegation that defendant realtor and company preparing termite report knew about termite damage and actively engaged in efforts to prevent plaintiff buyers from learning of the damage, on its face, alleged conduct which, if proved, could be either unfair or deceptive within the purview of this section, and housebuyers' claim against defendants was not barred as a matter of law by their failure to inspect for termite damage. Robertson v. Boyd, 88 N.C. App. 437, 363 S.E.2d 672 (1988).

Deceiving Lessor as to Intent to Vacate Property. — Where the jury found that an advertising company's president deliberately deceived a lessor and potential lessee as to his intent to vacate property and remove his sign, and instead remained on the property, delaying and ultimately preventing the potential lessee from securing a permit for the site and occupying the property, the evidence was sufficient to support the jury's findings that the president committed unfair and deceptive practices. Beroth Oil Co. v. Whiteheart, 173 N.C. App. 89, 618 S.E.2d 739, 2005 N.C. App. LEXIS 1903 (2005), cert. denied, 360 N.C. 531, 633 S.E.2d 674 (2006).

Systematically overcharging customer for two years, in the amount of $2,795.30, is an unfair trade practice squarely within the purview of this section. Sampson-Bladen Oil Co. v. Walters, 87 N.C. App. 173, 356 S.E.2d 805, cert. denied, 321 N.C. 121, 361 S.E.2d 597 (1987).

Deception by Vacillating Seller. — The trial court properly concluded that aggravating circumstances necessary to sustain a claim under this chapter against the defendant were present, given the deceptive nature of a letter he wrote the plaintiffs, his imposition of an increased price upon the lots they had contracted on, his entry into sales contracts thereon with third parties, and his improper retention of plaintiffs' earnest money deposits. Poor v. Hill, 138 N.C. App. 19, 530 S.E.2d 838, 2000 N.C. App. LEXIS 540 (2000).

Deception by Investigative Reporter. — The UTPA could not be applied to a case in which a reporter misrepresented her employment experience in order to obtain a job with a food store so as to film and obtain undercover information to discredit the food store chain, because the deception did not harm the consuming public. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999).

Automobile Sales. — Defendant dealership's failure to conduct a complete title search of a used vehicle and to apprise plaintiff of the results did not constitute an unfair trade practice. Ramsey v. Keever's Used Cars, 92 N.C. App. 187, 374 S.E.2d 135 (1988).

Where defendant, by its employee, made statements to the plaintiff that led the plaintiff to believe auto had not been wrecked, these statements were material to the parties' transaction and mislead the plaintiff into purchasing the auto, and were an unfair trade practice. Torrance v. AS & L Motors, Ltd., 119 N.C. App. 552, 459 S.E.2d 67 (1995).

False Representation as to Condition of Car. — Jury finding that defendant automobile dealer falsely represented to plaintiff that a car was in good mechanical and serviceable condition was sufficient to support the court's conclusion that defendant's actions constituted unfair and deceptive trade practices. Morris v. Bailey, 86 N.C. App. 378, 358 S.E.2d 120 (1987).

Defendants committed unfair and deceptive trade practices where car sold by defendants was severely structurally damaged, was not safe to operate, and plaintiff was misled by defendants into believing otherwise. Huff v. Autos Unlimited, Inc., 124 N.C. App. 410, 477 S.E.2d 86 (1996), cert. denied, 346 N.C. 279, 486 S.E.2d 546 (1997).

Sale of Vehicle with Defective Motor. — Evidence which showed that, in selling a motor vehicle with a motor that was defective and had to be replaced, defendants breached an implied warranty of fitness was not enough to establish an unfair and deceptive trade practice. Whitehurst v. Crisp R.V. Ctr., Inc., 86 N.C. App. 521, 358 S.E.2d 542 (1987).

Dealer's retention of customer's down payment on car for seven months without even attempting to get the car it had promised to obtain, while falsely claiming that the car had been obtained and would be delivered shortly, was some evidence of a deceptive trade practice. Foley v. L & L Int'l, Inc., 88 N.C. App. 710, 364 S.E.2d 733 (1988).

Warranty Exclusions Used in Bad Faith to Avoid Remedy. — Where the defendant realized that the problem with plaintiffs' boat could not be remedied, and seized upon commercial use exclusion in warranty in a bad faith attempt to avoid responsibility for the defective boat, the court properly submitted the issue of unfair and deceptive acts or practices to the jury. Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994).

Defective Mobile Home. — Manufacturer's violations of 11 N.C. Admin. Code 8.0907, which was based on G.S. 143-143.10 and G.S. 143-143.13, were not per se an unfair and deceptive trade practice under G.S. 75-1.1, although the violations of 11 N.C. Admin. Code 8.0907 were evidence of an unfair and deceptive trade practice. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

Conduct of residential subdivision developer vis-à-vis plaintiff-purchasers of a lot within the subdivision is within the scope of this section. Opsahl v. Pinehurst Inc., 81 N.C. App. 56, 344 S.E.2d 68 (1986), cert. dismissed as improvidently allowed, 319 N.C. 222, 353 S.E.2d 400 (1987).

Projected Construction Completion Dates. — In light of common knowledge that projected completion dates in the construction industry are often missed for a variety of reasons and may be impossible or impractical to fulfill, and the capacity of consumers to contract with reference thereto, the representation of such dates as firm when in fact they are not, standing alone, does not rise to the level of immoral, unethical, oppressive, or unscrupulous conduct, or amount to an inequitable assertion of power or position. Opsahl v. Pinehurst Inc., 81 N.C. App. 56, 344 S.E.2d 68 (1986), cert. dismissed as improvidently allowed, 319 N.C. 222, 353 S.E.2d 400 (1987).

Purchase and Resale by Brokers. — Evidence that (1) defendant brokers were plaintiffs' agents in looking for a house to buy (2) plaintiffs told defendants they wanted to buy a certain house (3) defendants later took title to the house and deeded it to plaintiffs and (4) defendants did not obtain plaintiffs' informed consent to defendants' purchase from the owners and defendants' sale to plaintiffs, was sufficient to support an unfair or deceptive practices claim, since the evidence also showed that the practice or act affected commerce. Spence v. Spaulding & Perkins, Ltd., 82 N.C. App. 665, 347 S.E.2d 864 (1986).

Failure to Maintain Dwellings. — Where plaintiff failed to maintain dwellings in a safe, fit, and habitable condition and subsequently made demands for payment of rent, his actions constituted an unfair and deceptive trade practice. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Tenant was entitled to a verdict in the tenant's favor in the unfair trade practices claim pursuant to G.S. 75-1.1, where the landlord breached the implied warranty of habitability by refusing to repair the leased premises; a residential lease agreement fell under the unfair trade practices statute, and the tenant established that the rental premises was uninhabitable, that the landlord knew that the premises needed to be repaired, and that the landlord refused to make repairs and continued to demand rent payments. Dean v. Hill, 171 N.C. App. 479, 615 S.E.2d 699, 2005 N.C. App. LEXIS 1275 (2005).

Failure to Forward Rent. — Where the seller of a shopping center continued to collect rents from its tenants after the sale, and did not forward those rents to the new owner in order to secure the new owner's performance of contractual obligations, a directed verdict against the seller for deceptive practices was appropriate. Lake Mary Ltd. Partnership v. Johnston, 145 N.C. App. 525, 551 S.E.2d 546, 2001 N.C. App. LEXIS 740 (2001), cert. denied, 354 N.C. 363, 557 S.E.2d 539 (2001).

Sale of Restaurant. — Evidence held sufficient to support findings by the jury from which the trial court could conclude that plaintiff seldom engaged in trade practices incident to the sale of restaurant which were unfair or deceptive in violation of this section. La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986), cert. denied and appeal dismissed, 319 N.C. 459, 354 S.E.2d 888 (1987).

Sale of Credit Insurance in Association with Mortgage Loans. — Because the North Carolina Department of Insurance authorized the sale of single-premium credit insurance (SPCI) in association with mortgage loans sold to borrowers with loans of 15 years or less and because G.S. 58-57-35(b) provided that any gain to a lender from an SPCI sale was not a violation of any other law, SPCI sales by a bank subsidiary for loans of 15 years or less were proper under G.S. 75-1.1(a); however, the sale of unapproved SPCI regarding loans having terms greater than 15 years was an unfair or deceptive act or practice in violation of G.S. 75-1.1(a). Richardson v. Bank of Am., N.A., — N.C. App. —, 643 S.E.2d 410, 2007 N.C. App. LEXIS 809 (2007), petition allowed as to additional issues 361 N.C. 569, 650 S.E.2d 439 (2007).

The "passing off"of one's goods as those of a competitor has long been regarded as unfair competition. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Where one company used another company's actual product in demonstrations to potential customers, at the same time falsely representing to the potential customers that the product had been manufactured by itself, although such conduct did not fit the mold to which the term "passing off" has traditionally been applied, it did constitute an unfair method of competition within the purview of this section. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Misbranding Constituted Deceptive Practice as Matter of Law. — Defendant's failure properly to label drums of antifreeze constituted a misbranding under former G.S. 106-571(2), and such misbranding was a deceptive practice within the meaning of this section as a matter of law. State ex rel. Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980).

Where it was undisputed that defendant distributed a counterfeit version of plaintiff's software bearing imitations of plaintiff's trademarks, where it was undisputed that defendant distributed a counterfeit version of plaintiff's software bearing imitations of plaintiff's trademarks, defendant committed an unfair or deceptive act that affected commerce and proximately injured the plaintiff. Microsoft Corp. v. Computer Serv. & Repair, Inc., 312 F. Supp. 2d 779, 2004 U.S. Dist. LEXIS 5984 (E.D.N.C. 2004).

Defamation Claim. — Plaintiff's claim for unfair and deceptive trade practices was properly dismissed because that claim necessarily depended on the validity of plaintiff's defamation claim, which had been dismissed for failure to state a claim. Craven v. SEIU COPE, 188 N.C. App. 814, 656 S.E.2d 729, 2008 N.C. App. LEXIS 266 (2008).

Libel Per Se. — A libel per se of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of this section, which will justify an award of damages under G.S. 75-16 for injuries proximately caused; however, to recover, a plaintiff must have suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation. Ellis v. Northern Star Co., 326 N.C. 219, 388 S.E.2d 127 (1990).

A libel per se of a type impeaching a party in its business activities is an unfair or deceptive act; however, even if defendant's statements were found to be actionable per se, the law would regard them as privileged. Qualified privilege will prevent liability for a defamatory statement, when the statement is made: (1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right, or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest. Market Am., Inc. v. Christman-Orth, 134 N.C. App. 234, 520 S.E.2d 570 (1999).

Builders' Misrepresentation Regarding Homeowners Warranty Program. — Trial judge did not err in concluding that builder's conduct was an unfair and deceptive trade practice where jury found defendants breached an implied warranty of workmanlike quality to plaintiffs regarding construction of house and determined the defendants' misrepresentations to plaintiffs regarding coverage of the house under the Homeowners Warranty Program (HOW) proximately caused damages to the plaintiffs; defendant's statement that he was a HOW builder had the capacity to deceive since all HOW builders are required to place their houses in the HOW Program; furthermore, defendant's statement that the house was or would be insured had the capacity of deceiving the plaintiffs into believing that they would be covered regardless of whether or not defendants effected the required repairs. Love v. Keith, 95 N.C. App. 549, 383 S.E.2d 674 (1989), overruled on other grounds, Custom Molders v. American Yard Prods., 342 N.C. 133, 463 S.E.2d 199 (1995).

Builders' intentional breach of contract and implied warranty of habitability did not constitute unfair and deceptive trade practices. Mitchell v. Linville, 148 N.C. App. 71, 557 S.E.2d 620, 2001 N.C. App. LEXIS 1277 (2001).

Builders' failure to notify the buyers that their home would actually be built by another company, and the builders' transfer of the home and lot to the actual builder without notice to the buyers, while potentially misleading and unfair, were not unfair and deceptive trade practices because they did not cause the buyers' damages, which were the result of structural defects in the home. Mitchell v. Linville, 148 N.C. App. 71, 557 S.E.2d 620, 2001 N.C. App. LEXIS 1277 (2001).

Exemption Denied. — Day care center was denied a tax exemption because, while some of its activities educated the children enrolled there, substantial evidence supported the tax commission's decision that its property was not wholly and exclusively used for educational purposes, as required by G.S. 105-278.4(a)(4). In re Chapel Hill Day Care Ctr., Inc., 144 N.C. App. 649, 551 S.E.2d 172, 2001 N.C. App. LEXIS 565 (2001), appeal dismissed, 355 N.C. 492, 563 S.E.2d 564 (2002).

Tortious interference with a contract could constitute an unfair method of competition or unfair acts within the meaning of the statute. American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983).

Tortious Interference With Noncompete Agreement. — Debtor's competitor was not entitled to summary judgment on a bankruptcy trustee's claim for violation of the North Carolina Unfair and Deceptive Trade Practices Act because the trustee presented evidence that the competitor intentionally induced the debtor's employees to breach their noncompete agreements with the debtor and that this was done with a wrong purpose. Magers v. Holland Group of Tenn., Inc. (In re Griffin Services, Inc.), — Bankr. —, 2005 Bankr. LEXIS 1116 (Bankr. M.D.N.C. Mar. 2, 2005).

Sale of Illegal Agreements. — Summary judgment was not granted to the director of a corporation in a claim under the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1.1 et seq., because there was evidence to show that the director engaged in conduct with the tendency or capacity to mislead when advocating the sale of certain illegal agreements; moreover, the claims were not barred by the four-year statute of limitations. Rich Food Servs., Inc. v. Rich Plan Corp., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27799 (E.D.N.C. Nov. 11, 2002).

Activities Insufficient to "Surround" or "Affect" Sale. — Where the actions alleged to be unfair under this section did not change the legal obligations of the parties or cause a change in title to the assets, the activities of defendant would not "surround" or "affect" a sale. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049 (E.D.N.C. 1980), aff'd, 649 F.2d 985 (4th Cir. 1981).

An agent employed to sell his principal's property may not himself become the purchaser absent both a good faith full disclosure to the principal of all material facts surrounding the transaction and consent by the principal after receiving full disclosure. Starling v. Sproles, 66 N.C. App. 653, 311 S.E.2d 688 (1984).

A broker can neither purchase from nor sell to the principal unless the latter expressly consents thereto or with full knowledge of all the facts and circumstances agrees to the transaction. Starling v. Sproles, 66 N.C. App. 653, 311 S.E.2d 688 (1984).

Real estate broker committed an unfair or deceptive act in violation of this section by failing to disclose prior to such broker's purchase of listed property that they had an offer to purchase the same property from a third party. Starling v. Sproles, 66 N.C. App. 653, 311 S.E.2d 688 (1984).

Inflating Value to Increase Price for Right of First Refusal. — Defendant oil company's motions to dismiss, for judgment on the pleadings, and to strike certain allegations as irrelevant were denied where plaintiff's complaint stated claims for fraudulent inducement and violation of the Unfair and Deceptive Trade Practices Act, G.S. 75-1. The oil company was alleged to have inflated the value of plaintiff's service station, increasing the price for the operator's right of first refusal. Simaan, Inc. v. BP Prods. N. Am., Inc., 395 F. Supp. 2d 271, 2005 U.S. Dist. LEXIS 11204 (M.D.N.C. 2005).

Partner's Breach of Fiduciary Duty by Self-Dealing and Constructive Fraud. — Partner's actions in self-dealing constituted a breach of the fiduciary duty the partner owed to the two other partners and a constructive fraud upon the two other partners. These actions were sufficient to support the partners' claim for unfair and deceptive trade practices; furthermore, the partner's actions, which revolved around the sale of a business, were in or affecting commerce. Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905, 2003 N.C. App. LEXIS 369 (2003).

Breach of Duties to Partnership by Partner Not Unfair Trade Practice. — Claims relating to breach of duties to a partnership by a son, who was also a partner, which alleged that the son took for himself opportunities that he agreed to pursue with the partnership, did not amount to practices impacting the marketplace, were not unfair trade practices under G.S. 75-1.1, and thus a treble damages award against the son was improper. White v. Thompson, — N.C. App. —, 676 S.E.2d 104, 2009 N.C. App. LEXIS 530 (2009).

Padlocking Premises upon Failure to Pay Rent. — The practices of defendant landlord in padlocking premises when tenants failed to pay rent did not constitute unfair trade practices under this section. Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981).

Agreement to Prevent Performance of Contract to Purchase Condominium. — Plaintiff's complaint stated a claim for relief against defendant bank and defendant mortgage lender for civil conspiracy and treble damages under the unfair trade practices statute where it alleged that plaintiffs contracted with defendant bank to purchase a condominium; pursuant to the terms of the contract, plaintiffs applied for a loan to defendant lender to finance the purchase of the condominium; defendant bank thereafter determined it did not want to perform the contract and made an agreement with defendant lender by which defendant lender would not make a loan to plaintiffs to finance the purchase and would not notify plaintiffs of the loan refusal until it was too late for plaintiffs to secure alternate financing; and defendant lender, in furtherance of this agreement, refused to make the loan, not because of a legitimate business reason, but in order to prevent plaintiffs from performing their part of the contract. Pedwell v. First Union Nat'l Bank, 51 N.C. App. 236, 275 S.E.2d 565 (1981).

Sale of Debtor's Assets Deemed Fraudulent Only to Provide An Equitable Remedy. — In an action to collect a debt owed under a contract by setting aside the sale of debtor's assets, where the evidence showed no intent to defraud plaintiff, and transaction was merely deemed fraudulent to provide plaintiff with an equitable remedy, the evidence did not reveal the kind of deceptive or oppressive conduct against plaintiff which would classify defendants' actions as an unfair and deceptive trade practice, and the trial court did not err in concluding that the transaction was not an unfair and deceptive trade practice in violation of this section. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Denial of Insurance Claim. — The record failed to reveal the existence of any facts which would create any genuine issue that the manner in which defendant insurer conducted its investigation, or its subsequent denial of plaintiffs' claim, was unethical, oppressive or deceptive in any way. Marshburn v. Associated Indem. Corp., 84 N.C. App. 365, 353 S.E.2d 123, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

Insured raised a fact issue for G.S. 75-1.1 and 58-63-15 purposes by alleging that an insurer failed to conduct a reasonable and complete investigation before denying the insured's claim—indeed, before speaking directly to the insured—and continuing to deny the insured's claim after speaking with the insured and receiving an alternate explanation as to why car two was driven to the airport; further, the insured alleged that the insurer failed to follow its claims handling guidelines. Martini v. Companion Prop. & Cas. Ins. Co., — N.C. App. —, 679 S.E.2d 156, 2009 N.C. App. LEXIS 1099 (July 7, 2009).

Jury's verdict that an insurer "improperly" determined that it would deny coverage, "misrepresented" the nature of its investigation to the insured, and "unfairly" and "improperly" cited a policy provision as its basis to send a reservation of rights letter supported the conclusion that the insurer's acts were unethical, involved an unfair assertion of its power, and violated G.S. 75-1.1. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Student pilot's claim under G.S. 75-1.1, based upon G.S. 58-63-15(11), survived an insurer's motion to dismiss where the student pilot sufficiently alleged that an insurance policy covered the aircraft in which the student pilot was injured, the insurer committed certain unfair settlement practices, the student pilot's rights were activated by a forced landing, and the student pilot had suffered permanent and severe injuries for which an insurance policy was to afford protection. Anderson v. Lancaster Aviation, Inc., 220 F. Supp. 2d 524, 2002 U.S. Dist. LEXIS 18423 (M.D.N.C. 2002).

When an insured sued an insurer for unfair and deceptive practices for negotiating his premium payment on a life insurance policy and then refunding it, stating that no coverage ever existed, summary judgment was properly granted to the insured, under G.S. 75-1.1, because: (1) the insured showed the insurer committed an unfair or deceptive act as the insurer, despite knowing coverage existed, represented and tried to convince the insured that there had never been coverage under the policy and tried to induce the insured to accept the refund under the false impression that the insurer was correct in claiming that coverage never existed; (2) the insurer's actions affected commerce; and (3) the insured was injured because the insurer represented that no coverage existed, and it was not necessary to show that the insured relied on the misrepresentation. Cullen v. Valley Forge Life Ins. Co., 161 N.C. App. 570, 589 S.E.2d 423, 2003 N.C. App. LEXIS 2273 (2003).

Insureds did not show that a homeowner's insurance carrier failed to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies, pursuant to G.S. 58-63-15(11)(c) of the Unfair Claims Settlement Practices statute, N.C. Gen. Stat. ch. 58, art. 63, by producing no evidence regarding those practices except for the carrier's two-sentence explanation of its general investigation practices; summary judgment was therefore properly granted to the carrier in the insureds' action under G.S. 75-1.1. Nelson v. Hartford Underwriters Ins. Co., 177 N.C. App. 595, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Homeowner's insurance carrier did not violate G.S. 58-63-15(11)(e) of the Unfair Claims Settlement Practices statute, N.C. Gen. Stat. ch. 58, art. 63, by failing to affirm or deny coverage of insureds' second claim based on mold damage in their house because the re-investigation was carried out in a reasonable amount of time and the insureds filed an action against the carrier shortly after the re-investigation report was concluded, providing little time for the carrier to respond; summary judgment was therefore properly granted to the carrier in the insureds' action under G.S. 75-1.1. Nelson v. Hartford Underwriters Ins. Co., 177 N.C. App. 595, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Homeowner's insurance carrier did not violate G.S. 58-63-15(11)(d) of the Unfair Claims Settlement Practices statute, N.C. Gen. Stat. ch. 58, art. 63, by failing to conduct a reasonable investigation when it commissioned a local engineering firm to report on a mold problem in the home of insureds because the purpose of the report was to determine whether mold was present and not to determine all its possible causes or the types of mold present; summary judgment was therefore properly granted to the carrier in the insureds' action under G.S. 75-1.1. Nelson v. Hartford Underwriters Ins. Co., 177 N.C. App. 595, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Summary judgment was properly granted to a homeowners' insurance carrier on insureds' cause of action under G.S. 75-1.1 claiming that the carrier violated G.S. 58-63-15(11)(n) of the Unfair Claims Settlement Practices statute, N.C. Gen. Stat. ch. 58, art. 63, by failing to provide a reasonable explanation of the basis in the policy for denying their claim; the carrier grounded its denial on exclusions in the policy for mold and faulty workmanship, and the omission of the policy's issuance after the harm occurred as a third ground for denial dd not make the explanation unreasonable, unfair, or deceptive. Nelson v. Hartford Underwriters Ins. Co., 177 N.C. App. 595, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Summary judgment was properly granted to a homeowners' insurance carrier on insureds' cause of action under G.S. 75-1.1 claiming that the carrier violated G.S. 58-63-15(11)(a) of the Unfair Claims Settlement Practices Statute, N.C. Gen. Stat. ch. 58, art. 63, by misrepresenting facts or insurance policy provisions relating to their claim for mold damage in their home; coverages not mentioned in its letter denying the claim were not applicable to the claim, the letter expressly reserved the carrier's right to assert other rights or defenses, and the letter was not unethical or unscrupulous and did not have a tendency to deceive the insureds. Nelson v. Hartford Underwriters Ins. Co., 177 N.C. App. 595, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Intentional Breach of Contract. — In an action for breach of contract alleging unfair competition, the trial court properly denied treble damages where the defendant's violation of its contractual obligation was an intentional breach, but there was neither unfairness nor deception in formulation of the contract; where the jury found no deception in the circumstances of its breach; where the contract was carefully negotiated and drawn by sophisticated parties; and where there was no hint of any unfairness to either party before the defendant's cessation of performance; thus, no unfairness inhered in the circumstances of the breach within the meaning of this section simply because the breach was intentional and not properly disclosed. United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985 (4th Cir.), cert. denied, 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed. 2d 590 (1981).

In a manufacturer's unfair trade practice claim against a seller alleging that the execution by the seller of an agreement with the manufacturer with the intention of breaching it, the manufacturer provided evidence that the seller's purchases that potentially breached the agreement occurred very soon after the agreement was executed and that an employee of the seller who participated in such transactions was told nothing of the agreement. Interstate Narrow Fabrics, Inc. v. Century USA, Inc., 218 F.R.D. 455, 2003 U.S. Dist. LEXIS 18227 (M.D.N.C. 2003).

Exercise of a 60-Day Notice for Termination Clause Held Not Unfair. — Where the plaintiff and defendant had a contract for intrastate carriage of yarn and staple fiber, and the contract only required 60 days' notice for either party to terminate the contract, the exercise of the termination clause did not constitute an unfair or deceptive trade practice, and plaintiff could not complain that it should have been informed that the defendant was looking for alternatives to plaintiff's contract. Tar Heel Indus., Inc. v. E.I. duPont de Nemours & Co., 91 N.C. App. 51, 370 S.E.2d 449 (1988).

Failure to comply with a Federal Trade Commission regulation, 16 C.F.R. § 429.1(e), by failing to orally explain to purchasers their rights to cancel at the time the agreement was signed, coupled with defective notice of cancellation, which was incomplete and unattached to the contract in violation of G.S. 25A-40(b) and 16 C.F.R. § 429.1(b), constituted an unfair and deceptive act in violation of this section. Eastern Roofing & Aluminum Co. v. Brock, 70 N.C. App. 431, 320 S.E.2d 22 (1984).

Automobile Sales. — A representation that a car is a demonstrator when it is, in fact, a used car may be inherently unfair to the average consumer, and moreover, such a representation may tend to deceive the consumer. Lee v. Payton, 67 N.C. App. 480, 313 S.E.2d 247 (1984).

The institution of a lawsuit may be the basis for an unfair trade practices claim if the lawsuit is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985).

Intentional Destruction of Documents Subject to Audit. — Summary judgment was denied where defendant's alleged intentional destruction of relevant documents in preparation for an audit by the plaintiff could be viewed as an intentional action to mislead or deceive the plaintiff sufficient to state an unfair trade practices claim under G.S. 75-1.1. N.C. Mut. Life Ins. Co. v. McKinley Fin. Servs., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 36308 (M.D.N.C. Dec. 22, 2005).

Unilateral Right of Withdrawal. — A sophisticated real estate developer such as plaintiff could not possibly have been deceived by bank's insistence upon and use of the unilateral right of withdrawal. United States Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n, 873 F.2d 731 (4th Cir. 1989).

The average consumer would not have understood the below-quoted statement, included in a letter written by an employee of an insurer in response to an inquiry by an agent of the insured as to the extent of the insured's coverage while he was in military service, to mean that the remaining exception to coverage, including an "air craft except," set out in the "accidental death rider" would no longer be applied: "However, in addition to the basic policy, this accidental death rider would also be payable should his death occur while in the Armed Forces but not as a result of an act of war." Pearce v. American Defender Life Ins. Co., 74 N.C. App. 620, 330 S.E.2d 9 (1985), aff'd in part and rev'd in part, 316 N.C. 461, 343 S.E.2d 174 (1986).

Actions Intended to Deceive Creditors into Extending Credit. — Trial court's conclusion that defendant engaged in actions intended to deceive creditors into extending credit to an individual who was not creditworthy and that these practices were forbidden by this section was amply supported by the findings of fact and the evidence. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Debt Collection. — Although in the area of debt collection, unfair or deceptive acts in commerce are limited to those acts set out in Article 2 of this Chapter, those specific practices delineated as prohibited are examples of unfair practices within the broader scope of this section. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Harassing Consumer After Cancellation of Long-Distance Phone Contract. — Trial court erred by granting summary judgment to a telephone corporation on the basis that consumer's claim that telephone corporation violated G.S. 75-1.1 by its actions in harassing the consumer after she had cancelled the contract for services was preempted by federal law; the Federal Communications Act did not preempt such a state claim. Morgan v. AT&T Corp., 168 N.C. App. 534, 608 S.E.2d 559, 2005 N.C. App. LEXIS 338 (2005).

Sending notices to a tenant regarding past due rent was a debt collection practice covered by G.S. ch. 75, art. 2 and that article exclusively constituted the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by the article, under G.S. 75-56, but the notices were not unfair or deceptive trade practices. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Repossessor Was Liable to Debtor for Perishable Goods. — Evidence supported the finding of an unfair and deceptive trade practice on the part of defendant repossessor with regard to the loss of a debtor's load of watermelons that was being held in a truck that was repossessed, because the repossessor denied the debtor a realistic opportunity to remove the goods at the time of the repossession and failed to respond to the debtor's prompt inquiries to access and remove the watermelons from the repossessor's secured yard. Eley v. Mid/East Acceptance Corp. of N.C., Inc., 171 N.C. App. 368, 614 S.E.2d 555, 2005 N.C. App. LEXIS 1253 (2005).

Where plaintiff represented to the State that he had a certain supplier when in fact he was purchasing a large part of his fuel supply from other suppliers at a lower price than the posted price of that supplier, and the State relied on this representation in paying for fuel, there was a misrepresentation upon which the State relied which constituted an unfair and deceptive trade practice. F. Ray Moore Oil Co. v. State, 80 N.C. App. 139, 341 S.E.2d 371, cert. denied, 317 N.C. 333, 346 S.E.2d 139 (1986).

Plaintiffs' allegations of wrongful and intentional harm to their credit rating and business prospects occurring less than four years before the filing date of their complaint were of a character clearly meant to be proscribed by the act and were therefore sufficient to state a claim for which relief could be granted under this section. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Material Issue of Fact Existed That Underinsurance Coverage Was Worthless. — Where plaintiff paid additional annual premiums for underinsured motorist coverage to defendant insurance company, where plaintiff was involved in automobile accident which caused him serious injuries resulting in medical expenses exceeding $100,000, and where after plaintiff settled with driver of other automobile for $25,000, defendant denied liability for any additional expenses under its policy's underinsurance coverage since defendants' responsibility under its $25,000 underinsurance coverage was reduced by plaintiff's $25,000 settlement with the other driver, renewal of plaintiff's minimum limits underinsurance, without disclosing its true value, was evidence of an unfair trade practice, and material issue of fact existed that underinsurance coverage was worthless. Davidson v. Knauff Ins. Agency, Inc., 93 N.C. App. 20, 376 S.E.2d 488, cert. denied, 324 N.C. 577, 381 S.E.2d 772 (1989).

Whether Defendant Explained That Promise Had Conditions Was Question for Jury. — Where defendant testified that he told prospective clients that defendants would build a swimming pool, tennis court, and clubhouse but did not explain to every prospective buyer that the building of these facilities was dependent upon an affirmative vote of the homeowners' association and a concomitant raise in homeowners' association dues, whether defendant explained this to plaintiffs was a question of fact for the jury and that portion of the trial court's order granting summary judgment for defendants on the issue of unfair and deceptive trade practices relating to the recreational facilities was reversed. Leake v. Sunbelt Ltd., 93 N.C. App. 199, 377 S.E.2d 285, cert. denied, 324 N.C. 326, 381 S.E.2d 774 (1989).

Damages Award Justified. — Defendant's contention that there was no likelihood of confusion between his and plaintiff's shirt products because of defendant's label affixed inside the back of the shirt's collar was without merit, where such label was not visible while the shirt was being worn and where the symbol used by defendant on the breast of the shirt was substantially identical to the one used by plaintiff. Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145 (4th Cir. 1987).

The court's entry of judgments against manufacturer for treble damages on claim under this section and against seller for breach of implied warranty combined with the order that manufacturer fully indemnify seller allowed plaintiff double recovery. Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994).

Trial court's findings of fact supported the conclusion that campground tenants were entitled to treble damages on the tenants unfair and deceptive trade practices claims after the owners rented campground spaces to the tenants on a monthly basis, charged the tenants for electricity, and electrical interruptions caused damage to the tenants' recreational vehicles. These activities constituted business activities; thus, the owners' acts were in or affecting commerce and the owners' acts in interfering with and disconnecting the tenants' electricity were, at a minimum, unfair. Shepard v. Bonita Vista Props., L.P., 191 N.C. App. 614, 664 S.E.2d 388, 2008 N.C. App. LEXIS 1489 (2008).

Cause of Action Justified. — Where alleged fraudulent actions occurred after plaintiffs were no longer employees, and were related to the settlement of the claims, not the accidents, the conduct did not fall within the scope of the Workers Compensation Act and a cause of action existed under this section. Johnson v. First Union Corp., 128 N.C. App. 450, 496 S.E.2d 1 (1998).

Customer's action for unfair trade practices against a casino manager was not actionable under state law because the casino was owned by a federally recognized Indian tribe, the tribe had established procedures for addressing complaints such as the customer's complaint, and the state had very little public policy interest in addressing an issue raised about gaming operations. Hatcher v. Harrah's NC Casino Co., LLC, 169 N.C. App. 151, 610 S.E.2d 210, 2005 N.C. App. LEXIS 512 (2005).

Conduct Amounting to Unfair Trade Practice. — Where a distributor of satellite television signals sought to recover from a defendant for alleged theft of signals using illegal equipment, the defendant properly alleged that the distributor engaged in unfair practices by falsely accusing the defendant of a crime, representing that the distributor had the power of law enforcement, and threatening to take action not permitted by law. DIRECTV, Inc. v. Cephas, 294 F. Supp. 2d 760, 2003 U.S. Dist. LEXIS 22297 (M.D.N.C. 2003).

Debtor who had been a shareholder and manager of a grocery store was personally liable to a creditor for funds that were owed to the creditor under a license agreement that the creditor had with the store and under a guaranty and indemnity agreement that the creditor had with the debtor, to the extent that the amount owed was not covered by amounts turned over by the trustee for the store; because of the debtor's egregious activity in operating the store, including the commingling of funds contrary to the license agreement, the damages owed by the debtor were trebled pursuant to G.S. 75-16. MEMO Money Order Co. v. Davis (In re Davis), 371 B.R. 127, 2007 Bankr. LEXIS 1786 (Bankr. E.D.N.C. 2007), vacated, on other grounds, 381 B.R. 650 (Bankr. E.D.N.C. 2008), MEMO Money Order Co. v. Davis (In re Davis), 371 B.R. 127, 2007 Bankr. LEXIS 1786 (Bankr. E.D.N.C. 2007).

Conduct Not Amounting to Unfair Trade Practice. — In an action to recover from defendant who had been given the exclusive right to negotiate a permanent loan for plaintiff partners to construct a shopping center, defendant mortgage broker did not engage in any conduct which would amount to an unfair trade practice where defendant was at all times cooperative, doing what it could as an intermediary with defendant lender so as to secure for plaintiff partnership the terms and modifications it desired to have; as a result of defendant broker's efforts there was no difficulty posed in obtaining the consent of defendant lender for substitution of tenants; there was no evidence that defendant broker exerted itself in any manner which would have contributed to the problem of securing tenants for plaintiff's shopping center; and there was no evidence that defendant broker had anything to do with the construction lender's withdrawal from the shopping center project. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980).

While a territorial restraint at least conceivably could be implied from economic factors, it could not be implied from market factors of plaintiff's own creation. Thus, where additional expenses which plaintiff distributor faced were caused by his decision to expand into an area in which he would not have access to a nearby supply terminal, and where even if supplier would have preferred that distributor stayed within his original territorial confines there was no evidence that it retaliated against him for not doing so, summary judgment for supplier was appropriate on distributor's Unfair Trade Practices claim. L.C. Williams Oil Co. v.

Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

Defendants' representation to owners that the beetle infestation of ceiling beams being installed in their new house would pose no problems other than a little sawdust did not amount to an unfair and deceptive act. Warfield v. Hicks, 91 N.C. App. 1, 370 S.E.2d 689, cert. denied, 323 N.C. 629, 374 S.E.2d 602 (1988).

Defendant was not a regulated utility in either the market in which the parties competed or the areas of service plaintiff wished to provide for defendant; therefore, defendant's election not to use plaintiff to perform its installation and repair service was not an unfair assertion of any power or position defendant might enjoy as a regulated utility, and it was not unfair for defendant to refuse to employ its competitor for the purposes of this section. Telephone Servs., Inc. v. General Tel. Co., 92 N.C. App. 90, 373 S.E.2d 440 (1988), cert. denied, 324 N.C. 251, 377 S.E.2d 763 (1989).

Defendants' claim that plaintiff submitted low bids for contracts and then later overcharged its customers, that plaintiff secured contracts that defendants also made bids on, and that plaintiff lured away some of defendants' customers with its seemingly lower fees did not provide a cause of action to defendants under this section; the statute is not so inclusive as to permit one competitor to claim unfair or deceptive trade practices on the ground that another competitor successfully bid for a contract. Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales & Serv., Inc., 91 N.C. App. 539, 372 S.E.2d 901 (1988).

The activity complained of in count two of defendants' counterclaim did not state a cause of action for unfair or deceptive trade practice, where defendants asked that plaintiff be subject to the risk of treble damages for continuing to conduct business during the negotiation process for the purchase of plaintiff business. Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales & Serv., Inc., 91 N.C. App. 539, 372 S.E.2d 901 (1988).

Where the evidence presented at trial was insufficient to support the jury's finding that defendant committed an intentional fraud by submitting applications for payment to plaintiff, plaintiff's claim of an unfair trade practice under this section was without basis. Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1988), petition for rehearing denied, 324 N.C. 117, 377 S.E.2d 235 (1989).

Where defendant-contractor, which had bid on a public project, informed Department of Transportation (DOT) and plaintiff that plaintiff-subcontractor would be replaced, defendant continued to meet the required DOT goals, regarding the employment of disadvantaged or minority business enterprises and no adverse action was taken against defendant. These facts and the surrounding circumstances did not support a claim for unfair trade practice, which is a practice that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Clark Trucking of Hope Mills, Inc. v. Lee Paving Co., 109 N.C. App. 71, 426 S.E.2d 288, cert. denied, 333 N.C. 789, 431 S.E.2d 21 (1993).

In action instituted by boatyard claiming a maritime lien on defendant vessel, where defendants alleged as their second counterclaim that plaintiff engaged in a practice where it would "lure" boat owners into its marina and charge excessively for services rendered, and if those owners refused to pay the bill, plaintiff would threaten seizure and sale of the vessel, defendants failed to show the existence of an act or practice concerning plaintiff's business policies that rose to the appellation "unfair" or "deceptive"; the "threats" of claiming a maritime lien or "papering" any vessel are exercises of valid rights of the plaintiff to assure payment for any services actually performed. Marlen C. Robb & Son Boatyard & Marina, Inc. v. Vessel Bristol, 893 F. Supp. 526 (E.D.N.C. 1994).

Where plaintiff, a graphic artist, had done work on an illustrated city map made by defendant, and where the relationship between the parties deteriorated to the point that a new artist was hired to complete an updated version of the map, as defendant had a copyright in the artwork, his hiring of another artist and his omission of plaintiff's name from the attribution bullet on the map did not amount to an unfair or deceptive trade practice. Armento v. Laser Image, Inc., 950 F. Supp. 719 (W.D.N.C. 1996), aff'd, 134 F.3d 362 (4th Cir. 1998).

Refusal to pay interest on money did not rise to the level of immoral, unethical, oppressive, unscrupulous, or injurious trade practices where bank inadvertently canceled deed of trust and offered to refund the purchase price without interest, as the bank's decision to wait until the bankruptcy trustee decided whether the deed of trust was valid was reasonable. Canady v. Crestar Mtg. Corp., 109 F.3d 969 (4th Cir. 1997).

Plaintiff's complaint lacked sufficient factual allegations to support a claim that defendant engaged in unfair and deceptive trade practices as proscribed by this section. Perry v. Carolina Bldrs. Corp., 128 N.C. App. 143, 493 S.E.2d 814 (1997).

Insured failed to allege that the commercial general liability insurer engaged in any prohibited practices with sufficient frequency to constitute a general business practice for purposes of a claim for unfair and deceptive trade practices. Wake Stone Corp. v. Aetna Cas. & Sur. Co., 995 F. Supp. 612 (E.D.N.C. 1998).

Evidence was insufficient to establish that conduct by the president of a corporation could properly be characterized as deceptive or oppressive conduct in violation of the statute. Norman Owen Trucking, Inc. v. Morkoski, 131 N.C. App. 168, 506 S.E.2d 267 (1998).

Where retail store left plaintiff's mall prior to the expiration of a twenty year contract which provided that lessee could sublet the space at any time, and where the lessor had notice of the defendant's intent to move, the store neither had the tendency to deceive the plaintiff lessor, nor actually did so, and the defendant retail store was entitled to summary judgment on the plaintiff's claim of unfair and deceptive trade practices. Forrest Drive Assocs. v. Wal-Mart Stores, Inc., 72 F. Supp. 2d 576 (M.D.N.C. 1999).

The plaintiffs's claim of unfair and deceptive trade practices pursuant to this section failed where defendants stood to gain very little from misleading the plaintiffs by expanding their existing insurance policy to cover inventory in a basement that was uninsurable under the policy; where the effect of defendants' actions in the marketplace would be negligible; and where the flood insurance sought by plaintiffs was not available among competing insurers so that no unfair advantage was or could be gained from defendants' actions. Erler v. Aon Risks Servs., Inc., 141 N.C. App. 312, 540 S.E.2d 65, 2000 N.C. App. LEXIS 1400 (2000).

When a landlord responding to an inquiry from another landlord about a tenant advised the inquiring landlord that the tenant's account was delinquent, this was not an unfair or deceptive practice, under the Unfair and Deceptive Trade Practices Act, G.S. 75-1.1, because, even after deducting certain erroneous charges made by the landlord, the tenant's account was delinquent. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Nothing in G.S. 1-239(c) required a judgment creditor to file a notice with the clerk that a judgment had been satisfied until a written demand for such a notice had been made; therefore, absent proof that such a demand was made, it was not an unfair or deceptive trade practice for a landlord to fail to file a notice that a judgment against a delinquent tenant had been satisfied. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Purchasing bank was properly granted summary judgment in a lender's action because the bank, in buying a mortgage that the borrower alleged was improperly obtained in the borrower's name, had no dealings with the borrower and had simply purchased the subject mortgage soon after its execution. Melton v. Family First Mortg. Corp., 156 N.C. App. 129, 576 S.E.2d 365, 2003 N.C. App. LEXIS 67 (2003).

Lender was properly granted summary judgment in a lender's action because the borrower failed to show any improper conduct on its part where there was no requirement for an in-person interview, there was no evidence of a forged signature, the lender disclosed all fees, there was no evidence of harm from allegedly backdated documents, there was no requirement that the lender recommend a reverse mortgage, and there was no violation in the same closing attorney representing both the borrower and the lender. Melton v. Family First Mortg. Corp., 156 N.C. App. 129, 576 S.E.2d 365, 2003 N.C. App. LEXIS 67 (2003).

Injured party's unfair and deceptive trade practices claim against a motorcycle helmet manufacturer failed as a matter of law because the injured party's deposition testimony demonstrated that the injured party did not, in fact, rely on the assumed misrepresentation in purchasing his helmet. Howerton v. Arai Helmet, Ltd., 158 N.C. App. 316, 581 S.E.2d 816, 2003 N.C. App. LEXIS 1193 (2003), cert. granted, 357 N.C. 459, 585 S.E.2d 757 (2003).

Trial court erred in awarding a mechanic and lienholder, who performed a diagnostic analysis on an automobile, treble damages when the credit union that financed the purchase of the automobile repossessed the automobile from the mechanic's premises late at night without the mechanic's knowledge or consent as the mechanic failed to show that he suffered an actual injury as a proximate result of the credit union's misrepresentations, instead the mechanic was entitled to the possession of the automobile again. Old Salem Foreign Car Serv., Inc. v. Webb, 159 N.C. App. 93, 582 S.E.2d 673, 2003 N.C. App. LEXIS 1426 (2003).

Where a competitor of patentees failed to show that the patentees communicated to the competitor's customers that the competitor infringed the patentees' product, made false and disparaging comments about the competitor's product, or sent infringement notices in bad faith, the competitor failed to show any actionable unfair and deceptive trade practice on the part of the patentees. Vesture Corp. v. Thermal Solutions, Inc., 284 F. Supp. 2d 290, 2003 U.S. Dist. LEXIS 16837 (M.D.N.C. 2003).

Plaintiff's claim that its former customer's employee revealed to plaintiff's competitor confidential information from plaintiff's bid that allowed the competitor to underbid, thereby committing fraud and violating G.S. 66-153 and G.S. 75-1.1, was properly dismissed on summary judgment; plaintiff, by submitting information to its customer and allowing it to use and disclose bid information at its sole discretion, did not act reasonably to maintain the secrecy of its bid information, so that it was not a "trade secret." Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 586 S.E.2d 507, 2003 N.C. App. LEXIS 1825 (2003).

Apparel company did not engage in an unfair or deceptive trade practice against an apparel assembler where (1) the company did not breach the parties' contract, (2) the company did not breach its duty of good faith and fair dealing, (3) there was no fiduciary relationship between the parties, (4) the company did not commit constructive fraud with respect to its relationship with the assembler, and (5) there was no other evidence of substantial aggravating circumstances that would have amounted to a violation of the North Carolina Unfair or Deceptive Trade Practice Act. Sara Lee Corp. v. Quality Mfg., 201 F. Supp. 2d 608, 2002 U.S. Dist. LEXIS 27687 (M.D.N.C. 2002).

Automobile dealership was granted summary judgment on a truck purchaser's claim under G.S. 75-1.1 related to the required state taxes where the purchaser failed to present any evidence that he was actually injured by the fact that he had to pay the required state taxes with a cash payment rather than with a financed payment. Comer v. Pers. Auto Sales, Inc., 368 F. Supp. 2d 478, 2005 U.S. Dist. LEXIS 6992 (M.D.N.C. 2005).

Trial court erred in granting judgment as to a services provider's unfair and deceptive trade practices claim as the mere establishment of a subsidiary corporation for the purpose of limiting the parent corporation's liability was not per se an unfair and deceptive trade practice; accordingly, the case was remanded to the lower court for a trial before a jury to determine whether the parent corporation's conduct, as to the provider, constituted an unfair and deceptive trade practice. Excel Staffing Serv. v. HP Reidsville, Inc., 172 N.C. App. 281, 616 S.E.2d 349, 2005 N.C. App. LEXIS 1582 (2005).

Dismissal of a patient's lawsuit against a hospital for unfair and deceptive acts regarding the rates charged the patient for treatment which she received at the hospital was affirmed because alleged unfair and deceptive acts committed by a hospital were not included as unfair an deceptive trade practices within the prohibition of G.S. 75-1.1(a). Shelton v. Duke Univ. Health Sys., 179 N.C. App. 120, 633 S.E.2d 113, 2006 N.C. App. LEXIS 1628 (2006), cert. denied, 643 S.E.2d 591, 2007 N.C. LEXIS 190 (2007).

Rather than alleging the facts needed to support each element of a trespass claim, the borrower made the conclusory statement that an agent of the lender trespassed upon the parcel and this bare allegation was insufficient to meet the pleading requirements, and therefore the trespass claim failed; the borrower did not allege sufficient facts to state a claim for trespass, so her conclusory allegations likewise did not state a claim for unfair or deceptive trade practices pursuant to G.S. 75-1.1. Booker v. Wash. Mut. Bank, F.A., — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 9632 (M.D.N.C. Feb. 9, 2007).

Loan servicing company could not be liable to a debtor for an alleged violation of the North Carolina Unfair Trade Practices Act, G.S. 75-1.1, because the loan servicing company as an agent of a successor mortgage company did not actively participate in the alleged unlawful activities during the execution of the mortgage. Tetterton v. Ocwen Fed. Bank (In re Tetterton), 379 B.R. 594, 2007 Bankr. LEXIS 4190 (Bankr. E.D.N.C. 2007).

Where a home was flooded and the homeowner argued that defendants, an insurer and an adjusting company, allowed the mold problem to go unremediated and become more severe, directed verdict was properly granted as to the unfair and deceptive trade practices claim because defendants' response was not the proximate cause of the damage. Burrell v. Sparkkles Reconstruction Co., 189 N.C. App. 104, 657 S.E.2d 712, 2008 N.C. App. LEXIS 422 (2008).

Where a financial company and an analyst published a company update regarding a manufacturer, the manufacturer's claim for unfair or deceptive trade practices failed because (1) the manufacturer's libel per se claim was properly dismissed, and (2) at most, the manufacturer alleged that its former employee breached a confidentiality agreement with the manufacturer when the employee downloaded confidential data and provided information to the analyst. Nucor Corp. v. Prudential Equity Group, LLC, 189 N.C. App. 731, 659 S.E.2d 483, 2008 N.C. App. LEXIS 713 (2008).

Trial court did not err by refusing to determine that the creditors' and the auctioneer's actions in auctioning off the debtors' cattle herd and not delivering any of the proceeds to the secured creditor constituted unfair and deceptive trade practices under G.S. 75-1.1. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

Where plaintiff alleged that defendants committed trademark infringement, such trademark infringement occurred in the marketing and advertising of defendants' agricultural news program, and the trademark infringement has caused plaintiff damages related to plaintiff's broadcast of agricultural radio, plaintiff had sufficiently alleged a claim under the North Carolina Unfair and Deceptive Trade Practices Act. Ray Communs., Inc. v. Clear Channel Communs., Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 4746 (E.D.N.C. Jan. 19, 2009).

Trial court erred in granting summary judgment on the issue of unfair and deceptive trade practices under G.S. 75-1.1. The wetlands delineations and a Master Wetlands Map were so facially flawed that a real estate acquisition company could not have reasonably relied on them in deciding to purchase a tract; given the company's experience in developing coastal communities and the fact that the company had unfettered access to the tract, the company could not have actually relied on the Master Wetlands Map that was dated more than two years earlier and signed by an individual no longer employed by the United States Army Corps of Engineers. Sunset Beach Dev., LLC v. Amec, Inc., — N.C. App. —, 675 S.E.2d 46, 2009 N.C. App. LEXIS 454 (2009).

Conduct of Employee. — Although a genuine issue of material fact existed as to whether defendant breached his duty of loyalty, allegations of defendant's unfair and deceptive trade practices did not come within the purview of this section because his conduct primarily occurred during his employment with plaintiff. Dalton v. Camp, 135 N.C. App. 32, 519 S.E.2d 82 (1999), cert. granted, 351 N.C. 353, 525 S.E.2d 470 (1999).

Conduct of Ex-Employee. — The conduct of defendant, who formed a competing business, obtained financing for that business, and began to solicit plaintiff's clients after she left plaintiff's employment, did not amount to unfair and deceptive trade practices under this section. Dalton v. Camp, 135 N.C. App. 32, 519 S.E.2d 82 (1999), cert. granted, 351 N.C. 353, 525 S.E.2d 470 (1999).

Targeted solicitation, and the use of those targeted employees to solicit other employees with that information, was an unfair trade practice under G.S. 75-1.1; since the corporation also showed that the customers it lost and the geographical areas where it lost business were the same customers and areas of the employees who the LLC hired away from the corporation, the corporation showed a proximate cause connection to its lost profits and those lost profit damages, along with treble damages and attorney fees, were properly awarded. Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C., 174 N.C. App. 49, 620 S.E.2d 222, 2005 N.C. App. LEXIS 2290 (2005).

As the evidence supported a determination that a staffing agency and its new manager had misappropriated trade secrets of an agency competitor, which was a violation of the Trade Secrets Protection Act pursuant to G.S. 66-146, such constituted an unfair act or practice pursuant to G.S. 75-1.1. Medical Staffing Network, Inc. v. Ridgway, — N.C. App. —, 670 S.E.2d 321, 2009 N.C. App. LEXIS 39 (2009).

Employees Did Not Violate Non-Competition Agreements When Wrongly Separated. — Trial court did not err in granting employees' judgment on the pleadings on a bank's counterclaims of breach of contract, tortious interference with contractual relations, and unfair competition because the employees did not breach their employment agreements when non-competition provisions did not apply to them prospectively following their termination without cause; because the employees were not bound by the non-competition provisions, the employees did not engage in unfair methods of competition with the bank. Washburn v. Yadkin Valley Bank & Trust Co., 190 N.C. App. 315, 660 S.E.2d 577, 2008 N.C. App. LEXIS 865 (2008).

Employee Held Liable. — Defendant engaged in self-dealing conduct and "business activities" which fell squarely within the ambit of the statutory prohibition of unfair and deceptive acts or practices, and the Court of Appeals erred in holding that his employee status safeguarded him from liability under this provision. Sara Lee Corp. v. Carter, 351 N.C. 27, 519 S.E.2d 308 (1999).

Plaintiffs were not entitled to a commission on the sale of defendant's property merely because their prospect ultimately purchased the property; defendant was under no obligation to plaintiffs arising out of the sale after plaintiffs failed to fulfill their obligations under the contract and, therefore, defendant's failure to involve plaintiffs did not create a cause of action under this section. Burge v. First S. Sav. Bank, 114 N.C. App. 648, 442 S.E.2d 552 (1994), cert. denied, 336 N.C. 778, 447 S.E.2d 417 (1994).

Builder's Misrepresentations Through Salesman, etc. — Where defendant builder represented through its salesman, sales brochures, and blueprints that it would build a deck for the new home it was constructing for plaintiffs in a certain location and to certain dimensions, but defendant knew that it was impossible to build the deck in that location, and relocated the site for the deck and built the deck smaller than represented, the trial court did not err in finding that defendant violated this section. Lapierre v. Samco Dev. Corp., 103 N.C. App. 551, 406 S.E.2d 646 (1991).

Structural Defects in Plaintiff's House. — The defendant had engaged in unfair and deceptive trade practices, violating this section, where he concealed material facts relevant to plaintiffs' house from plaintiffs which he knew at the time of purchase that plaintiffs could not discover in the exercise of due diligence, and falsely represented to plaintiffs that plaintiffs' house had been constructed in substantial conformity with plans and specifications approved for the house. Allen v. Roberts Constr. Co., 138 N.C. App. 557, 532 S.E.2d 534, 2000 N.C. App. LEXIS 783 (2000).

Judgment for violation of this section was properly entered against defendant construction company where the trial court based its conclusion of law that defendant had engaged in unfair and deceptive trade practices, in pertinent part, on the judgment for fraud entered against it. Allen v. Roberts Constr. Co., 138 N.C. App. 557, 532 S.E.2d 534, 2000 N.C. App. LEXIS 783 (2000).

Professional Contractor Charged with

Certain Knowledge. — Plaintiff, as a professional contractor, was charged with the knowledge that projected completion dates in the construction industry are often missed for a variety of reasons and may be impossible or impractical to fulfill; therefore, general contractor's circulation of an allegedly unrealistic completion date schedule as a basis for bids to plaintiff and other professional contractors did not rise to the level of unscrupulous, immoral conduct. Bolton Corp. v. T.A. Loving Co., 94 N.C. App. 392, 380 S.E.2d 796, cert. denied, 325 N.C. 545, 385 S.E.2d 496 (1989).

Actions Outside Scope of Duties. — Where allegations of fraudulent behavior were supported by evidence that defendant permissibly received information in his public capacity, but then impermissibly used that information to help his girlfriend acquire property while making fraudulent representations to stall plaintiff, the evidence sufficiently established that he was acting outside the scope of his duties and, therefore, was not entitled to immunity under this section. Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999).

Exercise of a 60-Day Notice for Termination Clause Held Not Unfair. — Where the plaintiff and defendant had a contract for intrastate carriage of yarn and staple fiber, and the contract only required 60 days' notice for either party to terminate the contract, the exercise of the termination clause did not constitute an unfair or deceptive trade practice, and plaintiff could not complain that it should have been informed that the defendant was looking for alternatives to plaintiff's contract. Tar Heel Indus., Inc. v. E.I. duPont de Nemours & Co., 91 N.C. App. 51, 370 S.E.2d 449 (1988).

Exercise by Lender of Contractual Right to Withdraw Not a Deceptive Trade Practice. — Where real estate developer conveyed in fee, subject to a buy-back agreement, 17 residential lots in development ("points lots") to lender in payment of $150,000 in discount points on loan and lender, in a later agreement, allowed real estate developer to finance the $200,000 repurchase price through sales of the points lots to individual purchasers, the district court was correct in concluding that lender's exercise of its contractual right to withdraw could not form the basis of a deceptive trade practice claim; real estate developer's position that lender's actions in regard to the later agreement were somehow deceptive was belied by the agreement itself; the agreement was simple and straightforward, and as a result of extensive negotiation a sophisticated real estate developer could not possibly have been deceived by lender's insistence upon and use of the unilateral right of withdrawal. United States Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n, 873 F.2d 731 (4th Cir. 1989).

Distributor who claimed that he was "deceived" about the status of his distributorship for a period of time prior to its termination, and that this caused him to prepare a market analysis report for defendant muffin company which detailed some proprietary information about his business, could not recover under this section, as he received all the notice of the termination of his distributorship for which he could conceivably have asked, and he failed to show how the supposedly proprietary information that he gave to defendant's representatives was misappropriated to his actual injury. Bartolomeo v. S.B. Thomas, Inc., 889 F.2d 530 (4th Cir. 1989).

Mere Use of Product Identifier Insufficient. — Because plaintiff did not come forward with any facts which suggested that defendant's conduct was unfair or deceptive beyond its mere use of the 'walking fingers" logo, which the court held to be a product identifier, rather than a trademark, plaintiff's claim must fail under the common law and statutory claims of unfair competition. BellSouth Corp. v. White Directory Publishers, Inc., 42 F. Supp. 2d 598 (M.D.N.C. 1999).

Misrepresentation as to Ownership of Land Did Not Affect Heating, etc., Contractor. — Fact that defendant, a travel agency owner, entered the home-building arena to help his children build homes, and that in so doing he represented that the land upon which the house would be built was still his, when in fact it was not, had no impact on damages to plaintiff heating, plumbing and electrical contractor, as he was able to protect his rights by a lien under Chapter 44A, and thus there was no deceptive trade practice, as prohibited in this Chapter. Miller v. Ensley, 88 N.C. App. 686, 365 S.E.2d 11 (1988).

Refusal of legal directory publisher to publish attorney's "professional card" and failure of ABA and North Carolina State Bar to prevent publisher from refusing to do so was not in violation of G.S. 75-1 and this section. Hester v. Martindale-Hubbell, Inc., 659 F.2d 433 (4th Cir. 1981), cert. denied, 455 U.S. 981, 102 S. Ct. 1489, 71 L. Ed. 2d 691 (1982).

Attorney's Communication Held Neither Unfair Nor Deceptive. — In view of the strong public policy favoring freedom of communication between parties and their attorneys with respect to anticipated or pending litigation, as a matter of law a communication from defendant's attorney to the attorney for plaintiff's employer, a party involved in the disputed claim, concerning the subject matter of the controversy was neither unfair nor deceptive. Harris v. NCNB Nat'l Bank, 85 N.C. App. 669, 355 S.E.2d 838 (1987).

Plaintiff's allegations that lessee intentionally caused the burning of a building which he leased from plaintiff failed to state a claim for relief under this section, since the alleged acts of the lessee did not constitute unfair and deceptive trade practices within the intended purpose of the statute. Threatt v. Hiers, 76 N.C. App. 521, 333 S.E.2d 772, cert. denied, 315 N.C. 397, 338 S.E.2d 887 (1985).

Construction of Pond. — This section was inapplicable under the following circumstances: (1) agents for a landowner and a contractor made an oral agreement for the construction of a pond, under which the contractor would receive no funds until the job was complete, unless he experienced cash flow problems, in which case he would ask for an advance for work already performed; (2) after excavating the pond site, the contractor asked for $2,000 to complete repairs on equipment, which was so advanced; (3) no additional work was performed; and (4) the contractor testified that the payment was for work already performed, to which he believed he was entitled. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

A misunderstanding between an insured and an insurance agent regarding collision insurance coverage for the insured did not constitute a deceptive representation in violation of this section. Cockman v. White, 76 N.C. App. 387, 333 S.E.2d 54 (1985).

Refusal of Insurers to Provide Chiropractic Treatment as Workers' Compensation Coverage. — Plaintiff chiropractors alleging that defendant insurance companies had interfered with their contractual rights by refusing to honor employers' choices of chiropractors as providers of health care treatment to employees under the Workers' Compensation Act, that defendants had misrepresented to employer insureds that their workers' compensation policies did not provide coverage for chiropractic treatment, that said misrepresentations were unfair and deceptive trade practices in violation of this section, and that defendants had conspired among themselves and with members of the medical profession to deprive plaintiffs of business opportunities by refusing to pay for chiropractic services provided in compliance with the Act, an illegal restraint of trade in violation of G.S. 75-1 and 15 U.S.C. § 1, could not maintain their action in superior court without first seeking relief from the Industrial Commission. North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988), remanding case to the trial court for entry of an order staying plaintiffs' action pending a determination of the underlying workers' compensation issues by the Commission.

Conduct Amounting to "Pirating". — To undermine a competitor's potentially lucrative business opportunity, by taking its source of a new income from an employee under contract, while at the same time marketing its product as one's own, is both unfair and deceptive. It is akin to the "pirating" of plaintiff's product. McDonald v. Scarboro, 91 N.C. App. 13, 370 S.E.2d 680 (1988).

Claim Not Cognizable Under Virginia Law. — In action in which defendants argued that plaintiff committed an unfair trade practice by representing to defendants that they had a buyer who would pay $150,000 for plane upon delivery to Norfolk, Virginia, where the plane was sold in Richmond, Virginia for the sum of $55,000, not $150,000, the last act giving rise to the defendants' claim under this section occurred in Virginia, and the substantive law of Virginia would apply to defendants' counterclaim. Moreover, as a statutory basis for defendants' injury could not be found in Virginia law, defendants' claim would fail. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

Violation Not Found. — Non-brokerage restrictions placed upon agents by defendant insurance company merely prevented them from using defendants' resources to promote and sell the products of competitors. The facts disclosed no acts or practices on the part of defendants which could be held to be inequitable, oppressive, offensive to public policy, or substantially injurious to consumers, so as to violate this section. Dull v. Mutual of Omaha Ins. Co., 85 N.C. App. 310, 354 S.E.2d 752, cert. denied, 320 N.C. 512, 358 S.E.2d 518 (1987).

No unfair practices were found and dismissal of the claims under this chapter against the aldermen was upheld where the aldermen complied with the court's judgment by holding "further proceedings," during which additional testimony and newspaper articles about the approved property lease and the construction of the cellular tower not previously considered by the judge were introduced. Stephenson v. Town of Garner, 136 N.C. App. 444, 524 S.E.2d 608, 2000 N.C. App. LEXIS 54 (2000).

Technology company was unlikely to succeed on its claim under the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1.1(a), where a software company who used a similar mark and domain name did not "siphon off" the technology company's customers by using its mark, nor did it intend to do so; thus, the software company did not act deceptively or unfairly in adopting its domain name or its mark. Yellowbrix, Inc. v. Yellowbrick Solutions, Inc., 181 F. Supp. 2d 575, 2001 U.S. Dist. LEXIS 23354 (E.D.N.C. 2001).

Tobacco companies' claim that a competitor's retail merchandising program violated G.S. 75-1, 75-1.1, 75-2, and 75-2.1, failed where they did not show any antitrust injury on their federal claims under the Sherman Act, did not show that the competitor possessed market power or that the merchandising program was coercive, and did not present any further evidence of unfair and deceptive trade practices. R.J. Reynolds Tobacco Co. v. Philip Morris, Inc., 199 F. Supp. 2d 362, 2002 U.S. Dist. LEXIS 8180 (M.D.N.C. 2002).

Store was entitled to summary judgment on consumer's unfair trade practices claim because the consumer failed to respond or produce any evidence sufficient to show as a matter of law that the store's action in reporting the consumer's non-payment of his store account to a credit reporting agency constituted an unfair or deceptive practice. Butler v. Sears Roebuck & Co., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 24229 (M.D.N.C. Dec. 12, 2002).

A store's reporting to a credit bureau of the customer's failure to pay his account did not constitute a deceptive trade practice under the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1. Butler v. Sears Roebuck & Co., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 15234 (M.D.N.C. Aug. 27, 2003).

Trial court properly granted the owners' summary judgment motion as to a subcontractor's claim for treble damages under G.S. 75-1.1 of the North Carolina Unfair and Deceptive Trade Practices Act [G.S. 75-1 et seq.], as the subcontractor failed to plead a viable fraud claim, and failed to show substantial aggravating circumstances attending to a breach of contract. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

In a claim brought by mobile home owners alleging unfair and deceptive trade practices by the manufacturers of the homes in the manufacturers' recommendations for use of an allegedly defective mobile home tie down system, summary judgment for the manufacturers was proper and was affirmed where, in his deposition, one owner admitted that he did not rely on the manufacturers' recommendation to use the tie-down system at issue when he bought his mobile home, that did not read the manual which specified the system, that the manufacturers did not make any representations about the system before he bought his mobile home, that his home withstood two hurricanes without damage to the system, and that he had not suffered any damages. Belcher v. Fleetwood Enters., 162 N.C. App. 80, 590 S.E.2d 15, 2004 N.C. App. LEXIS 9 (2004).

Trial court did not err by granting a directed verdict motion to a wedding show operator that was sued by a bridal facility owner because the bridal facility owner failed to prove that the declining attendance of vendors at his bridal shows was proximately caused by the wedding show operator, and the bridal facility owner merely speculated as to his lost profits so that the jury could not reasonably calculate the amount of any lost profits by the bridal facility owner. Castle McCulloch, Inc. v. Freedman, 169 N.C. App. 497, 610 S.E.2d 416, 2005 N.C. App. LEXIS 604 (2005), aff'd, 360 N.C. 57, 620 S.E.2d 674 (2005).

In an action that a retailer brought against a manufacturer that refused to sell its new golf products to retailers that discounted prices, a retailer could not show the concerted action necessary to establish a violation of G.S. 75-1 and G.S. 75-1.1(a) because the manufacturer's decision to institute its new product introduction policy was a unilateral action. MD Prods. v. Callaway Golf Sales Co., 459 F. Supp. 2d 434, 2006 U.S. Dist. LEXIS 72478 (W.D.N.C. 2006).

Inducement of Salesman. — These acts constituted unfair methods of competition and did not promote good faith dealings between a corporation and its competitor: (a) offering to pay legal fees and costs to induce salesman, in breach of his covenant not to compete, to attempt to divert accounts; (b) inducing salesman to use his relationship with corporation's accounts and knowledge of confidential business information to attempt to divert accounts; (c) offering to subsidize the income, draw and expenses of salesman in the event of an injunction, to induce salesman, to divert accounts; and (d) as a matter of routine practice, offering to pay legal fees and costs to induce experienced sales representatives, in breach of the salesmen's covenant not to compete, to attempt to divert competitor unfairly, the former employer's accounts. United Labs., Inc. v. Kuykendall, 102 N.C. App. 484, 403 S.E.2d 104 (1991), aff'd, 335 N.C. 183, 437 S.E.2d 374 (1993).

Automobile Dealership's Failure to Disclose Damages to Purchaser of Vehicle. — Automobile dealership was denied summary judgment on a truck purchaser's claim under G.S. 75-1.1 related to the condition of the truck where there was sufficient evidence to raise a question of fact as to whether the dealership failed to disclose damages to the truck and fraudulently misrepresented that it was in good condition. Comer v. Pers. Auto Sales, Inc., 368 F. Supp. 2d 478, 2005 U.S. Dist. LEXIS 6992 (M.D.N.C. 2005).

Tortious interference with a restrictive covenant by a competitor constituted a claim for unfair and deceptive trade practices. Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

Copyrighted furniture manufacturer's claims for unfair competition and unjust enrichment under North Carolina law were dismissed under Fed. R. Civ. P. 12(b)(6) as preempted by the Copyright Act because, despite allegations of deceptive trade practices, the manufacturer had not alleged fraud, and no relationship existed between the parties prior to the acts constituting the alleged infringement; thus, the copyright violation remained the gravamen of these claims. Collezione Europa U.S.A., Inc. v.

Hillsdale House, Ltd., 243 F. Supp. 2d 444, 2003 U.S. Dist. LEXIS 1942 (M.D.N.C. 2003).

Primary Insurer Was Not Entitled to Motion for Summary Judgment. — Since failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies and not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear and which are prohibited by Chapter 58 with regard to first party claims, these practices, if found by the jury, could support a finding of unfair or deceptive acts or practices under Chapter 75, therefore, there was a genuine issue as to material fact and primary insurer was not entitled to motion for summary judgment on unfair trade practices claim of excess and umbrella insurers. United States Fire Ins. Co. v. Nationwide Mut. Ins. Co., 735 F. Supp. 1320 (E.D.N.C. 1990).

Borrower Deceived into Thinking Credit Union Had Valid Security Interest in Retirement Account. — Practices and actions of credit union in deceiving borrower into thinking that credit union had a valid, enforceable security interest in his retirement account by inserting the word "retirement" in the "other collateral" block on front of loan documents and having debtor sign documents at the time of making his first loan, which authorized the sending of employee's retirement checks to the credit union and depositing therein and the filing away of these forms and applying them to all loans thereafter made violated public policy of protecting the retirement accounts of teachers and other state employees, and collectively constituted unfair and deceptive trade practices; and as debtor was damaged as a result of such practices in that he lost the ability to use his retirement fund for his own needs, including eventual retirement, he was entitled to recover treble damages and attorney's fees. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Landlord's Behavior. — Where landlord was aware of the needed repairs to house but did not honor his promise to correct the deficiencies, where the premises were unfit for human habitation, but landlord himself visited the premises to demand rent for unfit premises, where the conditions complained of throughout tenancy were the same unfit conditions identified by a city inspection report, landlord's behavior was at the very least unfair and fit all the definitions that the courts have used in determining the types of acts prohibited by this chapter. Allen v. Simmons, 99 N.C. App. 636, 394 S.E.2d 478 (1990).

Trial court erred in granting summary judgment to lessors and neighboring used car dealer on the lessee's unfair and deceptive trade practices claim; the lessee alleged all the necessary elements to support his claim by alleging that the lessor and the used car dealer agreed that the used car dealer could park his used cars on lessee's gas station property and permit the used car dealer's customers to park their cars on the lessee's gas station property when the lessee refused to sell his business to the used car dealer, who also leased his property from the lessor. Elec. World, Inc. v. Barefoot, 153 N.C. App. 387, 570 S.E.2d 225, 2002 N.C. App. LEXIS 1192 (2002).

Trial court correctly concluded that a landlord's actions in collecting rent after having knowledge of the uninhabitable nature of part of the house, because of the tenant's complaints about significant leaks in the back bedroom and living room for more than two years, constituted unfair trade practices and was thus a violation of G.S. 75-1.1. Pierce v. Reichard, 163 N.C. App. 294, 593 S.E.2d 787, 2004 N.C. App. LEXIS 382 (2004).

Location of Account. — Although none of named plaintiffs had a franchise in North Carolina, where plaintiffs alleged breach of fiduciary duty by the defendants regarding the daily administration of a North Carolina account which franchisees paid into, the wrong occurred in North Carolina and plaintiffs alleged facts sufficient to withstand summary judgment. Broussard v. Meineke Disct. Muffler Shops, Inc., 945 F. Supp. 901 (W.D.N.C. 1996).

Shareholder's Termination of Stock Buying Employees. — The trial court erred in dismissing the plaintiffs' claim for unfair and deceptive trade practices against the defendant's company and manager/controlling shareholder who attempted, in bad faith, to keep the employee group from buying the manager's stock and finally, terminated the plaintiff members of the employee purchasing group. Walker v. Sloan, 137 N.C. App. 387, 529 S.E.2d 236, 2000 N.C. App. LEXIS 414 (2000).

Minority Shareholders Not Liable for Manager's Actions. — The trial court correctly dismissed, as failing to state a claim upon which relief could be granted, the plaintiffs' claim that the defendant minority shareholders violated the prohibition against unfair and deceptive trade practices by ratifying the adverse actions of majority shareholder/manager who had would-be-stock-buyers/employees fired where the defendants continued to try to effectuate the sale, at no time decided not to sell, made no false or misleading statements and caused no injury. Walker v. Sloan, 137 N.C. App. 387, 529 S.E.2d 236, 2000 N.C. App. LEXIS 414 (2000).

Violation of Uniform Fiduciaries Act. — Bank's violation of G.S. 32-9 of the Uniform Fiduciaries Act was held not to constitute an unfair or deceptive trade practice where the breach of fiduciary duty was committed by a trustee, and there was an absence of actual knowledge or bad faith by the bank. Moretz v. Miller, 126 N.C. App. 514, 486 S.E.2d 85 (1997).

Preparation of Fire Insurance Investigation Report. — This section was inapplicable to a case involving the wrongful death of a child who died as a result of a fire in his home four days after an insurance inspection of damage caused by Hurricane Fran; the actions of defendant-insurer in having a fire investigation report prepared which resulted in the removal of plaintiff's child from her home and her placement with the Department of Social Services did not affect "commerce" as understood by this section; furthermore, plaintiff was not the intended third-party beneficiary of the contractual relationship between defendant-landlords and defendant-insurer. Prince v. Wright, 141 N.C. App. 262, 541 S.E.2d 191, 2000 N.C. App. LEXIS 1389 (2000).

Subcontract to Remove Hurricane Debris. — The district court erred in setting aside $ 100,000 award on the ground that plaintiff subcontractor failed to offer proof of entitlement to damages as the result of the defendant's fraud, where the plaintiff alleged in his amended complaint, and argued in closing, that he reasonably relied upon defendant's fraudulent misrepresentations and concealments to his detriment by fully mobilizing the project, by executing the subcontract, and by performing in good faith his obligations under that subcontract, and where he offered evidence of costs of more than $ 100,000 that he would not have incurred but for defendant's inducing him to contract. United States ex rel. S&D Land Clearing v. D'Elegance Mgmt., — F.3d —, 2000 U.S. App. LEXIS 16173 (4th Cir. July 13, 2000).

Construction Project Overseen by Architect. — Plaintiff failed to show sufficient aggravating circumstances to establish a claim for unfair and deceptive trade practice where architect's constant, close involvement in project belied any claim that a "relation of trust and confidence" existed between plaintiff and defendant giving rise to a fiduciary relationship, where a certificate of substantial completion was signed by the architect on March 27, 1996, and where the construction project was subject to local government inspection. Eastover Ridge, L.L.C. v. Metric Constructors, Inc., 139 N.C. App. 360, 533 S.E.2d 827, 2000 N.C. App. LEXIS 900 (2000), cert. denied, 353 N.C. 262, 546 S.E.2d 93 (2000).

The plaintiff-contractor could not maintain an action under this section against defendants-architects who were members of a learned profession and whose alleged conduct—(1) the "solicitation of business at the plaintiff's expense rather than the practice of architecture," and (2) "giving scientific advice outside the scope of any architectural expertise"—qualified as "rendering of professional services" under the learned profession exemption and could not serve as the basis for an unfair trade practices claim. RCDI Constr. v. Spaceplan/Architecture, Planning & Interiors, P.A., 148 F. Supp. 2d 607 (W.D.N.C. 2001).

Medical Professional Wielding Retaliatory Letter Against Former Jurors. — The trial court properly dismissed the plaintiffs jurors' complaint against defendant doctor for unfair and deceptive trade practices where his action—providing a letter to other medical professionals in his county with the alleged intention of discouraging them from providing professional health care to plaintiffs—fell within the exception in subsection (b) of this section. Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4, 2001 N.C. App. LEXIS 146 (2001).

Refusal to Pay Invoices. — Regarding a manufacturer's unfair trade practice claim against a seller and its president, alleging that the seller and the president ordered goods from the manufacturer after deciding that the seller would not pay the manufacturer's invoices, the seller's motion for partial summary judgment was granted as to the seller and the president because the manufacturer pointed to no evidence that could have been used to counter the summary judgment. Interstate Narrow Fabrics, Inc. v. Century USA, Inc., 218 F.R.D. 455, 2003 U.S. Dist. LEXIS 18227 (M.D.N.C. 2003).

Bank Check Fraud. — Where the Chapter 7 trustee alleged a check kiting scheme in a complaint under G.S. 75-1.1 against the debtor's bank, whereby a secured creditor wire transferred funds into the debtor's operating account based on the debtor's deposits into the blocked account that was daily swept by the secured creditor, and the debtor then issued "on us" checks from the operating account and deposited them into the blocked account, and the bank had extended provisional credit on the blocked account, since there was evidence to support a finding that the bank was aware of the fraudulent activity that comprised the check kite, the bank was denied summary judgment. Moseley v. Arth (In re Vendsouth, Inc.), — Bankr. —, 2003 Bankr. LEXIS 1437 (Bankr. M.D.N.C. Oct. 9, 2003).

Where an oral distributorship agreement between a manufacturer and a distributor was unenforceable based on the statute of frauds, the lack of a contractual relationship between the parties did not preclude the distributor from asserting a proper claim that the manufacturer committed unfair and deceptive trade practices in misrepresenting its intent to enter the agreement and abide by its terms, and by unreasonable increasing sales goals while simultaneously negotiating with a new distributor. Dealers Supply Co. v. Cheil Indus., 348 F. Supp. 2d 579, 2004 U.S. Dist. LEXIS 25313 (M.D.N.C. 2004).

Weight-loss Center. — In an action brought against a weight loss center and other defendants, the trial court erred in granting partial summary judgment against those plaintiffs who did not request their prescription as to a claim brought under the Unfair and Deceptive Trade Practices Act; at a minimum, a jury question existed as to damages. Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

Franchisees properly supported their claim against franchisors for unfair and deceptive practices where the evidence showed that franchisors of retail gasoline stations and a putative purchaser of the stations reallocated the value of the stations to inflate the value of the station of franchisees who had a right of first refusal to purchase the station; the franchisors misrepresented the purchaser's offer as the reallocated value and refused to provide the agreement with the purchaser, the franchisees had no choice but to rely on the misrepresentation in order to exercise their right of first refusal, and exercising such right did not constitute a ratification of the transaction since the franchisees were unaware of the true facts. Simaan, Inc. v. BP Prods. N. Am., Inc., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 11203 (M.D.N.C. May 26, 2005).

Claim of Improper Sexual Advances. — Plaintiff's claim that defendants wrongfully induced him to take employment, only to subject him to sexual advances, survived a motion to dismiss because the offending conduct, misleading a prospective employee to induce him to accept employment and face harassment, occurred before the employer-employee relationship existed. Mayes v. Moore, 419 F. Supp. 2d 775, 2006 U.S. Dist. LEXIS 9757 (M.D.N.C. 2006).

Sweepstakes Contestant Not Entitled to Damages. — Under G.S. 75-16, a sweepstakes contestant was not entitled to damages for unfair and deceptive trade practices, pursuant to G.S. 75-1.1 and G.S. 75-32; even if the contest sponsor's actions constituted actionable conduct pursuant to G.S. 75-1.1 and G.S. 75-32, no reasonable person could have relied on the representations contained therein to conclude that he or she would be entitled to the entire contest prize because any actual injury suffered could not have been, as a matter of law, proximately caused by the sponsor's representations. Fozard v. Publrs. Clearing House, Inc., — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 22994 (M.D.N.C. Apr. 29, 1999).

Litigation Lending Agreement. — Litigation lender violated G.S. 75-1.1 since it did not inform the injured driver that she was executing a contract that violated the Consumer Finance Act, and the contract for an illegal advance violated the public policy of protecting borrowers. Odell v. Legal Bucks, LLC, — N.C. App. —, 665 S.E.2d 767, 2008 N.C. App. LEXIS 1619 (2008).

Accounting Actions May Have Been Considered Unfair Trade Practices. — Father was hired to provide accounting services to a partnership, and his actions in improperly keeping and maintaining accounting records may have been considered unfair practices in or affecting commerce; further, because the jury found that the father breached a fiduciary duty, not a mere contractual duty, his contention that mere breach of contract was insufficient to show an unfair trade practice was rejected. A treble damages award against the father was proper. White v. Thompson, — N.C. App. —, 676 S.E.2d 104, 2009 N.C. App. LEXIS 530 (2009).

IV. PLEADING AND PRACTICE.

Mere allegation of intentional refusal to procure and deliver natural gas, without any suggestion of deception or any claim of injury to competition, does not state a claim under this section. CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 448 F. Supp. 475 (W.D.N.C. 1978).

Under this section the only question of fact is whether defendant did what was alleged; the words "unfair" and "deceptive" need never be mentioned to the jury. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

Application of statute in private action bifurcated procedure. The jury first decides any factual issues, including whether the allegedly deceptive act proximately caused injury to the plaintiff. The court then determines as a matter of law whether the proved facts amount to a violation of the statute. Hageman v. Twin City Chrysler-Plymouth Inc., 681 F. Supp. 303 (M.D.N.C. 1988).

Amendment of Complaint. — Motion to amend the complaint pursuant to Fed. R. Civ. P. 15, to add claims for conversion and unfair trade practices, under G.S. 75-1.1(b), was granted, but the issue whether the claims were barred by applicable statutes of limitations or related back in time was not properly addressable on the motion to amend. Gordon v. Lam (In re Lam), — Bankr. —, 2009 Bankr. LEXIS 1671 (Bankr. E.D.N.C. June 8, 2009).

Plaintiff Estopped in State Deceptive Trade Practices Claim Where Federal Claim Dismissed on Merits. — Family business was collaterally estopped from relitigating the element of causation in its deceptive trade practices claim where it sought damages for the same injuries in a federal action alleging a violation of RICO, and in dismissing the RICO claim, the federal court held that defendants' illegal conduct with respect to a midway contract was not the proximate cause of the business's injury. Strates Shows, Inc. v. Amusements of Am., Inc., 184 N.C. App. 455, 646 S.E.2d 418, 2007 N.C. App. LEXIS 1479 (2007).

Jury Decides Facts. — In cases under this section it is ordinarily the province of the jury to find the facts. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

In cases under this section and G.S. 75-16 the jury finds facts, and based on the jury's findings, the court then determines as a matter of law whether the defendant's conduct violated this section. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986).

In cases under G.S. 75-16 and this section, it is ordinarily for the jury to determine the facts, and based on the jury's findings, the court must then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce. La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986), cert. denied and appeal dismissed, 319 N.C. 459, 354 S.E.2d 888 (1987); Medina v. Town & Country Ford, Inc., 85 N.C. App. 650, 355 S.E.2d 831 (1987), aff'd, 321 N.C. 591, 364 S.E.2d 140 (1988).

Under this section it is a question for the jury as to whether the defendants committed the alleged acts, and then it is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice. United Labs., Inc. v. Kuykendall, 322 N.C. 643, 370 S.E.2d 375 (1988).

Once the plaintiff has presented evidence in support of each of the three elements in support of its claim of unfair and deceptive trade practices, the question whether the defendants committed the alleged acts is a question of fact for the jury; the court must then determine as a matter of law whether the proven facts constitute an unfair or deceptive trade practice. First Atl. Mgt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 507 S.E.2d 56 (1998).

Summary judgment was improperly granted to a motorcycle helmet manufacturer in a consumer's action alleging a claim for unfair trade practices, because the record revealed a genuine issue of material fact as to the consumer's reliance on the manufacturer's alleged misrepresentations regarding the safety of the helmet, and although the manufacturer presented some evidence calling into question the consumer's reliance on the advertisements, it was for the jury to weigh conflicting evidence of record. Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674, 2004 N.C. LEXIS 667 (2004).

And Court Determines Whether Practice Violates Section. — Whether an act or practice is unfair or deceptive within the meaning of this section is a question of law for the court to determine. CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 448 F. Supp. 475 (W.D.N.C. 1978); Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646, cert. denied, 300 N.C. 379, 267 S.E.2d 685 (1980), overruled on other grounds, Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Whitman v. Forbes, 55 N.C. App. 706, 286 S.E.2d 889 (1982); Cathy's Boutique, Inc. v. Winston-Salem Joint Venture, 72 N.C. App. 641, 325 S.E.2d 283 (1985); Pearce v. American Defender Life Ins. Co., 74 N.C. App. 620, 330 S.E.2d 9, aff'd in part and rev'd in part, 316 N.C. 461, 343 S.E.2d 174 (1986); General United Co. v. American Honda Motor Co., 618 F. Supp. 1452 (W.D.N.C. 1985).

Based on the jury's findings of fact, the court must determine as a matter of law whether a defendant's conduct violates this section. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Plaintiff's forecast of evidence was insufficient as a matter of law to show that defendants' actions constituted an unfair trade practice, and was also insufficient to show that plaintiff was actually damaged by defendants' actions. Walker v. Branch Banking & Trust Co., 133 N.C. App. 580, 515 S.E.2d 727 (1999).

Plaintiff Held Not Entitled to Proceed Under This Section. — The trial court did not err in dismissing plaintiff's action where in plaintiff's second action, he alleged insurance company had committed an unfair or deceptive trade practice in violation of this section by alleging in the answer to complaint that plaintiff was intoxicated at the time of the accident since plaintiff's complaint alleged only that insurance company's attorney improperly relied on hearsay statements gathered by accident investigator, and, as a result of his negligent reliance, the insurance company's attorney did not sufficiently investigate the defense before raising it in the answer and these facts were insufficient, as a matter of law, to state a claim entitling plaintiff to proceed under this section. Hoke v. Young, 89 N.C. App. 569, 366 S.E.2d 548 (1988).

Where plaintiff alleged no present monetary injury due to his personal guaranty of loans and where plaintiff's initial investment was provided in exchange for fifty percent of the stock and was thus part of a security transaction, he had no individual grounds to pursue a claim of unfair and deceptive trade practices against defendants. Allen v. Ferrera, 141 N.C. App. 284, 540 S.E.2d 761, 2000 N.C. App. LEXIS 1404 (2000).

Buyers who bought a trailer park "as is" failed to establish elements of a claim against the seller for unfair or deceptive trade practices under G.S. 75-1.1 based on buyers' discovery of an illegal diverter pipe in the septic system after purchase; buyers did not explain the factual basis for their unfair and deceptive trade practices claim, but merely incorporated by reference the factual allegations offered in support of the fraud claim, in which they alleged that the seller represented that the property was in compliance with applicable regulations, but failed to disclose the existence of the diverter pipe, thereby deceiving them. RD&J Props. v. Lauralea-Dilton Enters., LLC, 165 N.C. App. 737, 600 S.E.2d 492, 2004 N.C. App. LEXIS 1517 (2004).

Injury in fact is required for both standing and to support claims under the North Carolina Unfair and Deceptive Trade Practices Act (NC UDTPA); vehicle owners' claims against the manufacturer of the vehicles, alleging that the failure to install a brake shift interlock device (BSI) violated the NC UDTPA were properly dismissed for lack of standing where the owners suffered no injury or property damage arising from the lack of a BSI, did not allege that the vehicles were defective or had diminished in value, had not installed a BSI on their vehicles, and had no realized damages. Coker v. DaimlerChrysler Corp., 172 N.C. App. 386, 617 S.E.2d 306, 2005 N.C. App. LEXIS 1792 (2005), cert. denied, 360 N.C. 61, 623 S.E.2d 581 (2005), aff'd, 360 N.C. 398, 627 S.E.2d 461 (2006).

Manager-member of a limited liability company (LLC) did not state an individual claim for unfair or deceptive trade practices against a comanager-member of the LLC because all of the allegations alleging breach of fiduciary duty, and consequently an unfair or deceptive trade practice claim, related to the parties' relationship through the LLC. Crouse v. Mineo, 189 N.C. App. 232, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (2008).

Trial court did not err in dismissing employees' claims that a business associate and a limited liability company (LLC) engaged in unfair and deceptive trade practices because the employees' complaint did demonstrate that they were business partners, rather than mere employees; the employees had no partnership or equity interest in the LLC because they were compensated through a combination of salary and incentives, which were tied to the LLC's profits, and the letters of understanding the employees signed granted no equity interest to them. Schlieper v. Johnson, — N.C. App. —, 672 S.E.2d 548, 2009 N.C. App. LEXIS 124 (2009).

Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) was denied because plaintiffs had sufficiently stated a claim for breach of contract and for violation of G.S. 75-1.1 when plaintiffs had alleged that defendants had mistakenly placed and omitted their advertisements in the phone book. Rice v. Bellsouth Adver. & Publ'g Corp., 240 F. Supp. 2d 526, 2002 U.S. Dist. LEXIS 24230 (W.D.N.C. 2002).

Defendant's Motion to Dismiss Was Improperly Granted. — In a case brought by mobile home owners against the manufacturer of those homes, alleging that the manufacturer had engaged in unfair and deceptive trade practices by recommending and selling the owners a defective mobile home tie-down system, the owners' claim that they should be allowed to recover the costs that they incurred to buy and install the defective tie down systems or the costs to retro-fit their tie-down system to one that provided a safe and reliable method to secure the homes in severe weather conditions and met the minimal governmental standards, stated a claim for actual injury sufficient to survive the manufacturer's motion to dismiss; a trial court's dismissal of the owners' claim was reversed. Coley v. Champion Home Builders Co., 162 N.C. App. 163, 590 S.E.2d 20, 2004 N.C. App. LEXIS 5 (2004), cert. denied, 358 N.C. 542, 599 S.E.2d 41 (2004).

Attorney Not Proper Party. — Although the General Assembly intended for a party to have standing to sue for a violation of G.S. ch. 75 where he or she suffered an injury under ch. 75, regardless of whether that person purchased directly from the wrongdoer, an attorney who claimed that the copier of medical records committed a violation of G.S. 75-1.1 had no standing because he was not an indirect purchaser of the product or service and had not suffered an injury; the attorney merely advanced the costs of the records on behalf of his personal-injury clients, and accordingly, he was not a real party in interest pursuant to G.S. 1A-1, N.C. R. Civ. P. 17(a). Street v. Smart Corp., 157 N.C. App. 303, 578 S.E.2d 695 (2003).

Breach of Contract Insufficient to Support Unfair Practices Claim. — The defendants' claim was properly dismissed for failure to state a claim where their contention that the plaintiff did not follow through on an oral agreement to assist in purchasing a condominium, at most, stated a simple breach of contract, because they failed to allege any substantially aggravating circumstances which would give rise to an unfair or deceptive practices claim under this section. Miller v. Rose, 138 N.C. App. 582, 532 S.E.2d 228, 2000 N.C. App. LEXIS 777 (2000).

Where action in tort, as in this case, damages must be the natural and probable result of the tortfeasor's misconduct and the measure of damages under this section should also reflect the fact that the cause of action is broader than traditional common law actions. Process Components, Inc. v. Baltimore Aircoil Co., 89 N.C. App. 649, 366 S.E.2d 907 (1988).

Market Power. — Defendants' motion for summary judgment was granted as to plaintiffs' G.S. 75-1 claim because plaintiffs had not presented any evidence that defendants had market power. Oceans One Eleven, LLC v. Beach Mart, Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 82416 (E.D.N.C. Oct. 15, 2008).

Plaintiff Must Show Adverse Effect on Competition. — Where plaintiff made no showing of an adverse effect on competition plaintiff's claim under this section was insufficient as a matter of law. Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196 (W.D.N.C. 1989), aff'd in part and remanded in part, 912 F.2d 463 (4th Cir. 1990).

Impact on Commerce or Marketplace Not Shown. — Where a Chapter 11 debtor claimed that the actions of two of its former directors constituted unfair and deceptive trade practices, the directors were entitled to summary judgment because the debtor presented no evidence that their conduct had any impact on commerce or the marketplace. Anderson v. Brokers Inc. (In re Brokers, Inc.), 363 B.R. 458, 2007 Bankr. LEXIS 792 (Bankr. M.D.N.C. 2007).

Complaint Held Sufficient to State Claim. — Complaint alleging that at the time of conveyance of 346 acres of land the property was contaminated by certain chemical substances in violation of state and federal laws, that defendant knew or should have known that the land was contaminated but did not disclose that fact to plaintiffs, and that plaintiffs were deceived into purchasing the contaminated land by defendant's misrepresentations alleged facts sufficient to state a claim for unfair and deceptive practices under this Chapter. Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990).

Because plaintiffs' claims for fraud, negligent misrepresentation, and unfair and deceptive trade practices in violation of G.S. 75-1.1, were based on distinct conduct and unique injuries, plaintiffs had standing to pursue these claims, and the claims were not barred by res judicata based on the bankruptcy proceeding; in addition, the claims were sufficiently pled to give defendants notice of the circumstances surrounding the claims. Angell v. Kelly, 336 F. Supp. 2d 540, 2004 U.S. Dist. LEXIS 19003 (M.D.N.C. 2004).

Creditor was not entitled to judgment on the pleadings on a Chapter 11 debtor's unfair trade practices claim where the debtor sufficiently stated a claim for defamation, and defamation could serve as a basis for the unfair trade practices claim. Natural Care Labs, Inc. v. Medline Indus. (In re NCL Liquidation Corp.), — Bankr. —, 2005 Bankr. LEXIS 2067 (Bankr. M.D.N.C. Oct. 21, 2005).

A Chapter 7 trustee stated sufficient claims under North Carolina law for deceptive trade practice under G.S. 75-1.1 et seq., and civil conspiracy, to avoid judgment on the pleadings under Fed. R. Bankr. P. 7012(c) and Fed. R. Civ. P. 12(c). Ivey v. McDaniel (In re EBW Laser, Inc.), — Bankr. —, 2008 Bankr. LEXIS 1276 (Bankr. M.D.N.C. Apr. 21, 2008).

Trial court erred in dismissing pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) for lack of standing a consumer's action alleging that manufacturers violated G.S. 75-1 and G.S. 75-1.1 by engaging in price fixing of ethylene propylene diene monomor elastomers (EPDM) because the consumer had standing to bring the antitrust and consumer fraud action; if the consumer could demonstrate that the increased EPDM prices affected the price of the goods he purchased, then he would have established the type of injury to indirect purchasers that the General Assembly intended to remedy by allowing indirect purchaser suits, and although a rigorous economic analysis would be required to determine whether increased prices were the result of the alleged price fixing or the result of some other factor, that was not sufficient reason to dismiss for lack of standing. Teague v. Bayer AG, — N.C. App. —, 671 S.E.2d 550, 2009 N.C. App. LEXIS 58 (2009).

Trial court erred in dismissing pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) for lack of standing a consumer's action alleging that manufacturers violated G.S. 75-1 and G.S. 75-1.1 by engaging in price fixing of ethylene propylene diene monomor elastomers (EPDM) because the consumer had standing to bring the antitrust and consumer fraud action; the factors the United States Supreme Court identified in Associated Gen. Contractors v. Carpenters, 459 U.S. 519, 74 L. Ed. 2d. 723 (1983) to determine standing under federal antitrust law do not apply in determining which indirect purchasers have standing to sue under the North Carolina antitrust statutes. Teague v. Bayer AG, — N.C. App. —, 671 S.E.2d 550, 2009 N.C. App. LEXIS 58 (2009).

Court Order That Seller Pay Off Loan on Defective Car. — Where plaintiff buyer was required to return a defective car to defendant automobile dealer, requiring defendant to pay off the outstanding balance of a loan on the car was an appropriate order for the court to enter. Morris v. Bailey, 86 N.C. App. 378, 358 S.E.2d 120 (1987).

Error Rendered Harmless by Court's Independent Determination. — Court's error in submitting to the jury the question of law as to whether defendant's conduct violated this section was cured or rendered harmless and non-prejudicial by the court's independent determination that defendant's acts constituted unfair and deceptive trade practices. Medina v. Town & Country Ford, Inc., 85 N.C. App. 650, 355 S.E.2d 831 (1987), aff'd, 321 N.C. 591, 364 S.E.2d 140 (1988).

Class Actions Allowed to Enforce Section. — When the General Assembly has wished to prevent class actions to enforce statutory claims for relief where the relief sought was personal and penal in nature, it has said so expressly and unequivocally. The failure of the General Assembly to expressly prohibit class actions to enforce this statute convinces the Supreme Court that it intended to allow them for such purposes. Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Plaintiff's motion for class certification in an action alleging Unfair and Deceptive Trade Practices Act was denied because the myriad of variations of each plaintiff's situation defeated commonality, and it would have been inappropriate to rule on plaintiff's claims without considering the unique circumstances of individual class members; if a class member understood that the fees initially disclosed were estimates that could have changed before closing, then the claim of "unfair" or "deceptive" act or practice would likely fail, but plaintiff had not articulated a class definition that took into account the understanding of the individuals in each loan transaction. Rose v. SLM Fin. Corp., 254 F.R.D. 269, 2008 U.S. Dist. LEXIS 95540 (W.D.N.C. 2008).

Propriety of Arbitration. — An unfair and deceptive practices claim pursuant to this section is proper for arbitration. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

Bankruptcy court denied a debt counseling company's motion to stay a Chapter 11 debtor's adversary proceeding and compel arbitration under a Debt Mediation and Restructuring Agreement the parties entered before the debtor declared bankruptcy. The debtor's claims under 11 U.S.C.S. §§ 544, 548 and 550, G.S. 39-23.1 et seq., and G.S. 75-1.1, alleging fraudulent conveyance and unfair and deceptive trade practices, were core claims under 28 U.S.C.S. § 157(b)(2), the asset in dispute was the only asset left to be recaptured and redistributed in the debtor's Chapter 11 case, and arbitration under the terms of the parties' agreement would have caused great hardship to the debtor, as the debtor was administratively insolvent and had no available funds to pay counsel or its share of the costs of arbitration. Aeronautical Solutions, LLC v. Commer. Debt Counselling Corp. (In re Aeronautical Solutions, LLC), — Bankr. —, 2007 Bankr. LEXIS 4586 (Bankr. E.D.N.C. June 8, 2007).

Question of Law. — The determination of whether an act is unfair or deceptive is a question of law for the court. Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, cert. denied, 311 N.C. 751, 321 S.E.2d 126 (1984); L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985); Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

In action brought under this section, while the trial judge erred in submitting the issues of whether defendant's conduct was in commerce or affected commerce to the jury, because it is a part of the court's finding that the acts or conduct proven do or do not constitute an unfair or deceptive act within the meaning of this section, the error was harmless. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986).

The question of whether conduct constitutes an unfair or deceptive act in violation of the statute is one of law for the court, and the jury has no role in the decision as to whether damages should be trebled for such conduct. Mapp v. Toyota World, Inc., 81 N.C. App. 421, 344 S.E.2d 297, cert. denied, 318 N.C. 283, 347 S.E.2d 464 (1986).

While a court generally determines whether a practice is an unfair or deceptive act or practice based on the jury's findings, if the facts are not disputed the court should determine whether the defendant's conduct constitutes an unfair trade practice. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

Whether a commercial act or practice is violative of this section is a question of law. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Whether there is a causal relation between the violation of the statute and the injury complained of is an issue of fact for a jury. Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980).

Failure to Submit Issue to Jury Held Error. — Trial court's failure to submit to the jury factual questions in need of resolution concerning widow's claim for unfair and deceptive trade practices relating to an insurance policy was error, and widow was entitled to a new trial on this issue. Barber v. Woodmen of World Life Ins. Soc'y, 95 N.C. App. 340, 382 S.E.2d 830 (1989), cert. denied, 326 N.C. 363, 389 S.E.2d 820 (1990), overruled on other grounds, Jefferson-Pilot Life Ins. Co. v. Spencer, 336 N.C. 49, 442 S.E.2d 316 (1994).

Failure to Cite Proper Claim. — Accident victim failed to cite Chapter 75 in his appellate brief or to present any argument showing that the trial court erred in ruling on the victim's Ch. 75 claim; his discussion of Chapter 58 was therefore insufficient to satisfy preservation of his Ch. 75 claim pursuant to G.S. 58-63-15(11), and his assignment of error was dismissed. Stott v. Nationwide Mut. Ins. Co., 183 N.C. App. 46, 643 S.E.2d 653, 2007 N.C. App. LEXIS 827 (2007).

Court's Calculation of Award Held Proper. — Although one may only recover damages for breach of contract or violation of this section where the same course of conduct gives rise to a traditionally recognized cause of action, where the trial court did not allow damages for both tortious interference with contract and a violation of this section, but rather calculated lost profits and then trebled that amount pursuant to this Chapter, there was no double recovery allowed, and there was no error. American Aluminum Prods., Inc. v. Pollard, 97 N.C. App. 541, 389 S.E.2d 589 (1990).

Stipulated Facts Constituting Violation. — Ordinarily it would be for the jury to determine the facts, and based on the jury's finding, the court would then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce. However, where the parties stipulated certain facts, the Supreme Court, based on these facts, held as a matter of law that the false representations made by defendants to plaintiff constituted unfair or deceptive acts or practices in commerce contrary to the provisions of this section, and treble damages should have been awarded as provided by G.S. 75-16 in the amount of $1800. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975).

Tendency or Capacity to Mislead Must Be Shown. — To succeed under this section, it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception; plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception. Overstreet v. Brookland, Inc., 52 N.C. App. 444, 279 S.E.2d 1 (1981).

Constructive Fraud. — Allegations sufficient to allege constructive fraud were likewise sufficient to allege unfair and deceptive trade practices. Governor's Club, Inc. v. Governors Club Ltd. P'ship., 152 N.C. App. 240, 567 S.E.2d 781, 2002 N.C. App. LEXIS 926 (2002), aff'd sub nom., 357 N.C. 46, 577 S.E.2d 620 (2003).

But proof of actual deception is not required. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

Burden of Proving Exemption. — Any party claiming to be exempt from the provisions of this section has the burden of proof with respect to such claim. Olivetti Corp. v. Ames Bus. Sys., 81 N.C. App. 1, 344 S.E.2d 82 (1986), aff'd in part and rev'd in part on other grounds, 319 N.C. 534, 356 S.E.2d 578 (1987).

For a case setting forth the elements of a prima facie case of common-law fraud, see Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

To prevail on a claim of unfair and deceptive trade practice, a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business. Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

Burden Shifts to Defendant upon Proof of Fraud. — Once the plaintiff has proven fraud, thereby establishing prima facie a violation of this chapter, the burden shifts to the defendant to prove that he is exempt from the provisions of this section. Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440 (1991).

Bifurcated Procedure. — Where the evidence raises material issues of fact concerning negligent misrepresentation, the jury determines whether defendants committed the alleged acts, and if so, the trial court determines whether the proven facts constitute unfair or deceptive trade practices. Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 394 S.E.2d 643 (1990), cert. denied, 99 N.C. 587, 402 S.E.2d 824 (1991).

Any alleged contributory negligence by plaintiffs is irrelevant in an action governing conduct subject to this chapter. Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 394 S.E.2d 643 (1990), cert. denied, 99 N.C. 587, 402 S.E.2d 824 (1991).

Trustee as Successor in Interest Was Entitled to Recover Damages and Attorney's Fees. — Where lending and collection practices of the credit union collectively constituted unfair and deceptive trade practices pursuant to this section and where the credit union willfully engaged in unfair and deceptive trade practices, and that the debtor was deceived and damaged as a result thereof, trustee, as the successor in interest of the debtor's claims against the credit union was therefore entitled to recover treble damages and attorneys' fees pursuant to G.S. 75-16 and 75-16.1 on behalf of the debtor's estate. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

What Law Governs. — The law of the State where the last act occurred giving rise to defendant's injury governs defendant's action under this section. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

Trebling of Damages. — Damages assessed pursuant to this section are trebled automatically. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Once a plaintiff has established the right to recover under this section, the award of treble damages pursuant to G.S. 75-16 is automatic and not discretionary. Peterson v. Bozzano, 183 Bankr. 735 (Bankr. M.D.N.C. 1995).

Where a jury awarded plaintiff $106.25 million in compensatory damages and $45 million in punitive damages for common law fraud, together with $1 million for violation of the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA) [G.S. 75-1 et seq.], the compensatory damages for fraud were subject to trebling under the UDTPA because fraud in connection with commerce constituted a per se violation of the UDTPA; however, plaintiff could not recover both the jury's fraud award and its UDTPA award, as the same conduct gave rise to both claims, nor could plaintiff recover both treble damages and the jury's punitive damages award. Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 11831 (M.D.N.C. July 10, 2003).

Punitive Damages. — Because this section is in derogation of the common law causes of action for unfair or deceptive trade practices and G.S. 75-16 imposes a penalty, strict construction is in order. Thus, absent explicit legislative inclusion, punitive damages should be excluded. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Where the plaintiff partners alleged and were able to prove both breach of a fiduciary duty by constructive fraud and unfair and deceptive trade practices by defendant partner, the plaintiff partners were entitled to receive either punitive damages on the fraud claim or treble damages on the unfair and deceptive trade practices claim, but had to choose between the awards. Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905, 2003 N.C. App. LEXIS 369 (2003).

Trial court erred in entering a directed verdict on a homeowner's unfair and deceptive trade practices (UDTP) claim against a contractor because the approach the trial court followed in dismissing the UDTP claim but allowing counsel to argue it in connection with punitive damages was in error; because the jury found in favor of the homeowner on her fraud claim, and the contractor made no attempt to argue that it was exempt from the provisions of G.S. 75-1.1, the homeowner was entitled to recover treble damages under G.S. 75-16. Jones v. Harrelson & Smith Contrs., LLC, — N.C. App. —, 670 S.E.2d 242, 2008 N.C. App. LEXIS 2270 (2008).

Generally, punitive damages not awarded for violation of this section and where treble damages were awarded for a violation of this section and for that reason punitive damages for fraud could not be awarded even if fraud could be proven since there cannot be a recovery on both claims arising from the same course of conduct. Process Components, Inc. v. Baltimore Aircoil Co., 89 N.C. App. 649, 366 S.E.2d 907 (1988).

Punitive Damages and Attorney's Fees. — To recover punitive damages at common law, a plaintiff must show that the defendant acted in a willful or oppressive manner. To recover attorney's fees for unfair practices, however, the plaintiff must also show that there was an unwarranted refusal by the defendant to fully resolve the matter which constitutes the basis of the suit. Since recovery of attorney's fees requires proof different from that which gives rise to punitive damages, the claims do not arise from the same course of conduct, and plaintiff may recover both. United Lab., Inc. v. Kuykendall, 335 N.C. 183, 437 S.E.2d 374 (1993).

Judgment awarding consumers damages pursuant to the consumers' claim under G.S. 75-1.1, but not ruling on the consumers' request for attorney's fees, under G.S. 75-16.1, could not be appealed, despite the trial court's certification, under G.S. 1A-1, N.C. R. Civ. P. 54(b), that the judgment was final, because the judgment was interlocutory, as the issue of attorney's fees had not been resolved. Bumpers v. Cmty. Bank of N. Va., — N.C. App. —, 675 S.E.2d 697, 2009 N.C. App. LEXIS 516 (2009).

Measure of Damages. — For discussion of measure of damages for fraudulent inducement, see Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, cert. denied, 311 N.C. 751, 321 S.E.2d 126 (1984).

The trial court correctly allowed the jury to consider contractual damages as an element of unfair and deceptive trade practices claim, where plaintiff elected to recover under this section. Defendant could not prevent that recovery by stipulating to pay damages for the breach of contract claim; otherwise, defendant could simply take its chances with a jury and then avoid treble damages by stipulating to contractual liability should the jury find for the plaintiff. Vazquez v. Allstate Ins. Co., 137 N.C. App. 741, 529 S.E.2d 480, 2000 N.C. App. LEXIS 494 (2000).

Damages may be recovered either for breach of contract or for violation of this section, but not for both, where the same course of conduct gives rise to a traditionally recognized cause of action as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of this section. Marshall v. Miller, 47 N.C. App. 530, 268 S.E.2d 97, modified and aff'd, 302 N.C. 539, 276 S.E.2d 397 (1981).

Tortious Interference and Compensatory Damages. — There is no double redress for a single wrong and no inconsistency when a plaintiff recovers untrebled compensatory damages under this Chapter and punitive damages under a tortious interference claim. United Lab., Inc. v. Kuykendall, 335 N.C. 183, 437 S.E.2d 374 (1993).

Double Recovery by Plaintiff Under This Section and Breach of Warranty. — Court's entry of judgments against defendant for damages on plaintiff's claim under this section and for breach of implied warranty allowed plaintiff double recovery. Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994).

Indemnification. — Despite the factual similarity, a claim for unfair trade practices was not a libel claim, and the commercial general liability insurer had no duty to indemnify under a personal injury policy covering slander and libel. Wake Stone Corp. v. Aetna Cas. & Sur. Co., 995 F. Supp. 612 (E.D.N.C. 1998).

Lex loci delicti rule determines choice of law for actions brought under North Carolina's Unfair and Deceptive Trade Practices Act. United Dominion Indus., Inc. v. Overhead Door Corp., 762 F. Supp. 126 (W.D.N.C. 1991).

Inapplicability of Contract Provision as to Choice of Law. — A contractual provision providing that an agreement would be governed by and construed under Texas law may govern the choice of laws as to the interpretation and construction of the contract; however, it does not provide the applicable law for a claim based on unfair and deceptive acts. United Dominion Indus., Inc. v. Overhead Door Corp., 762 F. Supp. 126 (W.D.N.C. 1991).

The nature of the liability under this section is ex delicto, not ex contractu. Therefore, North Carolina courts would ignore the contractual choice of law provision in determining whether this section applied. United Dominion Indus., Inc. v. Overhead Door Corp., 762 F. Supp. 126 (W.D.N.C. 1991).

A clause in the contract for the sale of a tract that included wetlands indicated the parties' intent that issue of environmental law violations affecting the tract would survive closing. Sunset Beach Dev., LLC v. Amec, Inc., — N.C. App. —, 675 S.E.2d 46, 2009 N.C. App. LEXIS 454 (2009).

Reinstatement of Stale Law Claim. — Plaintiff manufacturer's claim under the North Carolina Unfair Trade Practices Act should not be reinstated, even though the defendant changed its position as to the applicability of North Carolina law, where the change of position would not render inaccurate a summary judgment determination, derived from Fourth Circuit case law, that South Carolina law applied. Vanwyk Textile Sys. v. Zimmer Mach. Am., Inc., 994 F. Supp. 350 (W.D.N.C. 1997).

Assessment of damages on both an unfair trade practices claim and odometer statute violations did not amount to a double recovery since an action for unfair or deceptive acts or practices is a distinct action apart from fraud, breach of contract, or violation of state and federal odometer statutes; where jury concluded that plaintiffs had been damaged in the amount of $1,300 pursuant to the unfair trade practices claim and the trial court then trebled this amount and where the trial court then assessed $1,500 on each of the odometer statute violations as required by statute, plaintiffs were not awarded double recovery. Washburn v. Vandiver, 93 N.C. App. 657, 379 S.E.2d 65 (1989).

Statute of Limitations. — Plaintiffs' claims against a trust company and its trustee under G.S. 75-1.1 failed where the statute of limitations for the action began to accrue when plaintiffs closed on their property and as that was more than four years prior to the filing of the action, the statute of limitations in G.S. 75-16.2 had expired. Skinner v. Preferred Credit, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005).

Expiration of the applicable four-year statute of limitations barred the borrowers' unfair and deceptive trade practices claim; the borrowers conceded that their unfair and deceptive trade practices claim was derived from their usury claim, and therefore because the claim accrued at the date on which the loan at issued closed, the trial court properly dismissed the complaint on this issue. Shepard v. Ocwen Fed. Bank, FSB, 361 N.C. 137, 638 S.E.2d 197, 2006 N.C. LEXIS 1327 (2006).

Statute of Limitations Prior to Enactment of G.S. 75-16.2. — See Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

The doctrine of equitable estoppel did not bar an action by the Attorney General against defendants finance companies who neither participated in the deceptive practices of defendant grocery chain nor were put on notice that the Attorney General was investigating the defendant, from whom they purchased the disputed retail installment sales contracts, for possible violations of this chapter, where they failed to affirmatively plead estoppel as required by G.S. 1A-1, Rule 8(c) and where the delay before the action was filed was attributed to the extensive investigation undertaken by the Consumer Protection Division of the Attorney General's Office, the efforts to obtain information from the defendant grocery chain, and intensive efforts to arrive at a resolution; furthermore, estoppel does not normally operate to bar the actions of the State or its agencies and arises only if such an estoppel will not impair the exercise of the governmental powers of the county. State ex rel. Easley v. Rich Food Servs., Inc., 139 N.C. App. 691, 535 S.E.2d 84, 2000 N.C. App. LEXIS 1041 (2000).

Election of Remedies. — In an action under this section based on deceptive sales practices, a plaintiff may allege inconsistent remedies, and need not make its election until either prior to jury instructions or after return of the jury verdict. State ex rel. Easley v. Rich Food Servs., Inc., 139 N.C. App. 691, 535 S.E.2d 84, 2000 N.C. App. LEXIS 1041 (2000).

Where a matter had to be remanded for a new trial on the issue of damages, if the property owners were awarded both punitive damages and unfair and deceptive trade practices damages based on a contractor's conduct, they had to elect between the two remedies. Decker v. Homes, Inc./Constr. Mgmt. & Fin. Group, 187 N.C. App. 658, 654 S.E.2d 495, 2007 N.C. App. LEXIS 2524 (2007).

Counterclaim Could Not Be Lodged. — In an action by a principal against, a developer claiming entitlement to indemnification, and alleging breach of contract and negligent misrepresentation, summary judgment was granted for the principal in part where the developer could not lodge an Unfair and Deceptive Trade Practices Act, G.S. 75-1 et seq., counterclaim against the principal founded on alleged violations of North Carolina's insurance laws, and the developer could not assert a bad faith cause of action against the principal. Cincinnati Ins. Co. v. Centech Bldg. Corp., 286 F. Supp. 2d 669, 2003 U.S. Dist. LEXIS 18585 (M.D.N.C. 2003).

Copyright Act Preemption. — Copyright Act, 17 U.S.C.S. § 301(a), preempted a doctor's claim against a hospital and two doctors under the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA), G.S. 75-1.1, for unauthorized use of his copyrighted materials because there were not extra elements for the UDTPA claim, and the identical acts supported both causes of action. Rutledge v. High Point Reg'l Health Sys., 558 F. Supp. 2d 611, 2008 U.S. Dist. LEXIS 48033 (M.D.N.C. 2008).

OPINIONS OF ATTORNEY GENERAL

The phrase "learned profession" applies to physicians, attorneys, clergy, and related professions. See opinion of Attorney General to Representative Robert L. Farmer, 47 N.C.A.G. 118 (1977). United Dominion Indus., Inc. v. Overhead Door Corp., 762 F. Supp. 126 (W.D.N.C. 1991).

§ 75-2. Any restraint in violation of common law included.

Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of G.S. 75-1. (1913, c. 41, s. 2; C.S., s. 2560.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

For article discussing unfair methods of competition, deceptive trade practices, and unfair trade practices, see 5 Campbell L. Rev. 119 (1982).

CASE NOTES

Common Law. — Under the common law at a remote period in England, the term contract in restraint of trade meant an individual's voluntary contractual restraint on his right to carry on his trade or calling. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

At common law in England, and later in this country, only combinations or agreements which operate to the prejudice of the public by unduly or unreasonably restricting competition or restraining trade are illegal. The combination is not objectionable if the restraint is such only as to afford fair protection to the parties thereto and not broad enough to interfere with the interest of the public. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Distinction Between Common-Law and Modern Rules. — Originally at common law, agreements in restraint of trade were held void as being against public policy. The position, however, has been more and more modified by the decisions of the courts until it has come to be the very generally accepted principle that agreements in partial restraint of trade will be upheld when they are "founded on valuable considerations, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest." Mar-Hof Co. v. Rosenbacker, 176 N.C. 330, 97 S.E. 169 (1918). The distinction may now be made between "general restraint" and "partial restraint." Morehead Sea Food Co. v. Way, 169 N.C. 679, 86 S.E. 603 (1915).

The common law is determinative of at least the minimum scope of G.S. 75-1. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Actionable conspiracy to restrain trade must operate to the prejudice of the public, in keeping with the common law's "Rule of Reason," accordingly, public damage must be alleged and proven. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Impact on Competitive Conditions Proper Focus. — The proper focus is not whether plaintiff-victim and defendant-conspirator were in actual competition with each other, but is upon the challenged restraint's impact on competitive conditions. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Applied in Wilmar, Inc. v. Liles, 13 N.C. App. 71, 185 S.E.2d 278 (1971); Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975); North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc., 740 F.2d 274 (4th Cir. 1984); Cooper v. Forsyth County Hosp. Auth., 604 F. Supp. 685 (M.D.N.C. 1985).

Cited in Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968); WCCB-TV, Inc. v. Telerep, Inc., 601 F. Supp. 284 (W.D.N.C. 1984); Keith v. Day, 81 N.C. App. 185, 343 S.E.2d 562 (1986); Cooper v. Forsyth County Hosp. Auth., 789 F.2d 278 (4th Cir. 1986); Brooks Distrib. Co. v. Pugh, 91 N.C. App. 715, 373 S.E.2d 300 (1988); Nursing Registry, Inc. v. Eastern N.C. Regional Emergency Medical Servs. Consortium, Inc., 959 F. Supp. 298 (E.D.N.C. 1997); R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 60 F. Supp. 2d 502 (N.D.N.C. 1999); R.J. Reynolds Tobacco Co. v. Philip Morris, Inc., 199 F. Supp. 2d 362, 2002 U.S. Dist. LEXIS 8180 (M.D.N.C. 2002).

§ 75-2.1. Monopolizing and attempting to monopolize prohibited.

It is unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce in the State of North Carolina. (1995 (Reg. Sess., 1996), c. 550, s. 1.)

Legal Periodicals. — For note on "requirements contracts" as violations of this section, see 29 N.C.L. Rev. 316 (1951).

For comment, "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For note on price discrimination in North Carolina, see 53 N.C.L. Rev. 135 (1974).

For article discussing North Carolina antitrust and consumer protection law, see 60 N.C.L. Rev. 207 (1982).

CASE NOTES

Cited in R.J. Reynolds Tobacco Co. v. Philip Morris, Inc., 199 F. Supp. 2d 362, 2002 U.S. Dist. LEXIS 8180 (M.D.N.C. 2002).

§ 75-3: Repealed by Session Laws 1961, c. 1153.

§ 75-4. Contracts to be in writing.

No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter into business in the State of North Carolina, or at any point in the State of North Carolina, which contract is now illegal, or which contract is made illegal by any other section of this Chapter. (1913, c. 41, s. 4; C.S., s. 2562.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For article, "The Regulation of Contractual Change: A Guide to No Oral Modification Clauses for North Carolina Lawyers," see 81 N.C.L. Rev. 2239 (2003).

CASE NOTES

Legislative Intent. — Through this section, the General Assembly has declared that no contract whereby a person limits and restricts his legal right to do business in the State shall be valid and enforceable unless in writing and signed by the party so contracting. Norlin Indus., Inc. v. Music Arts, Inc., 67 N.C. App. 300, 313 S.E.2d 166, cert. denied, 311 N.C. 403, 319 S.E.2d 273 (1984).

Waiver Not Applicable to Statute of Frauds. — Because the statute of frauds under G.S. 75-4 is a public policy consumer protection statute, waiver does not apply to obviate the need for a written agreement. Dealers Supply Co. v. Cheil Indus., 348 F. Supp. 2d 579, 2004 U.S. Dist. LEXIS 25313 (M.D.N.C. 2004).

Where a former distributor of a manufacturer's products contended that the manufacturer waived its right to assert the statute of frauds by stating that a written distributorship agreement was not necessary since the parties were partners, the requirements of the statute of frauds were not subject to waiver and thus the lack of a written agreement precluded enforcement of the oral distribution agreement. Dealers Supply Co. v. Cheil Indus., 348 F. Supp. 2d 579, 2004 U.S. Dist. LEXIS 25313 (M.D.N.C. 2004).

What Contracts Enforceable. — Where affidavits disclose that defendants in the course of their employment acquired knowledge which would give them an unfair advantage over plaintiff in a competitive business, under such circumstances equity will enforce a covenant not to compete if it is: (1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy. Orkin Exterminating Co. v. Griffin, 258 N.C. 179, 128 S.E.2d 139 (1962).

To be enforceable, a covenant not to compete must be (1) in writing, (2) entered into at the time and as part of the contract of employment, (3) based upon reasonable consideration, (4) reasonable both as to time and territory, and (5) not against public policy. Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 373 S.E.2d 449 (1988), aff'd, 324 N.C. 327, 377 S.E.2d 750 (1989).

This section was not applicable to an oral agreement not to copy furniture designs and, therefore, the district court's holding that the agreement had to be in writing to be enforceable would be reversed. Ashley Furn. Indus., Inc. v. SanGiacomo N.A. Ltd., 187 F.3d 363 (4th Cir. 1999).

A covenant not to compete is enforceable in equity if it is (1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties and (6) not against public policy. Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

An enforceable covenant not to compete must be: (1) in writing; (2) reasonable as to time and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) designed to protect a legitimate business interest of the plaintiff. Robins & Weill, Inc. v. Mason, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 559 (1984); Brooks Distrib. Co. v. Pugh, 91 N.C. App. 715, 373 S.E.2d 300 (1988), rev'd on other grounds, 324 N.C. 326, 378 S.E.2d 31 (1989).

This section is consistent with the other "statute of frauds" provisions in the law which require only that the writing be "signed by the party charged therewith," G.S. 22-1, or require that the writing be signed by "the party against whom enforcement is sought," G.S. 25-2-201(1). Manpower of Guilford County, Inc. v. Hedgecock, 42 N.C. App. 515, 257 S.E.2d 109 (1979).

Oral Contract Void and Unenforceable. — An oral contract which prohibits defendant's right to do business except through plaintiff as its exclusive distributor, limits substantially defendant's right to do business in North Carolina. Hence, under this section, the oral contract is void and unenforceable. Radio Electronics Co. v. Radio Corp. of Am., 244 N.C. 114, 92 S.E.2d 664 (1956).

This section does not require that a noncompetition agreement be set out in a single instrument; a memorandum is sufficient if the necessary contract provisions can be determined from separate but internally related writings. Brooks Distrib. Co. v. Pugh, 91 N.C. App. 715, 373 S.E.2d 300 (1988), rev'd on other grounds, 324 N.C. 326, 378 S.E.2d 31 (1989).

New Contract Required. — When the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration. Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

Person Seeking Enforcement Not Required to Sign. — A covenant not to compete in a contract signed by defendant was valid since this section establishes that contracts or agreements limiting the rights of persons to do business in this State may be enforceable if put in writing "duly signed by the party who agrees not to enter into any such business within such territory" and it is not necessary that the person seeking enforcement of the terms required to be in writing also sign the writing. Manpower of Guilford County, Inc. v. Hedgecock, 42 N.C. App. 515, 257 S.E.2d 109 (1979).

But the Party Agreeing Not to Compete Must Sign. — Agreement not to compete did not meet the signature requirements of this section, despite the fact that the form was notarized by the wife of the company president in the presence of the employee, because the employee printed her name at the top of the form, but there was no cursive script or any writing at all on the signature line of the agreement not to compete immediately preceding the notarization. New Hanover Rent-A-Car, Inc. v. Martinez, 136 N.C. App. 642, 525 S.E.2d 487, 2000 N.C. App. LEXIS 116 (2000).

Execution of Written Contracts After Start of Work. — If covenants not to compete were a part of original verbal employment contract, then they were founded on valuable consideration. The fact that the written contracts were executed after the defendants had started work is insignificant. The covenants became enforceable once they were put in writing and signed by the party to be charged. Robins & Weill, Inc. v. Mason, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 559 (1984).

Necessity of Alleging Violation of G.S. 75-1.1. — Applying this section to the plaintiff manufacturer's unfair trade practices claim, rendering unwritten non-compete agreements in the state unenforceable, did not require allowing the application of G.S. 75-1.1, prohibiting unfair and deceptive trade acts and practices, to the defendant's conduct. Vanwyk Textile Sys. v. Zimmer Mach. Am., Inc., 994 F. Supp. 350 (W.D.N.C. 1997).

Court Denied Defendants' Motion to Dismiss. — In an action filed by plaintiffs, two corporations, against defendants, its former editors and their new employer, the court denied defendants' motion to dismiss, filed under Fed. R. Civ. P. 12(b)(6), as to plaintiffs' breach of contract claims because plaintiffs alleged that the editors agreed to work for one corporation under terms identical to those under their previous employer and that the corporation accepted their offers; they also alleged valid and binding employment contracts that were in writing. Eli Research Inc. v. United Communs. Group, LLC, 312 F. Supp. 2d 748, 2004 U.S. Dist. LEXIS 5792 (M.D.N.C. 2004).

Promissory Estoppel. — Where a former distributor of a manufacturer's products contended that it detrimentally relied on the manufacturer's representation that a written distributorship agreement was not necessary since the parties were partners, promissory estoppel did not preclude application of the statute of frauds since there was no representation concerning an intended abandonment by the manufacturer of a right against the distributor. Dealers Supply Co. v. Cheil Indus., 348 F. Supp. 2d 579, 2004 U.S. Dist. LEXIS 25313 (M.D.N.C. 2004).

Applied in Sonotone Corp. v. Baldwin, 227 N.C. 387, 42 S.E.2d 352 (1947); Maola Ice Cream Co. v. Maola Milk & Ice Cream Co., 238 N.C. 317, 77 S.E.2d 910 (1953); Beck Distrib. Corp. v. Imported Parts, Inc., 7 N.C. App. 483, 173 S.E.2d 41 (1970); Wilmar, Inc. v. Liles, 13 N.C. App. 71, 185 S.E.2d 278 (1971).

Cited in Sandhill Motors, Inc. v. American Motors Sales Corp., 667 F.2d 1112 (4th Cir. 1981); Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985); Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985); Kossar v. Smith, 765 F. Supp. 871 (W.D.N.C. 1991).

§§ 75-5 through 75-7: Repealed by Session Laws 1995 (Regular Session, 1996), c. 550, s. 2.

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 550, s. 3, provides in part that the repeal of G.S. 75-5 is not intended to render conduct lawful that violates the provisions of any other section of Chapter 75 of the General Statutes.

CASE NOTES

Cited in Nursing Registry, Inc. v. Eastern N.C. Regional Emergency Medical Servs. Consortium, Inc., 959 F. Supp. 298 (E.D.N.C. 1997).

§ 75-8. Continuous violations separate offenses.

Where the things prohibited in this Chapter are continuous, then in such event, after the first violation of any of the provisions hereof, each week that the violation of such provision shall continue shall be a separate offense. (1913, c. 41, s. 7; C.S., s. 2566.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

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Actions not Continuous. — Borrowers' unfair and deceptive trade practices (UDTP) claims did not involve an installment contract, but rather their UDTP claims were solely premised on the bank's and its subsidiary's actions before and at the closing of the borrowers' loans; therefore, the borrowers' UDTP claims accrued at the closing of their loans, and G.S. 75-8 did not extend the statute of limitations because any violation of the North Carolina Unfair and Deceptive Trade Practices Act was not continuous. Richardson v. Bank of Am., N.A., — N.C. App. —, 643 S.E.2d 410, 2007 N.C. App. LEXIS 809 (2007), petition allowed as to additional issues 361 N.C. 569, 650 S.E.2d 439 (2007).

Applied in Thomas v. Petro-Wash, Inc., 429 F. Supp. 808 (M.D.N.C. 1977); Medicare Rentals, Inc. v. Advanced Servs., 119 N.C. App. 767, 460 S.E.2d 361 (1995).

Cited in State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1937).

§ 75-9. Duty of Attorney General to investigate.

The Attorney General of the State of North Carolina shall have power, and it shall be his duty, to investigate, from time to time, the affairs of all corporations or persons doing business in this State, which are or may be embraced within the meaning of the statutes of this State defining and denouncing trusts and combinations against trade and commerce, or which he shall be of opinion are so embraced, and all other corporations or persons in North Carolina doing business in violation of law; and all other corporations of every character engaged in this State in the business of transporting property or passengers, or transmitting messages, and all other public service corporations of any kind or nature whatever which are doing business in the State for hire. Such investigation shall be with a view of ascertaining whether the law or any rule of the Utilities Commission or Commission of Banks [Commissioner of Banks] is being or has been violated by any such corporation, officers or agents or employees thereof, and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to prosecute any such corporation, its agents, officers and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted. (1913, c. 41, s. 8; C.S., s. 2567; 1931, c. 243, s. 5; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1969, c. 833.)

Legal Periodicals. — For comment, "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Power of Attorney General to Investigate. — Although this section empowers the Attorney General to prosecute under applicable criminal and civil statutes, the power to investigate under this Chapter is not subject to the restrictions imposed upon criminal discovery under the Criminal Procedure Act, G.S. 15A-908, or upon civil discovery under the Rules of Civil Procedure, G.S. 1A-1, Rule 26(c). In re Investigation by Att'y Gen., 30 N.C. App. 585, 227 S.E.2d 645 (1976).

A prospective defendant in an anticipated enforcement action by the State may not prelitigate its defenses and seek to determine the scope of prosecutorial discretion in a declaratory judgment action and request for injunction. Central Carolina Nissan, Inc. v. Sturgis, 98 N.C. App. 253, 390 S.E.2d 730, cert. denied, 327 N.C. 137, 394 S.E.2d 169 (1990).

This chapter authorized an action against defendant employee who executed the agreement between defendant company and its franchisor; furthermore, defendant's allegations that he was not an officer, stockholder, or director of the defendant and that he did not personally make sales to consumers at most raised a question of fact to be resolved by the trier of fact, and did not entitle him to summary judgment. State ex rel. Easley v. Rich Food Servs., Inc., 139 N.C. App. 691, 535 S.E.2d 84, 2000 N.C. App. LEXIS 1041 (2000).

§ 75-10. Power to compel examination.

In performing the duty required in G.S. 75-9, the Attorney General shall have power, at any and all times, to require the officers, agents or employees of any such corporation or business, and all other persons having knowledge with respect to the matters and affairs of such corporations or businesses, to submit themselves to examination by him, and produce for his inspection any of the books and papers of any such corporations or businesses, or which are in any way connected with the business thereof; and the Attorney General is hereby given the right to administer oath to any person whom he may desire to examine. He shall also, if it may become necessary, have a right to apply to any justice or judge of the appellate or superior court divisions, after five days' notice of such application, for an order on any such person or corporation he may desire to examine to appear and subject himself or itself to such examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such judge. (1913, c. 41, s. 9; C.S., s. 2568; 1969, c. 44, s. 56; c. 833.)

Legal Periodicals. — For comment, "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

CASE NOTES

Cited in In re Investigation by Att'y Gen., 30 N.C. App. 585, 227 S.E.2d 645 (1976).

§ 75-11. Person examined exempt from prosecution.

No natural person examined, as provided in G.S. 75-10, shall be subject to indictment, criminal prosecution, criminal punishment or criminal penalty by reason of or on account of anything disclosed by him upon examination, and full immunity from criminal prosecution and criminal punishment by reason of or on account of anything so disclosed is hereby extended to all natural persons so examined. The immunity herein granted shall not apply to civil actions instituted pursuant to this Chapter. (1913, c. 41, s. 9; C.S., s. 2569; 1969, c. 833.)

Legal Periodicals. — For comment, "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Cited in In re Investigation by Att'y Gen., 30 N.C. App. 585, 227 S.E.2d 645 (1976).

§ 75-12. Refusal to furnish information; false swearing.

Any corporation or person unlawfully refusing or willfully neglecting to furnish the information required by this Chapter, when it is demanded as herein provided, shall be guilty of a Class 3 misdemeanor and only fined not less than one thousand dollars ($1,000): Provided, that if any corporation or person shall in writing notify the Attorney General that it objects to the time or place designated by him for the examination or inspection provided for in this Chapter, it shall be his duty to apply to a justice or judge of the appellate or superior court division, who shall fix an appropriate time and place for such examination or inspection, and such corporation or person shall, in such event, be guilty under this section only in the event of its failure, refusal or neglect to appear at the time and place so fixed by the judge and furnish the information required by this Chapter. False swearing by any person examined under the provisions of this Chapter is a Class I felony. (1913, c. 41, s. 10; C.S., s. 2570; 1969, c. 44, s. 57; c. 833; 1993, c. 539, ss. 560, 1284; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For comment, "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Cited in In re Investigation by Att'y Gen., 30 N.C. App. 585, 227 S.E.2d 645 (1976).

§ 75-13. Criminal prosecution; district attorneys to assist; expenses.

The Attorney General in carrying out the provisions of this Chapter shall have a right to send bills of indictment before any grand jury in any county in which it is alleged this Chapter has been violated or in any adjoining county, and may take charge of and prosecute all cases coming within the purview of this Chapter, and shall have the power to call to his assistance in the performance of any of these duties of his office which he may assign to them any of the district attorneys in the State, who shall, upon being required to do so by the Attorney General, send bills of indictment and assist him in the performance of the duties of his office. (1913, c. 41, s. 13; C.S., s. 2571; 1973, c. 47, s. 2.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-14. Action to obtain mandatory order.

If it shall become necessary to do so, the Attorney General may prosecute civil actions in the name of the State on relation of the Attorney General to obtain a mandatory order, including (but not limited to) permanent or temporary injunctions and temporary restraining orders, to carry out the provisions of this Chapter, and the venue shall be in any county as selected by the Attorney General. (1913, c. 41, s. 11; C.S., s. 2572; 1969, c. 833.)

Legal Periodicals. — For comment, "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For survey of 1980 commercial law, see 59 N.C.L. Rev. 1017 (1981).

CASE NOTES

Legislative Intent. — Even though individual remedies may exist, the statutes provide for injunctive relief at the instance of the State. To hold otherwise would cripple the legislative intent to provide an effective means of curbing illegitimate business schemes and protecting the consumers of the State. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

Proof of Actual Injury. — Public enforcement through the Attorney General is similar to Section 5 of the Federal Trade Commission Act, the purpose of which is to vindicate public interest rather than to redress individual grievances. Under the federal act, it is not necessary to show actual injury has resulted, but merely that the act or practice complained of adversely affects the public interest, and similarly, there is no suggestion in the North Carolina statutory scheme that the Attorney General would be required to prove such actual injury. State ex rel. Edmisten v. Challenge, Inc., 54 N.C. App. 513, 284 S.E.2d 333 (1981).

Cited in Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978); Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978); Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860 (1980); State ex rel. Easley v. Rich Food Servs., Inc., 139 N.C. App. 691, 535 S.E.2d 84, 2000 N.C. App. LEXIS 1041 (2000).

§ 75-15. Actions prosecuted by Attorney General.

It shall be the duty of the Attorney General, upon his ascertaining that the laws have been violated by any trust or public service corporation, so as to render it liable to prosecution in a civil action, to prosecute such action in the name of the State, or any officer or department thereof, as provided by law, or in the name of the State on relation of the Attorney General, and to prosecute all officers or agents or employees of such corporations, whenever in his opinion the interests of the public require it. (1913, c. 41, s. 12; C.S., s. 2573.)

Legal Periodicals. — For comment, "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Applied in State ex rel. Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980).

Cited in Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978); State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986).

§ 75-15.1. Restoration of property and cancellation of contract.

In any suit instituted by the Attorney General to enjoin a practice alleged to violate G.S. 75-1.1, the presiding judge may, upon a final determination of the cause, order the restoration of any moneys or property and the cancellation of any contract obtained by any defendant as a result of such violation. (1973, c. 614, s. 2.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

This section is a companion enforcement provision to G.S. 75-1.1. State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

Applicability of Section to Debt Collection Activities. — Inherent in the remedy of this section is the intent to prohibit only unfair and deceptive practices affecting sales. If the legislature had intended to cover debt collection activities it would have provided for the rescission of contracts not only where the contract is obtained as a result of a violation, but also where a violation occurs which is unrelated to the contract's formation. State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

Applicability To Check Cashing Business That Charged Usurious Interest Rates. — Where evidence against a check cashing business established that it executed contracts for usurious loans, it used its alternative business purpose of providing Internet access to consumers as a guise to cover this illegal activity, and no evidentiary basis existed upon which a reasonable fact-finder could reach a contrary conclusion, the State's claims of usury and violations of the Consumer Finance Act were established as a matter of law; moreover, the contracts which customers had with the business were cancelled pursuant to G.S. 75-15.1, requiring all funds collected by the business pursuant to such contracts to be refunded to the customers. State ex rel. Cooper v. NCCS Loans, Inc., 174 N.C. App. 630, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005).

Unnecessary to Return Valueless Property. — It was unnecessary that the parties receiving restitution be ordered to return the drums of mislabeled and useless antifreeze to the seller, where the record clearly showed that the antifreeze had no value. State ex rel. Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980).

Interest on Judgment. — In an action under former G.S. 75-5 to enjoin deceptive acts and practices in the sale of antifreeze, interest on the court's judgment ordering defendant to make restoration payments to 33 customers was governed by G.S. 24-5 and should have been awarded only from the time of entry of the judgment. State ex rel. Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980).

Applied in Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712 (4th Cir. 1983).

Cited in Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978); Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860 (1980); State ex rel. Easley v. Rich Food Servs., Inc., 139 N.C. App. 691, 535 S.E.2d 84, 2000 N.C. App. LEXIS 1041 (2000).

§ 75-15.2. Civil penalty.

In any suit instituted by the Attorney General, in which the defendant is found to have violated G.S. 75-1.1 and the acts or practices which constituted the violation were, when committed, knowingly violative of a statute, the court may, in its discretion, impose a civil penalty against the defendant of up to five thousand dollars ($5,000) for each violation. In any action brought by the Attorney General pursuant to this Chapter in which it is shown that an action or practice when committed was specifically prohibited by a court order, the Court may, in its discretion, impose a civil penalty of up to five thousand dollars ($5,000) for each violation. Civil penalties may be imposed in a new action or by motion in an earlier action, whether or not such earlier action has been concluded. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant. The clear proceeds of penalties so assessed shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1977, c. 747, s. 3; 1983, c. 721, s. 1; 1998-215, s. 99.)

Legal Periodicals. — For comment on this section, see 56 N.C.L. Rev. 547 (1978).

For survey of 1980 commercial law, see 59 N.C.L. Rev. 1017 (1981).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

CASE NOTES

Applied in Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712 (4th Cir. 1983).

Cited in Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1 (1979); Marshall v. Miller, 47 N.C. App. 530, 268 S.E.2d 97 (1980); Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646 (1988); Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources, 333 N.C. 318, 426 S.E.2d 274 (1993).

§ 75-16. Civil action by person injured; treble damages.

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. (1913, c. 41, s. 14; C.S., s. 2574; 1969, c. 833; 1977, c. 707.)

Legal Periodicals. — For comment, "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For comment, "Attacking the 'Forfeiture as Liquidated Damages' Clause in North Carolina Installment Land Sales Contracts as an Equitable Mortgage, Penalty and Unfair and Deceptive Trade Practice," see 7 N.C. Cent. L.J. 370 (1976).

For survey of 1980 commercial law, see 59 N.C.L. Rev. 1017 (1981).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

For article discussing unfair methods of competition, deceptive trade practices, and unfair trade practices, see 5 Campbell L. Rev. 119 (1982).

For note suggesting that intent is not required to award treble damages for a violation of North Carolina's Unfair or Deceptive Acts or Practices Statute, see 18 Wake Forest L. Rev. 134 (1982).

For comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For article discussing pendent claims for damages in actions under the Federal Racketeer Influenced and Corrupt Organizations Act, see 7 Campbell L. Rev. 299 (1985).

For survey of North Carolina construction law, with particular reference to unfair or deceptive acts or practices, see 21 Wake Forest L. Rev. 633 (1986).

For survey of 1987 law on unfair and deceptive trade practices, see 65 N.C.L. Rev. 1169 (1987).

For note, "Consumer Protection — The Unfair Trade Practice Act and the Insurance Code: Does Per Se Necessarily Preempt?," see 10 Campbell L. Rev. 487 (1988).

For note, "Ellis v. Northern Star Co.: Libel in a Business Setting Subject to Mandatory Treble Damages Under North Carolina General Statutes Sections 75-1.1 and 75-16," see 69 N.C.L. Rev. 1739 (1991).

For survey on consumer law, see 70 N.C.L. Rev. 1959 (1992).

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

For article, "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?," see 74 N.C.L. Rev. 2174 (1996).

For article, "Unfair Trade Practices, Antitrust and Consumer Welfare in North Carolina," see 80 N.C.L. Rev. 1927 (2002).

CASE NOTES

I. In General.
II. Practice and Procedure.
III. Damages.

I. IN GENERAL.

Purpose. — The purpose of the statutory provisions for treble money damages and attorney's fees in this section and G.S. 75-16.1 was to encourage private enforcement in the marketplace and to make the bringing of such suit more economically feasible. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

Legislative Intent. — It was the clear intention of the General Assembly in enacting G.S. 75-1.1 and this section, among other things, to declare deceptive acts or practices in the conduct of any trade or commerce in North Carolina unlawful, to provide civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State and to enable a person injured by deceptive acts or practices to recover treble damages from a wrongdoer. Hardy v. Toler, 24 N.C. App. 625, 211 S.E.2d 809, modified on other grounds, 288 N.C. 303, 218 S.E.2d 342 (1975); American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983).

In enacting this section and G.S. 75-16.1, the legislature intended to establish an effective private cause of action for aggrieved consumers in this State. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

The legislature's intent in enacting this section was to create a new, private cause of action for aggrieved consumers, since traditional common-law remedies were often deficient. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

The North Carolina Legislature must have intended that substantial aggravating circumstances be present before any practice is deemed unfair under G.S. 75-1.1, since it provided that any damages suffered by the victim are to be trebled. General United Co. v. American Honda Motor Co., 618 F. Supp. 1452 (W.D.N.C. 1985).

By enacting the 1969 revisions to this section, the General Assembly clearly intended to expand the class of persons with standing to sue for a violation of Chapter 75 to include any person who suffers an injury under Chapter 75, regardless of whether that person purchased directly from the wrongdoer. Hyde v. Abbott Labs., Inc., 123 N.C. App. 572, 473 S.E.2d 680 (1996).

Standing of Consumer. — This section allows a suit by an indirect purchaser; thus, consumers who did not buy infant formula directly from the manufacturer had standing to sue. Hyde v. Abbott Labs., Inc., 123 N.C. App. 572, 473 S.E.2d 680 (1996).

Applicability. — Situations where small monetary damages were involved are not the only situations to which this section applies. Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 97 N.C. App. 511, 389 S.E.2d 576, cert. denied, 326 N.C. 801, 393 S.E.2d 898 (1990).

Actions taken by an investment equity and its principals with respect to a software development firm, which it eventually took over from the original shareholders and others, was not within the ordinary conduct that was covered by the North Carolina Unfair and Deceptive Trade Practices Act such that a claim by the shareholders under G.S. 75-16 did not withstand a dismissal challenge; the conduct involved the equity's use of its position as a senior creditor to pressure the development firm into a transaction with terms disproportionately beneficial to the equity. Rhodes v. Silkroad Equity, LLC, — A.2d —, 2007 Del. Ch. LEXIS 96 (Del. Ch. July 11, 2007).

Section Remedial as Well as Punitive. — This section is partially punitive in nature in that it clearly serves as a deterrent to future violations; but it is also remedial for other reasons, among them the fact that it encourages private enforcement and the fact that it provides a remedy for aggrieved parties. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

This section is both remedial and punitive in nature. Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643, cert. denied, 322 N.C. 114, 367 S.E.2d 917 (1988).

But while this section is punitive, it is not a penal statute. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049 (E.D.N.C. 1980), aff'd, 649 F.2d 985 (4th Cir. 1981).

And It Is Not Intended as a Penalty. — It would not be proper for the North Carolina Appeals Court to strain to infer that the General Assembly meant this section to be a penalty where, in the preceding statutory section, the General Assembly has expressly created a "penalty" denominated as such and reserved the authority to enforce the "penalty" to the State's chief law enforcement officer. The language of G.S. 75-15.2 is sufficiently particular for the court to conclude that had the General Assembly intended its sister provision, G.S. 75-16, also to be a "penalty," the General Assembly would have expressly provided for a second "penalty." Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

Plaintiffs may not utilize the North Carolina Unfair and Deceptive Trade Practices Act to create a private right of action where none exists and thereby circumvent the intent of the legislature to have the honesty requirement in the enforcement section of the North Carolina Clean Water Act enforced as provided for in that section; the Unfair and Deceptive Trade Practices Act was created to regulate, among other things, deceptive behavior in the permitting process under the Clean Water Act, and it provides the exclusive statutory remedy for violation thereof. Brinkman v. Barrett Kays & Assocs., P.A., 155 N.C. App. 738, 575 S.E.2d 40, 2003 N.C. App. LEXIS 17 (2003).

Inapplicability to Cases Involving Innocent and Unintentional Infringement of Unregistered Trademarks. — This section and G.S. 75-1.1 were not intended to apply to cases involving innocent and unintentional infringement of unregistered trademarks. Sideshow, Inc. v. Mammoth Records, Inc., 751 F. Supp. 78 (E.D.N.C. 1990).

Failure to Prove Unfair Claims Practices Does Not Necessitate Judgment Against Claim for Unfair Trade Practices. — Award of treble damages and attorney fees under the North Carolina Unfair and Deceptive Trade Practices Act was not precluded by earlier summary judgment for the insurer on insured's claim under the North Carolina Unfair Claims Settlement Practices Act; failure to prove unfair claims practices does not independently necessitate judgment as a matter of law against a related claim for unfair trade practices. High Country Arts & Craft Guild v. Hartford Fire Ins. Co., 126 F.3d 629 (4th Cir. 1997).

Accrual of Action. — A cause of action for unfair and deceptive trade practices under this section accrues when the right to institute and maintain a suit arises, or when the violation occurs. Hinson v. United Fin. Servs., Inc., 123 N.C. App. 469, 473 S.E.2d 382 (1996).

Postjudgment Interest. — This section provides for postjudgment interest on judgments for money damages generally, including a judgment for treble damages, until the judgment is paid. Custom Molders, Inc. v. American Yard Prods., Inc., 342 N.C. 133, 463 S.E.2d 199 (1995).

If a violation of this Chapter is found, treble damages must be awarded. Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440 (1991).

Interest Included in Costs Trebled. — Where, at the time the contract between the parties was made, it was reasonable to expect that if, as a result of defendant's breach, plaintiff was required to spend an additional $15,727.11 over and above the original contract price to complete the log home, additional financing would be necessary, the interest was part of the cost of negotiating new financing and was foreseeable as a natural and contemplated result of borrowing money; therefore, these costs were a proximate result of defendant's breach and were entitled to be recovered with the principal of the loan and the combined amount trebled pursuant to this section. Quate v. Caudle, 95 N.C. App. 80, 381 S.E.2d 842, cert. denied, 325 N.C. 709, 388 S.E.2d 462 (1989).

Trebling Damages Before Adding Damages for Another Claim. — Plaintiffs who proved that defendant insurer violated both G.S. 75-1.1 and G.S. 58-63-15(11) were entitled to damages for the G.S. 58-63-15(11) claim plus treble damages for the G.S. 75-1.1 claim, not three times the sum of the two claims. Gray v. North Carolina Ins. Underwriting Ass'n, 352 N.C. 61, 529 S.E.2d 676 (2000).

Trebling Damages Before Deducting Set-Off. — Trial court committed no error by trebling the damages awarded before deducting the set-off amount stipulated by the parties as due and owing on defendant's counterclaim. Washburn v. Vandiver, 93 N.C. App. 657, 379 S.E.2d 65 (1989).

Deception of Debtor Who Lost Use of Retirement Fund. — Practices and actions of credit union in deceiving borrower into thinking that credit union had a valid, enforceable security interest in his retirement account by inserting the word "retirement" in the "other collateral" block on front of loan documents and having debtor sign documents at the time of making his first loan, which authorized the sending of employee's retirement checks to the credit union and depositing therein and the filing away of these forms and applying them to all loans thereafter made violated public policy of protecting the retirement accounts of teachers and other state employees, having the tendency to deceive them regarding their rights as to their retirement accounts and collectively constitute unfair and deceptive trade practices; since debtor was damaged as a result of such practices in that he lost the ability to use his retirement fund for his own needs, including eventual retirement, he was entitled to recover treble damages and attorney's fees. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Trustee, as Successor in Interest of Debtor's Estate, Could Recover Damages and Fees. — Where lending and collection practices of the credit union collectively constituted unfair and deceptive trade practices pursuant to G.S. 75-1.1 and where the credit union willfully engaged in unfair and deceptive trade practices, and that the debtor was deceived and damaged as a result thereof, trustee, as the successor in interest of the debtor's claims against the credit union was therefore entitled to recover treble damages and attorneys' fees pursuant to this section and G.S. 75-16.1 on behalf of the debtor's estate. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Violation of Federal Copyright Law. — The treble damages provision only authorizes the trebling of actual damages found to have resulted from violations of the Unfair and Deceptive Trade Practice Act. It does not purport to authorize trebling of either actual or statutory damages found recoverable for parallel violations of federal copyright law. Nintendo of Am., Inc. v. Aeropower Co., 34 F.3d 246 (4th Cir. 1994).

Insurance Company Violation Shown as a Matter of Law. — Insurance company which engaged in the act or practice of not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability had become reasonably clear, G.S. 58-63-15(11)(f), also violated G.S. 75-1.1, as a matter of law, without the necessity of an additional showing of frequency indicating a "general business practice," and allegations to that effect sufficiently stated an unfair and deceptive trade practices (UDTP) claim; while insureds' claims for breach of contract, breach of fiduciary duty, and bad faith were barred by the three-year statute of limitations, their UDTP claim was separate and distinct from the claims on the underlying insurance policy, was thus governed by the G.S. 75-16.2 four-year statute of limitations applicable to such claims, and was therefore timely. Page v. Lexington Ins. Co., 177 N.C. App. 246, 628 S.E.2d 427, 2006 N.C. App. LEXIS 862 (2006).

Accounting Actions May Have Been Considered Unfair Trade Practices. — Father was hired to provide accounting services to a partnership, and his actions in improperly keeping and maintaining accounting records may have been considered unfair practices in or affecting commerce; further, because the jury found that the father breached a fiduciary duty, not a mere contractual duty, his contention that mere breach of contract was insufficient to show an unfair trade practice was rejected. A treble damages award against the father was proper. White v. Thompson, — N.C. App. —, 676 S.E.2d 104, 2009 N.C. App. LEXIS 530 (2009).

Applied in Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860 (1980); Martin v. Pilot Indus., 632 F.2d 271 (4th Cir. 1980); Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176 (1981); Smith v. King, 52 N.C. App. 158, 277 S.E.2d 875 (1981); North Carolina Nat'l Bank v. Carter, 71 N.C. App. 118, 322 S.E.2d 180 (1984); Coble v. Richardson Corp., 71 N.C. App. 511, 322 S.E.2d 817 (1984); Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985); Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985); Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692 (1987); Southern Pines Chrysler-Plymouth, Inc. v. Chrysler Corp., 826 F.2d 1360 (4th Cir. 1987); United Labs., Inc. v. Kuykendall, 102 N.C. App. 484, 403 S.E.2d 104 (1991); Malone v. Topsail Area Jaycees, Inc., 113 N.C. App. 498, 439 S.E.2d 192 (1994); Adams v. Jones, 114 N.C. App. 256, 441 S.E.2d 699 (1994); State Props., LLC v. Ray, 155 N.C. App. 65, 574 S.E.2d 180, 2002 N.C. App. LEXIS 1701 (2002); DIRECTV, Inc. v. Cephas, 294 F. Supp. 2d 760, 2003 U.S. Dist. LEXIS 22297 (M.D.N.C. 2003); Teague v. Bayer AG, — N.C. App. —, 671 S.E.2d 550, 2009 N.C. App. LEXIS 58 (2009).

Cited in Waldron Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961); Ramsey v. Camp, 254 N.C. 443, 119 S.E.2d 209 (1961); Parsons v. Bailey, 30 N.C. App. 497, 227 S.E.2d 166 (1976); Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977); Travelers Ins. Co. v. Ryder Truck Rental, Inc., 34 N.C. App. 379, 238 S.E.2d 193 (1977); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977); Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977); Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978); Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978); CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 448 F. Supp. 475 (W.D.N.C. 1978); Greenway v. North Carolina Farm Bureau Mut. Ins. Co., 35 N.C. App. 308, 241 S.E.2d 339 (1978); Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978); Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978); Burgess v. North Carolina Farm Bureau Mut. Ins. Co., 44 N.C. App. 441, 261 S.E.2d 234 (1980); Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646 (1980); Hammers v. Lowe's Cos., 48 N.C. App. 150, 268 S.E.2d 257 (1980); Taylor v. Hayes, 302 N.C. 627, 276 S.E.2d 369 (1981); Old Dominion Distribs., Inc. v. Bissette, 56 N.C. App. 200, 287 S.E.2d 409 (1982); American Travel Corp. v. Central Carolina Bank & Trust Co., 57 N.C. App. 437, 291 S.E.2d 892 (1982); ITCO Corp. v. Michelin Tire Corp., 722 F.2d 42 (4th Cir. 1983); Simmons v. C.W. Myers Trading Post, Inc., 68 N.C. App. 511, 315 S.E.2d 75 (1984); Day v. Coffey, 68 N.C. App. 509, 315 S.E.2d 96 (1984); Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985); Baker v. Log Sys., 75 N.C. App. 347, 330 S.E.2d 632 (1985); Skinner v. E.F. Hutton & Co., 314 N.C. 267, 333 S.E.2d 236 (1985); L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985); Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986); United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986); Ehlenbeck v. Patton, 58 Bankr. 149 (W.D.N.C. 1986); Yadkin Valley Bank & Trust Co. v. Northwestern Bank, 80 N.C. App. 716, 343 S.E.2d 439 (1986); Jackson v. Hollowell Chevrolet Co., 81 N.C. App. 150, 343 S.E.2d 577 (1986); Opsahl v. Pinehurst, Inc., 81 N.C. App. 56, 344 S.E.2d 68 (1986); American Marble Corp. v. Crawford, 84 N.C. App. 86, 351 S.E.2d 848 (1987); Sampson-Bladen Oil Co. v. Walters, 86 N.C. App. 173, 356 S.E.2d 805 (1987); United Labs., Inc. v. Kuykendall, 87 N.C. App. 296, 361 S.E.2d 292 (1987); Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 87 N.C. App. 438, 361 S.E.2d 608 (1987); Robertson v. Boyd, 88 N.C. App. 437, 363 S.E.2d 672 (1988); Miller v. Ensley, 88 N.C. App. 686, 365 S.E.2d 11 (1988); Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646 (1988); Taylor v. Foy, 91 N.C. App. 82, 370 S.E.2d 442 (1988); Warfield v. Hicks, 91 N.C. App. 1, 370 S.E.2d 689 (1988); Hajmm Co. v. House of Raeford Farms, Inc., 94 N.C. App. 1, 379 S.E.2d 868 (1989); Overcash v. Blue Cross & Blue Shield, 94 N.C. App. 602, 381 S.E.2d 330 (1989); Shell Oil Co. v. Commercial Petro., Inc., 733 F. Supp. 40 (W.D.N.C. 1989); River Birch Assocs. v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990); American Aluminum Prods., Inc. v. Pollard, 97 N.C. App. 541, 389 S.E.2d 589 (1990); Bhatti v. Buckland, 99 N.C. App. 750, 394 S.E.2d 192 (1990); Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990); Lapierre v. Samco Dev. Corp., 103 N.C. App. 551, 406 S.E.2d 646 (1991); United Dominion Indus., Inc. v. Overhead Door Corp., 762 F. Supp. 126 (W.D.N.C. 1991); Anders v. Hyundai Motor Am. Corp., 104 N.C. App. 61, 407 S.E.2d 618 (1991); Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992); Ferris v. Haymore, 967 F.2d 946 (4th Cir. 1992); Liggett Group, Inc. v. Sunas, 113 N.C. App. 19, 437 S.E.2d 674 (1993); Jefferson-Pilot Life Ins. Co. v. Spencer, 336 N.C. 49, 442 S.E.2d 316 (1994); Isenhour v. Universal Underwriters Ins. Co., 341 N.C. 597, 461 S.E.2d 317 (1995); Broussad v. Meineke Disct. Muffler Shops, Inc., 958 F. Supp. 1087 (W.D.N.C. 1997); Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920 (1998); Jones v. Asheville Radiological Group, 129 N.C. App. 449, 500 S.E.2d 740 (1998); First Atl. Mgt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 507 S.E.2d 56 (1998); Gray v. North Carolina Ins. Underwriting Ass'n, 132 N.C. App. 63, 510 S.E.2d 396 (1999); Market Am., Inc. v. Christman-Orth, 134 N.C. App. 234, 520 S.E.2d 570 (1999); Jones v. Asheville Radiological Group, P.A., 134 N.C. App. 520, 518 S.E.2d 528 (1999); State ex rel. Easley v. Rich Food Servs., Inc., 139 N.C. App. 691, 535 S.E.2d 84, 2000 N.C. App. LEXIS 1041 (2000); Stephenson v. Warren, 136 N.C. App. 768, 525 S.E.2d 809, 2000 N.C. App. LEXIS 139 (2000); Wilson v. Jefferson-Green, Inc., 136 N.C. App. 824, 526 S.E.2d 506, 2000 N.C. App. LEXIS 161 (2000); Byrd's Lawn & Landscaping, Inc. v. Smith, 142 N.C. App. 371, 542 S.E.2d 689, 2001 N.C. App. LEXIS 99 (2001); S. Atl. Ltd. P'ship of Tenn., LP v. Riese, 284 F.3d 518, 2002 U.S. App. LEXIS 4747 (4th. Cir. 2002); Bell v. E. Davis Int'l, Inc., 197 F. Supp. 2d 449, 2002 U.S. Dist. LEXIS 5969 (W.D.N.C. 2002); Anderson v. Lancaster Aviation, Inc., 220 F. Supp. 2d 524, 2002 U.S. Dist. LEXIS 18423 (M.D.N.C. 2002); Blankenship v. Town & Country Ford, Inc., 155 N.C. App. 161, 574 S.E.2d 132, 2002 N.C. App. LEXIS 1599 (2002); Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc., 243 F. Supp. 2d 386, 2003 U.S. Dist. LEXIS 1354 (M.D.N.C. 2003); Wilson v. Blue Ridge Elec. Mbrshp. Corp., 157 N.C. App. 355, 578 S.E.2d 692, 2003 N.C. App. LEXIS 541 (2003); Lippard v. Unumprovident Corp., 261 F. Supp. 2d 368, 2003 U.S. Dist. LEXIS 7348 (M.D.N.C. 2003); Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005); Business Cabling, Inc. v. Yokeley, — N.C. App. —, 643 S.E.2d 63, 2007 N.C. App. LEXIS 786 (2007); Hendrix v. Advanced Metal Corp., — N.C. App. —, 672 S.E.2d 745, 2009 N.C. App. LEXIS 151 (2009).

II. PRACTICE AND PROCEDURE.

Who May Bring Action. — The contention that an action for the violation of this Chapter resulting in injury to a party's business can only be brought by the Attorney General is contrary to the provisions of this section. Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

Daughter had standing to maintain an unfair and deceptive trade practices claim under G.S. 75-16, 143-143.12(c), and 143-143.9(2) against a manufacturer as: (1) her father bought her a defective mobile home, (2) she was the person who selected the interior details for the home, who planned to live in the home, and who was going to make the monthly installment payments, (3) she was a consumer of the mobile home supplied by a manufacturer, and (4) when the manufacturer supplied a defective home, the daughter suffered a resulting injury. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

Who Are Protected. — Individual consumers are not the only ones protected and provided a remedy under G.S. 75-1.1 and this section. Olivetti Corp. v. Ames Bus. Sys., 81 N.C. App. 1, 344 S.E.2d 82 (1986), aff'd in part and rev'd in part on other grounds, 319 N.C. 534, 356 S.E.2d 578 (1987).

The State of North Carolina is not a person, firm, or corporation within the meaning of this section. Sperry Corp. v. Patterson, 73 N.C. App. 123, 325 S.E.2d 642 (1985).

The State is not a person, firm or corporation that can be sued under this section. F. Ray Moore Oil Co. v. State, 80 N.C. App. 139, 341 S.E.2d 371, cert. denied, 317 N.C. 333, 346 S.E.2d 139 (1986).

But the State as Consumer Can Take Advantage of This Section. — There is no reason why the State as a consumer cannot take advantage of this section if it is the victim of an unfair or deceptive trade practice. F. Ray Moore Oil Co. v. State, 80 N.C. App. 139, 341 S.E.2d 371, cert. denied, 317 N.C. 333, 346 S.E.2d 139 (1986).

Plaintiff Estopped in State Deceptive Trade Practices Claim Where Federal Claim Dismissed on Merits. — Family business was collaterally estopped from relitigating the element of causation in its deceptive trade practices claim where it sought damages for the same injuries in a federal action alleging a violation of RICO, and in dismissing the RICO claim, the federal court held that defendants' illegal conduct with respect to a midway contract was not the proximate cause of the business's injury. Strates Shows, Inc. v. Amusements of Am., Inc., 184 N.C. App. 455, 646 S.E.2d 418, 2007 N.C. App. LEXIS 1479 (2007).

Standing of Dealer to Sue Distributor. — G.S. 75-1.1 was applicable to the distributor-dealer relationship between defendant and plaintiff, and plaintiff dealer had standing to sue distributor under this section. Olivetti Corp. v. Ames Bus. Sys., 81 N.C. App. 1, 344 S.E.2d 82 (1986), aff'd in part and rev'd in part on other grounds, 319 N.C. 534, 356 S.E.2d 578 (1987).

What Must Be Proved In Order to Prevail. — In order to prevail under G.S. 75-1.1 and this section, trustee must show that (1) the acts or practices in question are "in or affecting commerce"; (2) the acts or practices in question had the capacity or tendency to deceive or were unfair; and (3) the debtor suffered actual injury as a proximate result of credit union's acts or practices. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Causal Relation Between Violation and Injury Must Be Shown. — Former G.S. 75-5 condemns a contract of sale only when such sale is made "upon the condition" that the purchaser shall not deal in the goods or merchandise of a competitor of the seller, and in order for a party to recover damages for a breach of the statute under the provisions of this section, he must show a violation of the statute and a causal relation between the violation and injury to his business. Lewis v. Archbell, 199 N.C. 205, 154 S.E. 11 (1930). See Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

Because the buyers to a contract with the seller did not possess any contract rights due to the insufficiency of their consideration, they could not allege damages by virtue of any alleged unfair and deceptive acts of the seller relating to that alleged contract; further, because the buyers did not allege that the seller intended to deceive them from the outset, there was no allegation that an unfair or deceptive act by the seller induced the buyers either to pay the deposits mentioned in the alleged option contract or to leave the deposits with the seller's agent rather than withdrawing them. McLamb v. T.P. Inc., 173 N.C. App. 586, 619 S.E.2d 577, 2005 N.C. App. LEXIS 2122 (2005).

Determination of Facts and Law. — In cases under G.S. 75-1.1 and this section the jury finds facts, and based on the jury's findings, the court then determines as a matter of law whether the defendant's conduct violated G.S. 75-1.1. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986).

In cases under G.S. 75-1.1 and this section, it is ordinarily for the jury to determine the facts, and based on the jury's findings, the court must then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce. La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986), cert. denied and appeal dismissed, 319 N.C. 459, 354 S.E.2d 888 (1987); Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986); Medina v. Town & Country Ford, Inc., 85 N.C. App. 650, 355 S.E.2d 831 (1987), aff'd, 321 N.C. 591, 364 S.E.2d 140 (1988).

Causal Relation Is Issue of Fact for Jury. — Whether there is a causal relation between the violation of the statute and the injury complained of is an issue of fact for a jury. Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980).

Actual Injury Must Be Proved. — As an essential element of a cause of action under this section, plaintiff must prove not only a violation of G.S. 75-1.1 by the defendants, but also that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentations. Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980); Bailey v. LeBeau, 79 N.C. App. 345, 339 S.E.2d 460, modified and aff'd, 318 N.C. 411, 348 S.E.2d 524 (1986).

Standard of Proximate Cause. — Under this section, the North Carolina courts apply the standard of proximate cause articulated in federal antitrust cases. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Statute of Limitations Prior to Enactment of G.S. 75-16.2. — An action under this section to recover treble damages for a violation of the unfair trade practices statute, G.S. 75-1.1, instituted prior to the enactment of the four-year statute of limitations of G.S. 75-16.2 on June 12, 1969, is governed by the three-year limitation of G.S. 1-52(2), not the one-year limitation of G.S. 1-54(2) applicable to actions to recover a statutory penalty. Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

Accrual of Cause of Action. — Any breach of contract by a trademark licensor first occurred when the third party's interim injunction based on its assertion of a superior registration effectively caused a cessation of performance of the licensor's contractual obligation, which was to continuously provide the trademark for the licensee's use. Any claim for fraud or unfair trade practices also accrued no later than the date of the interim injunction. Rothmans Tobacco Co. v. Liggett Group, Inc., 770 F.2d 1246 (4th Cir. 1985).

State Court Antitrust Consent Decree Res Judicata in Federal Court on Identical Cause of Action. — There was a sufficient identity of causes of action between a state court antitrust action and a federal district court antitrust action to support a finding of res judicata based on the consent judgment in the earlier state court action, where the two suits alleged the same operative facts and the same illegal price-fixing conspiracy, and the state and federal statutes upon which the actions were based were identical except for the interstate commerce requirement of the federal statute. Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484 (4th Cir. 1981), cert. denied, 454 U.S. 878, 102 S. Ct. 359, 70 L. Ed. 2d 188, rehearing denied, 454 U.S. 1117, 102 S. Ct. 692, 70 L. Ed. 2d 654 (1981).

Civil Action for Damages and Injunctive Relief. — While conspiracies in restraint of trade, and undertakings to destroy or injure the business of a competitor, with the purpose of attempting to fix the price when competition is removed, are made unlawful, these provisions do not prevent one whose business as a common carrier has been injured and threatened by any of the acts thus denounced from pursuing a remedy by civil action for damages and seeking the interposition of equity, if necessary to restrain wrongful acts which threaten irreparable loss. Burke Transit Co. v. Queen City Coach Co., 228 N.C. 768, 47 S.E.2d 297 (1948).

Proof of fraud would necessarily constitute an unfair or deceptive act or practice; however, the converse is not always true. La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986), cert. denied and appeal dismissed, 319 N.C. 459, 354 S.E.2d 888 (1987).

In a Chapter 11 case, a motion to dismiss a fraud claim brought by a creditor in its individual capacity was not dismissed because the complaint contained sufficient allegations to satisfy the heightened pleading requirements in Fed. R. Civ. P. 9 where the creditor contended that misrepresentations and omissions were made with intent to induce reliance, reliance occurred, and damages were the result; these allegations also supported causes of action for negligent misrepresentation and unfair and deceptive trade practices. TUG Liquidation, LLC v. Atwood (In re BuildNet, Inc.), — Bankr. —, 2004 Bankr. LEXIS 2383 (Bankr. M.D.N.C. June 16, 2004).

A libel per se of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of G.S. 75-1.1, which will justify an award of damages under this section for injuries proximately caused; however, to recover, a plaintiff must have suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation. Ellis v. Northern Star Co., 326 N.C. 219, 388 S.E.2d 127 (1990).

Conducting Business During Negotiations Not Grounds for Cause of Action. — The activity complained of in count two of defendants' counterclaim did not state a cause of action for unfair or deceptive trade practice, where defendants asked that plaintiff be subject to the risk of treble damages for continuing to conduct business during the negotiation process for the purchase of plaintiff business. Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales & Serv., Inc., 91 N.C. App. 539, 372 S.E.2d 901 (1988).

A mere breach of contract does not constitute an unfair or deceptive trade practice. Southern Bldg. Maintenance, Inc. v. Osborne, 127 N.C. App. 327, 489 S.E.2d 892 (1997).

Plaintiff subcontractor was not entitled to treble the $ 400,000 in compensatory damages that he was awarded for defendant contractor's breach of a hurricane debris removal contract, where there was no basis for the district court to determine that defendant's conduct was unfair or deceptive because the jury made no finding regarding what specific conduct by it gave rise to the $ 400,000 damage award. United States ex rel. S&D Land Clearing v. D'Elegance Mgmt., — F.3d —, 2000 U.S. App. LEXIS 16173 (4th Cir. July 13, 2000).

Intentional Breach of Contract. — In an action for breach of contract alleging unfair competition, the trial court properly denied treble damages where the defendant's violation of its contractual obligation was an intentional breach, but there was neither unfairness nor deception in formulation of the contract; where the jury found no deception in the circumstances of its breach; where the contract was carefully negotiated and drawn by sophisticated parties; and where there was no hint of any unfairness to either party before the defendant's cessation of performance; thus, no unfairness inhered in the circumstances of the breach within the meaning of G.S. 75-1.1 simply because the breach was intentional and not properly disclosed. United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985 (4th Cir.), cert. denied, 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed. 2d 590 (1981).

Insured was properly awarded treble damages against an insured for negotiating the insured's premium payment on a life insurance policy and then refunding it, stating that no coverage ever existed, because: (1) the insurer's negotiation of the insured's payment, after it knew of the insured's health problems, was inconsistent with enforcing a "good health" provision of the policy and waived that provision; (2) the insurer could not claim accord and satisfaction based on the insured's negotiation of the refund check, because that negotiation was based on the insurer's misrepresentation that the insured was never covered, when it knew he was; (3) and this conduct was an unfair and deceptive practice under G.S. 75-1.1 and G.S. 58-63-15(1). Cullen v. Valley Forge Life Ins. Co., 161 N.C. App. 570, 589 S.E.2d 423, 2003 N.C. App. LEXIS 2273 (2003).

Breach of Warranties in Sale of House. — Breach of implied and express warranties alone in the sale of a house does not constitute a "violation of the provisions" of this Chapter. Hence, it is inappropriate to treble damages resulting solely from breach of warranties. Stone v. Paradise Park Homes, 37 N.C. App. 97, 245 S.E.2d 801, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

Judgment Awarding Damages Not Appealable if Attorney's Fee Claim Unresolved. — Judgment awarding consumers damages pursuant to the consumers' claim under G.S. 75-1.1, but not ruling on the consumers' request for attorney's fees, under G.S. 75-16.1, could not be appealed, despite the trial court's certification, under G.S. 1A-1, N.C. R. Civ. P. 54(b), that the judgment was final, because the judgment was interlocutory, as the issue of attorney's fees had not been resolved. Bumpers v. Cmty. Bank of N. Va., — N.C. App. —, 675 S.E.2d 697, 2009 N.C. App. LEXIS 516 (2009).

III. DAMAGES.

Application of the treble damage penalty provided by this section to extraterritorial conduct violates the Commerce Clause, and is precluded thereby. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Treble Damages Not Subject to Judicial Discretion. — The award of treble damages is a right of the successful plaintiff and is not subject to judicial discretion. Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712 (4th Cir. 1983), cert. denied, 464 U.S. 848, 104 S. Ct. 155, 78 L. Ed. 2d 143 (1983).

Damages assessed pursuant to G.S. 75-1.1 are trebled automatically. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Once a plaintiff has established the right to recover under G.S. 75-1.1, the award of treble damages pursuant to this section is automatic and not discretionary. Peterson v. Bozzano, 183 Bankr. 735 (Bankr. M.D.N.C. 1995).

Prejudgment Interest Not Trebled. — It is appropriate under this section to treble only the verdict awarded by the jury and not the prejudgment interest assessable pursuant to G.S. 24-5(b). Market Am., Inc. v. Rossi, 104 F. Supp. 2d 606 (M.D.N.C. 2000), aff'd, 238 F.3d 413 (4th Cir. 2000).

Plaintiff whose damages were trebled pursuant to G.S. 75-16 of the North Carolina Unfair and Deceptive Trade Practices Act [G.S. 75-1 et seq.] was awarded prejudgment interest on the amount of compensatory damages, $106.25 million, and postjudgment interest on the trebled amount, $318.75 million. Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 11831 (M.D.N.C. July 10, 2003).

In a case arising from the termination of an employee, pre-judgment interest should not have been awarded based on treble damages arising from a violation of G.S. 75-1.1 due to a breach of contract; rather, the pre-judgment interest should have been awarded on the actual damages for breach of contract. Johnson v. Colonial Life & Accident Ins. Co., 173 N.C. App. 365, 618 S.E.2d 867, 2005 N.C. App. LEXIS 2015 (2005).

Because treble damages are both punitive and remedial, a treble damages award of $180,000, which was $70,000 over and above plaintiff's compensatory damages ($60,000) and attorney fees ($50,000), was not an abuse of discretion. Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999).

Plaintiff establishing a violation of G.S. 75-1.1 is not entitled to recover both punitive damages and treble damages under this section. He is entitled to recover actual damages trebled and to an appropriate award of attorney's fees. Jennings Glass Co. v. Brummer, 88 N.C. App. 44, 362 S.E.2d 578 (1987).

Punitive damages may be awarded only where the wrong is done willfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975).

Because G.S. 75-1.1 is in derogation of the common law causes of action for unfair or deceptive trade practices and this section imposes a penalty, strict construction is in order. Thus, absent explicit legislative inclusion, punitive damages should be excluded. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Trial court erred in entering a directed verdict on a homeowner's unfair and deceptive trade practices (UDTP) claim against a contractor because the approach the trial court followed in dismissing the UDTP claim but allowing counsel to argue it in connection with punitive damages was in error; because the jury found in favor of the homeowner on her fraud claim, and the contractor made no attempt to argue that it was exempt from the provisions of G.S. 75-1.1, the homeowner was entitled to recover treble damages under G.S. 75-16. Jones v. Harrelson & Smith Contrs., LLC, — N.C. App. —, 670 S.E.2d 242, 2008 N.C. App. LEXIS 2270 (2008).

Claim based on the Debt Collection Act will not support punitive damages. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

Election Between Punitive Damages and Treble Damages. — Actions may assert both G.S. 75-1.1 violations and fraud based on the same conduct or transaction, and plaintiffs in such actions may receive punitive damages or be awarded treble damages, but may not have both. It would be manifestly unfair to require plaintiffs in such cases to elect before the jury has answered the issues and the trial court has determined whether to treble the compensatory damages found by the jury, and such election should be allowed in the judgment. Mapp v. Toyota World, Inc., 81 N.C. App. 421, 344 S.E.2d 297, cert. denied, 318 N.C. 283, 347 S.E.2d 464 (1986).

The law in North Carolina does not hold that a plaintiff must elect against a Chapter 75 violation in its entirety. It merely holds that plaintiff must elect between punitive damages and compensatory damages that are trebled pursuant to this section. United Labs., Inc. v. Kuykendall, 102 N.C. App. 484, 403 S.E.2d 104 (1991), aff'd, 335 N.C. 183, 437 S.E.2d 374 (1993).

Plaintiffs could have elected to recover trebled $15,000 compensatory reward ($45,000) for defendants' violation of G.S. 75-1.1 and recovered nominal damages of $1.00 for tortious interference claim, or plaintiffs could have elected to take the nominal and punitive damages awarded for the tortious interference claim and the compensatory damages awarded for the violation of G.S. 75-1.1 Plaintiff chose the latter. The trial court properly allowed the election of damages from the allocated award. United Labs., Inc. v. Kuykendall, 102 N.C. App. 484, 403 S.E.2d 104 (1991), aff'd, 335 N.C. 183, 437 S.E.2d 374 (1993).

Election Between Punitive Damages and Treble Damages. — Where a jury awarded plaintiff $106.25 million in compensatory damages and $45 million in punitive damages for common law fraud, together with $1 million for violation of the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA) [G.S. 75-1 et seq.], the compensatory damages for fraud were subject to trebling under the UDTPA because fraud in connection with commerce constituted a per se violation of the UDTPA; however, plaintiff could not recover both the jury's fraud award and its UDTPA award, as the same conduct gave rise to both claims, nor could plaintiff recover both treble damages and the jury's punitive damages award. Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 11831 (M.D.N.C. July 10, 2003).

Wrongful Eviction Actions. — The prohibition against punitive or treble damages in wrongful eviction actions contained in G.S. 42-25.9(a) of the Ejectment of Residential Tenants Act does not preclude tenants from recovering treble damages under this section and attorney's fees under G.S. 75-16.1 of the Unfair and Deceptive Practices Act. Stanley v. Moore, 339 N.C. 717, 454 S.E.2d 225 (1995).

Tortious Interference and Compensatory Damages. — There is no double redress for a single wrong and no inconsistency when a plaintiff recovers untrebled compensatory damages under this Chapter and punitive damages under a tortious interference claim. United Lab., Inc. v. Kuykendall, 335 N.C. 183, 437 S.E.2d 374 (1993).

Surety Not Liable for Trebled Portion of Damages. — Where dealer did not pay buyer's monthly car payments as required by agreement, the total of the unpaid payments was the amount "suffered" by the plaintiff; she did not "suffer" further compensatory damages. Thus under G.S. 20-288 the surety was not liable for the trebled portion of damages imposed under this section. Tomlinson v. Camel City Motors, Inc., 330 N.C. 76, 408 S.E.2d 853 (1991).

Measure of Damages. — An action for unfair or deceptive acts or practices is a distinct action apart from fraud, breach of contract, or breach of warranty. Since the remedy was created partly because those remedies often were ineffective, it would be illogical to hold that only those methods of measuring damages could be used. To rule otherwise would produce the anomalous result of recognizing that although G.S. 75-1.1 creates a cause of action broader than traditional common-law actions, this section limits the availability of any remedy to cases where some recovery at common law would probably also lie. Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, cert. denied, 311 N.C. 751, 321 S.E.2d 126 (1984).

For discussion of measure of damages for fraudulent inducement, see Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, cert. denied, 311 N.C. 751, 321 S.E.2d 126 (1984).

Single-premium credit insurance (SPCI) sold by a bank subsidiary to borrowers with mortgage loans greater than 15 years in length did not have any value because the contracts were void as against public policy, and therefore the subsidiary was not entitled to reduce the amount of damages determined by the trial court by any amount attributable to the sale of the unlawful insurance product; accordingly, to make the borrowers whole, the trial court properly held that the measure of damages was to include the premium, interest, fees, and points associated with the purchase and financing of the SPCI. Richardson v. Bank of Am., N.A., — N.C. App. —, 643 S.E.2d 410, 2007 N.C. App. LEXIS 809 (2007), petition allowed as to additional issues 361 N.C. 569, 650 S.E.2d 439 (2007).

When consumers alleged that a debt collector violated various statutory provisions of G.S. 75-50 et seq., those claims did not have to be dismissed for a failure to state actual damages because a consumer sufficiently offered evidence of injury proximately caused by the collector's harassing telephone calls when the evidence tended to show that the calls caused the consumer emotional distress; the consumer did not have to show out-of-pocket damages, as that would be inconsistent with G.S. 75-16, providing that a person "injured" as a result of conduct violating G.S. Ch. 75 had a right of action on account of such injury done, and if damages were assessed, judgment would be entered for treble the amount fixed by a verdict, so the statute distinguished between "injury" and "damages." Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 646 S.E.2d 381, 2007 N.C. App. LEXIS 1472 (2007).

Motion to Compel Tax Returns for Purposes of Punitive Damage Award Denied. — Plaintiff failed to overcome the qualified privilege against the disclosure of defendants' tax returns in an action for trademark infringement and violation of the North Carolina Unfair and Deceptive Trade Practices Act and, thus, plaintiff's motion to compel was denied because the returns were not relevant when plaintiff did not assert a punitive damages claim and because the award of damages by a court or jury had nothing to do with defendants' net worth or ability to pay when any enhanced damages in trademark cases and in cases involving unfair and deceptive trade practices are three times the damages award, pursuant to 15 U.S.C.S. § 1117(b) and G.S. 75-16. Water Out Drying Corp. v. Allen, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 37867 (W.D.N.C. June 7, 2006).

Refusal of Partial Refund. — Trial court did not err in calculating damages under G.S. 75-16 and G.S. 66-111 when plaintiff had refused a partial refund proffered by defendant; there was no evidence showing that plaintiff had retained any money in settlement of the matter that could offset any money due to it. Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc., 180 N.C. App. 70, 637 S.E.2d 230, 2006 N.C. App. LEXIS 2253 (2006).

Time for Deducting Credit. — Trial court erred by deducting $137,000.00 credit representing the amount plaintiff received from codefendants in exchange for dismissals before rather than after trebling the jury's award of damages. Seafare Corp. v. Trenor Corp., 86 N.C. App. 534, 363 S.E.2d 643, cert. denied, 322 N.C. 114, 367 S.E.2d 917 (1988).

Commercial Bribery Warranted Treble Damages. — Commercial bribery harms an employer as a matter of law, and the proper measure of damages suffered must include at a minimum the amount of the commercial bribes the third party paid, with the damages trebled based on the unfair and deceptive commercial conduct. Kewaunee Scientific Corp. v. Pegram, 130 N.C. App. 576, 503 S.E.2d 417 (1998).

Plaintiff was not entitled to treble damages under section where he sought to rescind the sale of a car and to recover the sale price on the ground the year model of the car had been misrepresented by the seller. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

Because damages were not assessed, but rescission was elected in action against developers of failed development of ocean front property, the amount awarded to plaintiffs as restitution from defendants should not have been trebled. Winant v. Bostic, 5 F.3d 767 (4th Cir. 1993).

Claims relating to breach of duties to a partnership by a son, who was also a partner, which alleged that the son took for himself opportunities that he agreed to pursue with the partnership, did not amount to practices impacting the marketplace, were not unfair trade practices under G.S. 75-1.1, and thus a treble damages award against the son was improper. White v. Thompson, — N.C. App. —, 676 S.E.2d 104, 2009 N.C. App. LEXIS 530 (2009).

Because plaintiff had no actual damages, plaintiff was not entitled to treble damages under state law. Evans v. Sullivan, 928 F.2d 109 (4th Cir. 1991).

Treble Damages Awarded. — Because the jury found that the sale was procured by defendant's fraudulent representation, plaintiff was entitled to treble damages. Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440 (1991).

Plaintiff subcontractor was entitled to an award of $300,000 under this section, where the district court specifically found that defendant contractor's fraud in misrepresenting the scope of a hurricane debris removal contract to induce plaintiff to enter said contract constituted a Chapter 75 violation, and defendant had not challenged that ruling on appeal. United States ex rel. S&D Land Clearing v. D'Elegance Mgmt., — F.3d —, 2000 U.S. App. LEXIS 16173 (4th Cir. July 13, 2000).

Award to a plaintiff in the amount of $1,365, which represented the trebling of $455, the amount that the plaintiff had paid for watermelons lost due to the defendant's repossession of her truck and the refusal to permit the plaintiff an opportunity to retrieve the perishable melons, was upheld on appeal, because the plaintiff's testimony that she paid $3.50 per watermelon was sufficient to support the amount of damages asserted by the plaintiff. Eley v. Mid/East Acceptance Corp. of N.C., Inc., 171 N.C. App. 368, 614 S.E.2d 555, 2005 N.C. App. LEXIS 1253 (2005).

Debtor who had been a shareholder and manager of a grocery store was personally liable to a creditor for funds that were owed to the creditor under a license agreement that the creditor had with the store and under a guaranty and indemnity agreement that the creditor had with the debtor, to the extent that the amount owed was not covered by amounts turned over by the trustee for the store; because of the debtor's egregious activity in operating the store, including the commingling of funds contrary to the license agreement, the damages owed by the debtor were trebled pursuant to G.S. 75-16. MEMO Money Order Co. v. Davis (In re Davis), 371 B.R. 127, 2007 Bankr. LEXIS 1786 (Bankr. E.D.N.C. 2007), vacated, on other grounds, 381 B.R. 650 (Bankr. E.D.N.C. 2008), MEMO Money Order Co. v. Davis (In re Davis), 371 B.R. 127, 2007 Bankr. LEXIS 1786 (Bankr. E.D.N.C. 2007).

Trial court's findings of fact supported the conclusion that campground tenants were entitled to treble damages on the tenants unfair and deceptive trade practices claims after the owners rented campground spaces to the tenants on a monthly basis, charged the tenants for electricity, and electrical interruptions caused damage to the tenants' recreational vehicles. These activities constituted business activities; thus, the owners' acts were in or affecting commerce and the owners' acts in interfering with and disconnecting the tenants' electricity were, at a minimum, unfair. Shepard v. Bonita Vista Props., L.P., 191 N.C. App. 614, 664 S.E.2d 388, 2008 N.C. App. LEXIS 1489 (2008).

Findings in Arbitration Award Sufficient to Support Award of Treble Damages. — There was no error in the absence of specific findings in an arbitration award that would justify treble damages as the trial court previously found for plaintiffs on the issue of liability for unfair and deceptive trade practices and found treble damages to be statutorily appropriate; under G.S. 75-16, the arbitrator was bound by law to treble the damages and was not required to make findings already established by the trial court. Linsenmayer v. Omni Homes, Inc., — N.C. App. —, 668 S.E.2d 388, 2008 N.C. App. LEXIS 2018 (2008).

Treble Damages Required and Attorney's Fees Permissible. — If the trial court finds that a defendant has violated the Unfair and Deceptive Trade Practices Act, it must award treble damages, and it may, in its discretion, award attorney's fees. Canady v. Crestar Mtg. Corp., 109 F.3d 969 (4th Cir. 1997).

In a specialized construction equipment rental market where customer pricing was highly competitive, a corporation's pricing, customer, and employee salary information met the factors of a trade secret under G.S. 66-152, and those trade secrets were misappropriated when a competing limited liability company (LLC) solicited the corporation's employees who had that information; since the corporation also showed that the customers it lost and the geographical areas where it lost business were the same customers and areas of the employees who the LLC hired away from the corporation, the corporation showed a proximate cause connection to its lost profits and those lost profit damages, along with treble damages and attorney fees, were properly awarded. Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C., 174 N.C. App. 49, 620 S.E.2d 222, 2005 N.C. App. LEXIS 2290 (2005).

Demand for Treble Damages Warranted Denial of Motion to Remand to State Court. — District court denied the borrowers' motion to remand, under 28 U.S.C.S. § 1447(c), their action alleging violations of state law by the banks and loan trusts because it found that the amount in controversy exceed $75,000, as opposed to what the borrowers' complaint asserted. The banks and loan trusts pointed to N.C. R. Civ. P. 8(a)(2), which permitted the borrowers to recover more than what they pled in their complaint, and they produced evidence that the actual amount in controversy exceeded $75,000; the borrowers had also requested treble damages under G.S. 75-16. Dash v. FirstPlus Home Loan Trust 1996-2, 248 F. Supp. 2d 489, 2003 U.S. Dist. LEXIS 3706 (M.D.N.C. 2003).

Arbitrator Had Authority to Award Treble Damages. — Although 9 U.S.C.S. § 10(a)(4) of the Federal Arbitration Act applied, where an arbitration provision in a contract between parties was ambiguous, the trial court erred in modifying the arbitrators' G.S. 75-16 award of treble damages to plaintiffs in their deceptive trade practices claim under G.S. 75-1.1; the arbitrators, not the court had the authority to construe that ambiguous provision. WMS, Inc. v. Weaver, 166 N.C. App. 352, 602 S.E.2d 706, 2004 N.C. App. LEXIS 1782 (2004), cert. denied, 359 N.C. 197, 608 S.E.2d 330 (2004).

Arbitration award in contract dispute which included treble damages was proper because the arbitration clause at issue stated that arbitration was the proper avenue should any dispute arise relative to the performance of the contract; "any dispute" included plaintiffs' claim that the contractors were liable for unfair and deceptive trade practices, which allowed for an award of treble damages pursuant to G.S. 75-16. Linsenmayer v. Omni Homes, Inc., — N.C. App. —, 668 S.E.2d 388, 2008 N.C. App. LEXIS 2018 (2008).

Sweepstakes Contestant Not Entitled to Damages. — Under G.S. 75-16, a sweepstakes contestant was not entitled to damages for unfair and deceptive trade practices, pursuant to G.S. 75-1.1 and G.S. 75-32; even if the contest sponsor's actions constituted actionable conduct pursuant to G.S. 75-1.1 and G.S. 75-32, no reasonable person could have relied on the representations contained therein to conclude that he or she would be entitled to the entire contest prize because any actual injury suffered could not have been, as a matter of law, proximately caused by the sponsor's representations. Fozard v. Publrs. Clearing House, Inc., — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 22994 (M.D.N.C. Apr. 29, 1999).

§ 75-16.1. Attorney fee.

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or

(2) The party instituting the action knew, or should have known, the action was frivolous and malicious. (1973, c. 614, s. 1; 1983, c. 417, s. 2.)

Legal Periodicals. — For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note, "Consumer Protection — The Unfair Trade Practice Act and the Insurance Code: Does Per Se Necessarily Preempt?," see 10 Campbell L. Rev. 487 (1988).

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

CASE NOTES

Legislative Intent. — In enacting G.S. 75-16 and this section, the legislature intended to establish an effective private cause of action for aggrieved consumers in this State. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

Purpose. — The purpose of the statutory provisions for treble money damages and attorneys' fees, this section and G.S. 75-16, were to encourage private enforcement in the marketplace and to make the bringing of such suit more economically feasible. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

Permitting recovery of punitive damages on a common law claim in addition to attorneys fees on the unfair practices claim best serves the policy of this Chapter policy of encouraging private enforcement of this act. United Lab., Inc. v. Kuykendall, 335 N.C. 183, 437 S.E.2d 374 (1993).

Construction with Other Laws. — Debtors are protected from unfair debt collection practices under G.S. 58-70 et seq., and 75-1.1 et seq., and although Chapter 58, Article 70, does not set forth provisions for awarding attorney's fees, G.S. 58-70-130(c) expressly refers to G.S. 75-1.1, which contains an attorney's fee provision at G.S. 75-16.1. Llera v. Security Credit Sys., 93 F. Supp. 2d 674, 2000 U.S. Dist. LEXIS 3646 (W.D.N.C. 2000).

Based on the language set forth in G.S. 58-70-130(c), attorney's fees are available for plaintiffs alleging violations of Chapter 58, Article 70 who can satisfy the requirements set forth in this section. Llera v. Security Credit Sys., 93 F. Supp. 2d 674, 2000 U.S. Dist. LEXIS 3646 (W.D.N.C. 2000).

Under G.S. 75-16.1, an award of attorneys' fees in unfair and deceptive trade practices must take into account the time and labor expended, the skill required, the customary fee for like work, the experience or ability of the attorney, the novelty and difficulty of the questions of law, the adequacy of the representation, the difficulty of the problems faced by the attorney, especially any unusual difficulties, the kind of case for which the fees are sought and the result obtained, and the services expended by paralegals and secretaries acting as paralegals; the same factors are proper guidelines for the trial courts to follow when determining the reasonable value of a discharged attorney's services, which determinations are reviewable upon appeal only for an abuse of discretion. Guess v. Parrott, 160 N.C. App. 325, 585 S.E.2d 464, 2003 N.C. App. LEXIS 1798 (2003).

When Attorneys' Fees May Be Awarded. — Attorneys' fees may be awarded upon findings that defendant willfully engaged in unlawful acts or practices proscribed by this chapter, that there was an unwarranted refusal to fully resolve the matters, and that complainant showed some actual injury resulting from the violation. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

This section entitled plaintiffs who demonstrated that the defendant insurer had violated both G.S. 75-1.1 and G.S. 58-63-15 to attorneys' fees. Gray v. North Carolina Ins. Underwriting Ass'n, 352 N.C. 61, 529 S.E.2d 676 (2000).

Attorney's fees are available for plaintiffs alleging violations of Chapter 58, Article 70, who can satisfy the requirements set forth in this section. Llera v. Security Credit Sys., 93 F. Supp. 2d 674, 2000 U.S. Dist. LEXIS 3646 (W.D.N.C. 2000).

Award of an attorney's fee was appropriate for a violation of G.S. ch. 75, art. 2 in the same manner as any other part of ch. 75, and G.S. 75-56 did not limit an award of an attorney's fee as allowed by G.S. 75-16.1, but it was necessary for a trial court to make findings and conclusions to support an award of an attorney's fee. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

In an unfair trade practices case that certain borrowers filed against a lender for violations of G.S. 75-1.1, the borrowers failed to show that an arbitration clause in their loan agreement was invalid. The borrowers failed to prove that the costs of arbitration were prohibitively high and would have exceeded the costs of litigation, as the borrowers made unequal comparisons between the two categories of costs and left out of their calculations certain statutory provisions, including the provision in G.S. 75-16.1, which allowed an award of attorney's fees for the prevailing party. Tillman v. Commer. Credit Loans, Inc., 177 N.C. App. 568, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006), aff'd, 362 N.C. 162, 655 S.E.2d 359 (2008), Tillman v. Commer. Credit Loans, Inc., 177 N.C. App. 568, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006).

Willfulness Required for Award of Attorney's Fees. — While a showing of willfulness seems not to be required in order to establish a violation of the act with respect to ordinary damages, the portion of the statute relating to attorney's fees does require such showing. Standing v. Midgett, 850 F. Supp. 396 (E.D.N.C. 1993).

Willfulness Shown. — The court made adequate findings to support its conclusions that defendant willfully charged usurious rates of interest and that defendant's pre-trial rejection of plaintiff's offer to settle constituted an unwarranted refusal to settle. Britt v. Jones, 123 N.C. App. 108, 472 S.E.2d 199 (1996).

Findings Required. — To award attorney's fees under the statute, the trial court must find: (1) plaintiff is the prevailing party; (2) defendant willfully engaged in the act at issue; and (3) defendant made an unwarranted refusal to fully resolve the matter. Evans v. Full Circle Prods., Inc., 114 N.C. App. 777, 443 S.E.2d 108 (1994).

The court must make specific findings of fact that the actions of the party charged with violating Chapter 75 were willful, that he refused to resolve the matter fully, and that the attorney's fee was reasonable. Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994).

To recover attorney's fees under this section, a plaintiff must prove by a preponderance of the evidence that the plaintiff is a prevailing party, that the defendant willfully engaged in the prohibited act, and that the defendant's refusal to fully resolve the matter was unwarranted. Llera v. Security Credit Sys., 93 F. Supp. 2d 674, 2000 U.S. Dist. LEXIS 3646 (W.D.N.C. 2000).

Plaintiff Not Entitled to Attorney's Fees. — Successful plaintiff in trade dress infringement action was not entitled to attorney's fees where the jury found that defendant did not intentionally copy plaintiff's trade dress. Tools USA & Equip. Co. v. Champ Frame Straightening Equip., Inc., 885 F. Supp. 141 (M.D.N.C. 1994), aff'd, 87 F.3d 654 (4th Cir. 1996).

Prevailing plaintiff was not entitled to attorneys' fees under G.S. 75-16.1 because plaintiff failed to establish an unwarranted refusal to settle on defendant's part; an unwarranted refusal to settle could not be demonstrated solely from a proportional comparison between the jury's ultimate award and defendant's highest offer of settlement. Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 11831 (M.D.N.C. July 10, 2003).

"Prevailing Party" Must Have Suffered Actual Injury. — In a private action to recover damages for a violation of G.S. 75-1.1, the plaintiff, in order to be the "prevailing party" within the meaning of this section, must prove not only a violation of G.S. 75-1.1 by the defendant, but also that plaintiff has suffered actual injury as a result of that violation. Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860, cert. denied, 300 N.C. 198, 269 S.E.2d 624 (1980).

To be a prevailing party within the meaning of G.S. 75-16.1, the plaintiff must prove both an actual violation of G.S. 75-1.1 and actual injury to plaintiff as a result of the violation. Evans v. Full Circle Prods., Inc., 114 N.C. App. 777, 443 S.E.2d 108 (1994).

The jury's assessment of the statutory penalty was insufficient to prove by a preponderance of the evidence that plaintiff suffered an actual injury, and as such, plaintiff was not entitled to recover attorney's fees under this section. Llera v. Security Credit Sys., 93 F. Supp. 2d 674, 2000 U.S. Dist. LEXIS 3646 (W.D.N.C. 2000).

Award of attorneys' fees pursuant to this section is not permissible where court has found that G.S. 75-1.1 either did not apply or was not violated. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049 (E.D.N.C. 1980), aff'd, 649 F.2d 985 (4th Cir. 1981), cert. denied, 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed. 2d 590 (1981).

Enforcement of the covenant was not preempted by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C.S. § 10101 et seq., because it was not the sort of rail regulation contemplated by the statute and, as a voluntary agreement, did not unreasonably interfere with rail transportation; at the same time, to honor the parties' original bargain, the appellate court rejected the mine owner's attempt to change the terms of the agreement by seeking treble damages for breach of the agreement under the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA), G.S. 75-1.1. The case involved straightforward breach of covenant or contract claims and the carefully negotiated bargains that were at the center of these agreements drove the appellate court's conclusions—the rail carrier could not escape its obligation by disputing the parties' intent or hiding behind the ICCTA, but, just the same, the owner could not enlarge the scope of the carrier's obligation by transforming a breach of covenant claim into a UDTPA action for treble damages and attorneys' fees. Instead, the parties were to fulfill their contractual commitments. PCS Phosphate Co. v. Norfolk Southern Corp., 559 F.3d 212, 2009 U.S. App. LEXIS 5024 (4th Cir. 2009).

Wrongful Eviction Actions. — The prohibition against punitive or treble damages in wrongful eviction actions contained in G.S. 42-25.9(a) of the Ejectment of Residential Tenants Act does not preclude tenants from recovering treble damages under G.S. 75-16 and attorney's fees under this section of the Unfair and Deceptive Practices Act. Stanley v. Moore, 339 N.C. 717, 454 S.E.2d 225 (1995).

Discretion of Trial Judge. — The award of attorneys' fees under this section is within the sound discretion of the trial judge. Borders v. Newton, 68 N.C. App. 768, 315 S.E.2d 731 (1984); Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985); Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Award or denial of attorneys' fees, even where supporting facts exist, is within the discretion of the trial judge. Olivetti Corp. v. Ames Bus. Sys., 81 N.C. App. 1, 344 S.E.2d 82 (1986), aff'd in part and rev'd in part on other grounds, 319 N.C. 534, 356 S.E.2d 578 (1987); McDonald v. Scarboro, 91 N.C. App. 13, 370 S.E.2d 680, cert. denied, 323 N.C. 476, 373 S.E.2d 864 (1988).

Under both the Lanham Act and this state statute, attorneys' fees are not awarded as a matter of right; they are within the discretion of the trial court. Shell Oil Co. v. Commercial Petro., Inc., 928 F.2d 104 (4th Cir. 1991).

An award of attorney's fees under this section is within the sound discretion of the trial judge, so that, even where facts exist to support a finding that plaintiff has satisfied the requirements of this section, a court may deny attorney's fees. Llera v. Security Credit Sys., 93 F. Supp. 2d 674, 2000 U.S. Dist. LEXIS 3646 (W.D.N.C. 2000).

Discretion of Court. — Award or denial of attorneys' fees under this section is a matter within the sole discretion of the trial judge. Morris v. Bailey, 86 N.C. App. 378, 358 S.E.2d 120 (1987).

Even if the requirements are met, an award of attorney's fees under this section is in the trial court's discretion. Evans v. Full Circle Prods., Inc., 114 N.C. App. 777, 443 S.E.2d 108 (1994).

If the trial court finds that a defendant has violated the Unfair and Deceptive Trade Practices Act, it must award treble damages, and it may, in its discretion, award attorney's fees. Canady v. Crestar Mtg. Corp., 109 F.3d 969 (4th Cir. 1997).

Under G.S. 75-16.1(1), a trial court has discretion in actions based upon a violation of G.S. 75-1.1 to award attorney's fees where the trial court determines that the party charged with the violation has willfully engaged in the act or practice, and that there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; an award or denial of attorney's fees under this section is within the sound discretion of the trial court. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Where the trial court had discretion to refuse to award any attorneys' fees, its decision to award approximately half of the amount requested by the buyers was not an abuse of discretion; the buyers were also entitled to attorneys' fees on appeal. Willen v. Hewson, 174 N.C. App. 714, 622 S.E.2d 187, 2005 N.C. App. LEXIS 2612 (2005), cert. denied, — N.C. —, 631 S.E.2d 520 (2006).

Trial court was authorized to deny the outdoor advertising company's motion for attorney fees that it sought pursuant to G.S. 75-16.1. Despite the fact that the outdoor advertising company obtained a jury verdict in its favor against the ad agency for committing unfair and deceptive trade practices, the case involved some unique questions of law and the ad agency had valid reasons to litigate it to the conclusion and, thus, the trial court reasonably denied the attorney fee request. Media Network, Inc. v. Long Haymes Carr, Inc., — N.C. App. —, 678 S.E.2d 671, 2009 N.C. App. LEXIS 774 (2009).

Trial court has authority to award attorneys' fees for all phases of a case. City Fin. Co. v. Boykin, 86 N.C. App. 446, 358 S.E.2d 83 (1987).

Court Must Make Findings of Fact. — In awarding attorneys fees under this section, the trial court must make findings of fact to support the award. Appropriate findings include findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney. Lapierre v. Samco Dev. Corp., 103 N.C. App. 551, 406 S.E.2d 646 (1991).

Where the trial court awarded plaintiff $50,000 in attorney's fees, and where the record indicated that one defendant had offered to settle for $12,000 and another had refused to settle but was silent as to the third defendant, the appellate court remanded the case for further findings as to the award of attorney's fees against the third defendant. Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999).

Although there was some evidence in the record that would support an award of attorney fees in favor of the competitors, an attorney fees award to the competitors under G.S. 1A-1-11 and G.S. 75-16.1 was error, as the order contained no findings of fact or conclusions of law, even though it summarily granted all of the attorney fees and costs requested by the competitors, and it failed to indicate what portion of the fees granted was based on G.S. 1A-1-11 and what portion was based on G.S. 75-16.1. Blyth v. McCrary, 184 N.C. App. 654, 646 S.E.2d 813, 2007 N.C. App. LEXIS 1626 (2007).

Defendant Not Entitled Even Though Plaintiff's Claim Dismissed. — The defendant was not entitled to attorney fees under the North Carolina Unfair Trade Practices Act, even though the plaintiff's claim under the Act was dismissed based on a finding that North Carolina law did not apply, where a jury found that the defendant committed fraud and breach of fiduciary duty. Vanwyk Textile Sys. v. Zimmer Mach. Am., Inc., 994 F. Supp. 350 (W.D.N.C. 1997).

Because plaintiff customer could have reasonably thought that both defendant company and defendant individual officer should have been named in the G.S. 75-1.1 allegations, the court was not willing to state that the unfair and deceptive trade practices claim against defendant individual was frivolous and malicious; also, the requested fee was unreasonable where the legal services were rendered with the intent that they benefit both the individual and the company defendants. Basnight v. Diamond Developers, Inc., 178 F. Supp. 2d 589, 2001 U.S. Dist. LEXIS 23826 (M.D.N.C. 2001).

Where a contractor unsuccessfully asserted claims against a surety for bad faith and deceptive trade practices based on the surety's status as an insurer, the contractor's claims, although weak, were not frivolous, and the surety was not entitled to an award of attorney fees; the distinction between a relationship of insurance and a relationship of suretyship was an unsettled area of state law, and a finding that the one state case on point was determined to be controlling did not render the contractor's claims contrary to settled law. Cincinnati Ins. Co. v. Dynamic Dev. Group, LLC, 336 F. Supp. 2d 552, 2004 U.S. Dist. LEXIS 19181 (M.D.N.C. 2004).

Failure to Show Injury. — Where although there was evidence in the record that defendants misrepresented that engine parts had been replaced within six months prior to sale of automobile, there was no evidence that plaintiff suffered an "injury" because of such representation, the court erred in trebling any damages and awarding attorneys' fees. Bailey v. LeBeau, 79 N.C. App. 345, 339 S.E.2d 460, modified and aff'd, 318 N.C. 411, 348 S.E.2d 524 (1986).

Unwarranted Refusal to Fully Resolve Matter. — Where defendant admitted his motivation for failing to enroll the house in Homeowners Warranty Program (HOW) was to pressure the plaintiffs into releasing the escrow funds and argued that they had offered to settle the matter by belatedly enrolling the house in HOW and then affecting whatever repairs were required under HOW, defendants' settlement offer to enroll the plaintiffs' house in the HOW Program upon plaintiffs' release of the escrow funds amounted to an unwarranted refusal to fully resolve the matter; the defendants had placed the escrow as a precondition of the HOW enrollment. Love v. Keith, 95 N.C. App. 549, 383 S.E.2d 674 (1989), overruled on other grounds, Custom Molders v. American Yard Prods., 342 N.C. 133, 463 S.E.2d 199 (1995).

Deception of Debtor Who Lost Use of Retirement Fund. — Practices and actions of credit union in deceiving borrower into thinking that credit union had a valid, enforceable security interest in his retirement account by inserting the word "retirement" in the "other collateral" block on front of loan documents and having debtor sign documents at the time of making his first loan, which authorized the sending of employee's retirement checks to the credit union and depositing therein and the filing away of these forms and applying them to all loans thereafter made violated public policy of protecting the retirement accounts of teachers and other state employees, having the tendency to deceive them regarding their rights as to their retirement accounts and collectively constitute unfair and deceptive trade practices; and as debtor was damaged as a result of such practices in that he lost the ability to use his retirement fund for his own needs, including eventual retirement, he was entitled to recover treble damages and attorney's fees. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Trustee, As Successor in Interest of Estate, Could Recover Damages and Fees. — Where lending and collection practices of credit union collectively constituted unfair and deceptive trade practices pursuant to G.S. 75-1.1, and where the credit union willfully engaged in unfair and deceptive trade practices, and that the debtor was deceived and damaged as a result thereof, trustee, as the successor in interest of the debtor's claims against the credit union was therefore entitled to recover treble damages and attorneys' fees pursuant to G.S. 75-16 and this section on behalf of the debtor's estate. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Attorney's Fees Upheld. — The trial court did not err in awarding plaintiff $87,480 in attorneys fees, under this section, where the plaintiff's recovery on an unfair and deceptive trade practices claim amounted to $87,480, given the attorneys' experience, positions within their respective firms, and the comparable hourly rates for attorneys in the area. Vazquez v. Allstate Ins. Co., 137 N.C. App. 741, 529 S.E.2d 480, 2000 N.C. App. LEXIS 494 (2000).

Where trial court made extensive findings that the insurer had both willfully engaged in the acts at issue and engaged in an unwarranted refusal to fully resolve the insured's claims before awarding attorney's fees after a jury verdict found that the insurer had committed acts supporting a judgment for unfair business practices, the appellate court could not conclude that the trial court's findings and conclusion were wholly unsupported or that the decision to award fees was either "manifestly unsupported by reason" or so arbitrary that it could not have been the result of a reasoned decision. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

When an insured sued an insurer for breach of contract and unfair and deceptive practices for negotiating his premium payment on a life insurance policy and then refunding it, stating that no coverage ever existed, the insured was properly awarded attorney's fees because: (1) the insured was the prevailing party on his unfair trade practices claim; and (2) there were no genuine issues of material fact that the insurer's refusal to settle was unwarranted, so the trial court did not abuse its discretion by awarding attorney's fees. Cullen v. Valley Forge Life Ins. Co., 161 N.C. App. 570, 589 S.E.2d 423, 2003 N.C. App. LEXIS 2273 (2003).

Since the trial court found that defendants willfully committed unfair and deceptive trade acts or practices in commerce within the meaning of G.S. 75-1.1, there was an unwarranted refusal by defendants to fully resolve the matter which constituted the basis of the suit, and plaintiffs were entitled to an award of reasonable attorney fees pursuant to G.S. 75-16.1, those findings satisfied the trial court's obligation to find that defendants refused to resolve the matter fully. Shepard v. Bonita Vista Props., L.P., 191 N.C. App. 614, 664 S.E.2d 388, 2008 N.C. App. LEXIS 1489 (2008).

In an action to confirm an arbitration award by a contractor, the trial court properly declined to award attorney fees to property owners under G.S. 75-16.1; the owners resisted arbitration up to and including at the hearing from which the trial court finally compelled arbitration. Creekside Constr. Co. v. Dowler, 172 N.C. App. 558, 616 S.E.2d 609, 2005 N.C. App. LEXIS 1783 (2005).

Trial court did not abuse its discretion in awarding attorney's fees because the trial court found that the plaintiff knew, or should have known, that it would be unable to establish any damages arising from the alleged conduct of the defendant and that the action was frivolous and malicious; furthermore, the appellate court found that the trial court's decision was not manifestly unsupported by reason. Castle

McCulloch, Inc. v. Freedman, 169 N.C. App. 497, 610 S.E.2d 416, 2005 N.C. App. LEXIS 604 (2005), aff'd, 360 N.C. 57, 620 S.E.2d 674 (2005).

Arbitrators' award of attorney fees to plaintiffs under G.S. 75-16.1 was properly confirmed by the trial court; although there was no question that defendants could have argued to the arbitrators that the parties' agreement, together with previous caselaw's application of former G.S. 1-567.11, precluded any award of attorneys' fees, defendants failed to do so and thus waived their right to object. WMS, Inc. v. Weaver, 166 N.C. App. 352, 602 S.E.2d 706, 2004 N.C. App. LEXIS 1782 (2004), cert. denied, 359 N.C. 197, 608 S.E.2d 330 (2004).

Award of attorneys' fees to plaintiff would be upheld where the trial court made findings that defendant specifically intended to deceive creditors, that his refusal to pay was unwarranted, and that as a result of defendants' actions, plaintiff supplied materials and received no payment in return. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Failure to Prove Unfair Claims Practices Does Not Necessitate Judgment Against Claim for Unfair Trade Practices. — Award of treble damages and attorney fees under the North Carolina Unfair and Deceptive Trade Practices Act was not precluded by earlier summary judgment for the insurer on insured's claim under the North Carolina Unfair Claims Settlement Practices Act; failure to prove unfair claims practices does not independently necessitate judgment as a matter of law against a related claim for unfair trade practices. High Country Arts & Craft Guild v. Hartford Fire Ins. Co., 126 F.3d 629 (4th Cir. 1997).

Fees Allowed for Prosecuting Appeal and Preparation for Retrial. — Where tenants sought review of the trial court's refusal to submit the issue of damages to the jury and prevailed on this issue on appeal and the trial court had already found in the previous order that landlord's conduct was willful and their refusal to settle the dispute was unwarranted, tenants were entitled to legal fees for prosecuting the appeal as well as for the preparation for retrial. Cotton v. Stanley, 94 N.C. App. 367, 380 S.E.2d 419 (1989).

Counter-claimants who were initially awarded attorneys' fees under this section were also entitled to an additional award of attorneys' fees for time spent in protecting their judgment and for attorneys' fees for time expended on appeal. City Fin. Co. v. Boykin, 86 N.C. App. 446, 358 S.E.2d 83 (1987).

Findings of Fact in Record. — In order for the appellate court to determine if the award of attorneys' fees is reasonable, the record must contain findings of fact to support the award. Morris v. Bailey, 86 N.C. App. 378, 358 S.E.2d 120 (1987).

Findings of Fact Held Sufficient. — Trial judge had sufficient facts upon which to base his legal conclusion awarding attorneys' fees; evidence was sufficient where defendants willfully represented to plaintiffs that the house was to be covered under the Homeowners Warranty Program and then willfully failed to have the house registered under the Homeowners Warranty Program and there was an unwarranted refusal by the defendants to fully resolve the matter which constituted the basis of plaintiffs' suit under this Chapter. Love v. Keith, 95 N.C. App. 549, 383 S.E.2d 674 (1989), overruled on other grounds, Custom Molders v. American Yard Prods., 342 N.C. 133, 463 S.E.2d 199 (1995).

District court properly awarded attorneys' fees to plaintiff debris removal subcontractor pursuant to this section, where there was evidence that defendant contractor misrepresented to plaintiff the scope of its own contract in order to induce him to subcontract and refused to seriously discuss settlement in which the plaintiff would have settled for $350,000, where the verdict returned was for $400,000, not including attorneys fees and costs, and where the district court considered the 12 factors discussed in Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978), as evidenced by its deduction of $4,000 from the fees requested. United States ex rel. S&D Land Clearing v. D'Elegance Mgmt., — F.3d —, 2000 U.S. App. LEXIS 16173 (4th Cir. July 13, 2000).

Where trial court found that defendant willfully engaged in unfair and deceptive practices by entering into contract for specifically designed parts without intent to be bound by contract and defendant's refusal to settle the case was unwarranted, award of attorney fees to plaintiff manufacturer was justified under unfair and deceptive trade practices statute. Custom Molders, Inc. v. Roper Corp., 101 N.C. App. 606, 401 S.E.2d 96, aff'd per curiam, 330 N.C. 191, 410 S.E.2d 55 (1991).

Where defendant willfully committed the acts charged and there was an unwarranted refusal to settle, the findings were sufficient to support the award for attorneys' fees under this section. Garlock v. Henson, 112 N.C. App. 243, 435 S.E.2d 114 (1993).

Where the record was rife with evidence of defendant's intractability, the court's findings on the issues of willfulness and refusal to resolve the matter supported the award of attorneys' fees. Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994).

Plaintiff was entitled to attorneys' fees pursuant to this section in connection with services performed in appeal to the State Supreme Court which was necessary in order to protect plaintiff's right to postjudgment interest. Custom Molders, Inc. v. American Yard Prods., Inc., 342 N.C. 133, 463 S.E.2d 199 (1995).

Award for attorneys fees to plaintiffs was appropriate where defendants engaged in deceptive trade practices by changing and recording plat to show the acreage of subdivision lot as 1.41 acres although plaintiffs had already signed an offer or purchase based on plat showing the acreage as 1.88 acres. Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920 (1998), cert. denied, 348 N.C. 282, 501 S.E.2d 918 (1998).

The trial court made appropriate findings before awarding attorney's fees for an insured's unfair business practices, including those addressed to the time and labor expended by the attorney, the skill required to perform the services rendered, the experience and ability of the attorney, and the customary fee for like work. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Findings of Fact Held Insufficient to Support Attorneys' Fees. — Where the only findings of fact in support of the amount of the award for attorneys' fees were that plaintiff's attorney "provided good and valuable services"; that the reasonable value of the services provided by plaintiff's attorney was $2,000.00; and that plaintiff's fee contract with her attorney provided for a contingent fee of one-third of the damage award, those findings are not sufficient to support an award of $2,000. Epps v. Ewers, 90 N.C. App. 597, 369 S.E.2d 104 (1988).

Trial court committed reversible error in setting an unreasonable attorneys' fee award; order was deficient in that findings of fact were inadequate to enable court to determine whether or not the award of attorneys' fees was reasonable; the order merely stated "The court in its discretion therefore awards an additional amount of one thousand, five hundred dollars ($1,500) in attorneys' fees." Cotton v. Stanley, 94 N.C. App. 367, 380 S.E.2d 419 (1989).

Case was remanded for failure to make necessary findings of facts regarding time, labor expended, skills, customary fees, and the experience and ability of the attorneys to support the amount of the sanctions award. Polygenex Int'l, Inc. v. Polyzen, Inc., 133 N.C. App. 245, 515 S.E.2d 457 (1999).

Trial court's findings, even if supported by the evidence, were not adequate to justify an award of fees under G.S. 75-16.1, because the court's findings did not address either of the grounds for attorneys fees specified in the statute; therefore, the appellate court vacated the finding of fact and conclusion of law paragraphs from the trial court's order and remanded the case for further proceedings. Pierce v. Reichard, 163 N.C. App. 294, 593 S.E.2d 787, 2004 N.C. App. LEXIS 382 (2004).

Although plaintiff was entitled to attorney fees under G.S. 75-16.1 and G.S. 66-111, there were no findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney; thus, the court could not determine the reasonableness of the trial court's award. Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc., 180 N.C. App. 70, 637 S.E.2d 230, 2006 N.C. App. LEXIS 2253 (2006).

Where No Verdict Was Returned. — The trial judge erred in awarding attorneys' fees and expenses against the corporate defendant and taxing those fees as a part of the cost, where no verdict was returned against it. Taylor v. Foy, 91 N.C. App. 82, 370 S.E.2d 442 (1988), aff'd, 324 N.C. 331, 377 S.E.2d 745 (1989).

Improper Award of Attorney Fees Pursuant to a Rule 60 Motion. — When debtors' motion for attorney's fees, pursuant to G.S. 75-16.1, was denied, it was error for a trial court to grant attorney's fees pursuant to a reconsideration of the court's prior denial, under G.S. 1A-1, N.C. R. Civ. P. 60(b)(6), because the motion to reconsider raised alleged errors of law by claiming the trial court applied the wrong legal standard in denying the attorney's fees motion, and such errors could not properly be considered under a motion to reconsider, but, rather, had to be considered either on appeal or pursuant to a new trial motion under G.S. 1A-1, N.C. R. Civ. P. 59. Catawba Valley Bank v. Porter, 188 N.C. App. 326, 655 S.E.2d 473, 2008 N.C. App. LEXIS 77 (2008).

Trial court erred in using the incorrect standard in its order awarding attorney's fees to the prevailing home sellers in the unfair and deceptive practices claim brought by the home buyer because the standard for awarding attorney's fees under G.S. 75-16.1(2) was that the plaintiff knew, or should have known, the action was frivolous and malicious; the trial court instead applied the lower standard of an unwarranted refusal to resolve the case. Thus, remand of the matter to the trial court was necessary for additional findings of fact and conclusions of law regarding the award of attorney's fees because the appellate court was unable to determine if the trial court would have awarded attorney's fees if it had applied the correct standard. Birmingham v. H&H Home Consultants & Designs, Inc., 189 N.C. App. 435, 658 S.E.2d 513, 2008 N.C. App. LEXIS 646 (2008).

Judgment Awarding Damages Not Appealable if Attorney's Fee Claim Unresolved. — Judgment awarding consumers damages pursuant to the consumers' claim under G.S. 75-1.1, but not ruling on the consumers' request for attorney's fees, under G.S. 75-16.1, could not be appealed, despite the trial court's certification, under G.S. 1A-1, N.C. R.

Civ. P. 54(b), that the judgment was final, because the judgment was interlocutory, as the issue of attorney's fees had not been resolved. Bumpers v. Cmty. Bank of N. Va., — N.C. App. —, 675 S.E.2d 697, 2009 N.C. App. LEXIS 516 (2009).

Applied in Stone v. Paradise Park Homes, 37 N.C. App. 97, 245 S.E.2d 801 (1978); United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049 (E.D.N.C. 1980); American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983); Wilder v. Squires, 68 N.C. App. 310, 315 S.E.2d 63 (1984); North Carolina Nat'l Bank v. Carter, 71 N.C. App. 118, 322 S.E.2d 180 (1984); Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985); Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918 (1986); Investors Title Ins. Co. v. Herzig, 101 N.C. App. 127, 398 S.E.2d 659 (1990); Investors Title Ins. Co. v. Herzig, 330 N.C. 681, 413 S.E.2d 268 (1992); Peterson v. Bozzano, 173 Bankr. 990 (Bankr. M.D.N.C. 1994); Hicks v. Clegg's Termite & Pest Control, Inc., 132 N.C. App. 383, 512 S.E.2d 85 (1999); Reinhold v. Lucas, 167 N.C. App. 735, 606 S.E.2d 412, 2005 N.C. App. LEXIS 10 (2005); Eley v. Mid/East Acceptance Corp. of N.C., Inc., 171 N.C. App. 368, 614 S.E.2d 555, 2005 N.C. App. LEXIS 1253 (2005); Sharyn's Jewelers, LLC v. Ipayment, Inc., — N.C. App. —, 674 S.E.2d 732, 2009 N.C. App. LEXIS 362 (2009).

Cited in CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 448 F. Supp. 475 (W.D.N.C. 1978); Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978); Burgess v. North Carolina Farm Bureau Mut. Ins. Co., 44 N.C. App. 441, 261 S.E.2d 234 (1980); Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712 (4th Cir. 1983); ITCO Corp. v. Michelin Tire Corp., 722 F.2d 42 (4th Cir. 1983); Skinner v. E.F. Hutton & Co., 314 N.C. 267, 333 S.E.2d 236 (1985); Weft, Inc. v. G.C. Inv. Assocs., 630 F. Supp. 1138 (E.D.N.C. 1986); Wilder v. Hodges, 80 N.C. App. 333, 342 S.E.2d 57 (1986); Robertson v. Boyd, 88 N.C. App. 437, 363 S.E.2d 672 (1988); Miller v. Ensley, 88 N.C. App. 686, 365 S.E.2d 11 (1988); T'ai Co. v. Market Square Ltd. Partnership, 92 N.C. App. 234, 373 S.E.2d 885 (1988); Richmar Dev., Inc. v. Midland Doherty Servs., Ltd., 717 F. Supp. 1107 (W.D.N.C. 1989); Hajmm Co. v. House of Raeford Farms, Inc., 94 N.C. App. 1, 379 S.E.2d 868 (1989); Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990); Bhatti v. Buckland, 99 N.C. App. 750, 394 S.E.2d 192 (1990); Tomlinson v. Camel City Motors, Inc., 330 N.C. 76, 408 S.E.2d 853 (1991); Nintendo of Am., Inc. v. Aeropower Co., 34 F.3d 246 (4th Cir. 1994); Polygenex Int'l, Inc. v. Polyzen, Inc., 133 N.C. App. 245, 515 S.E.2d 457 (1999); Republic Mtg. Ins. Co. v. Brightware, Inc., 35 F. Supp. 2d 482 (M.D.N.C. 1999); Poor v. Hill, 138 N.C. App. 19, 530 S.E.2d 838, 2000 N.C. App. LEXIS 540 (2000); Allen v. Roberts Constr. Co., 138 N.C. App. 557, 532 S.E.2d 534, 2000 N.C. App. LEXIS 783 (2000); Static Control Components, Inc. v. Darkprint Imaging, Inc., 240 F. Supp. 2d 465, 2002 U.S. Dist. LEXIS 25255 (M.D.N.C. 2002); Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 586 S.E.2d 507, 2003 N.C. App. LEXIS 1825 (2003); Beroth Oil Co. v. Whiteheart, 173 N.C. App. 89, 618 S.E.2d 739, 2005 N.C. App. LEXIS 1903 (2005); Craven v. SEIU COPE, 188 N.C. App. 814, 656 S.E.2d 729, 2008 N.C. App. LEXIS 266 (2008); Jones v. Harrelson & Smith Contrs., LLC, — N.C. App. —, 670 S.E.2d 242, 2008 N.C. App. LEXIS 2270 (2008).

§ 75-16.2. Limitation of actions.

Any civil action brought under this Chapter to enforce the provisions thereof shall be barred unless commenced within four years after the cause of action accrues.

When any civil or criminal proceeding shall be commenced by the Attorney General or by any of the district attorneys of the State to prevent, restrain or punish a violation of Chapter 75, the running of the period of limitation with respect to every private right of action arising under Chapter 75 and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; provided that when the running of the period of limitation with respect to a cause of action arising under Chapter 75 shall be suspended hereunder, any action to enforce such cause of action shall be barred unless commenced either within the period of suspension or within four years after the cause of action accrued, whichever is later. (1979, c. 169, s. 1.)

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

For note, "Consumer Protection — The Unfair Trade Practice Act and the Insurance Code: Does Per Se Necessarily Preempt?," see 10 Campbell L. Rev. 487 (1988).

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

CASE NOTES

Applicable Statute Prior to Enactment of Section. — An action under G.S. 75-16 to recover treble damages for a violation of the unfair trade practices statute, G.S. 75-1.1, instituted prior to the enactment of the four-year statute of limitations of this section on June 12, 1969, is governed by the three-year limitation of G.S. 1-52(2), not the one-year limitation of G.S. 1-54(2) applicable to actions to recover a statutory penalty. Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

Accrual of Cause of Action. — Any breach of contract by a trademark licensor first occurred when the third party's interim injunction based on its assertion of a superior registration effectively caused a cessation of performance of the licensor's contractual obligation, which was to continuously provide the trademark for the licensee's use. On comparable reasoning, any claim for fraud or unfair trade practices also accrued no later than the date of the interim injunction. Rothmans Tobacco Co. v. Liggett Group, Inc., 770 F.2d 1246 (4th Cir. 1985).

A cause of action "accrues" under this statute when the alleged violation occurs. United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985).

For actions based on fraud, the cause of action accrues at the time the fraud is discovered or should have been discovered with the exercise of reasonable diligence. Nash v. Motorola Communications & Elecs., Inc., 96 N.C. App. 329, 385 S.E.2d 537 (1989), aff'd, 328 N.C. 267, 400 S.E.2d 36 (1991).

Where plaintiff alleged that defendants were guilty of unfair trade practices by using preferential pricing to compete for a contract which plaintiff had with one of the defendants, plaintiff's cause of action began to accrue on the date the contract in question was terminated. Ring Drug Co. v. Carolina Medicorp Enters., Inc., 96 N.C. App. 277, 385 S.E.2d 801 (1989), overruled on other grounds, Crossman v. Moore, 341 N.C. 185, 459 S.E.2d 715 (1995).

Where plaintiff, by a reasonably diligent effort, could not have ascertained that he was in violation of FCC regulations, his cause of action against defendants for false or deceptive statements to him regarding the set up of his business did not accrue until the FCC notified plaintiff to cease and desist operations. Nash v. Motorola Communications & Elecs., Inc., 96 N.C. App. 329, 385 S.E.2d 537 (1989), aff'd, 328 N.C. 267, 400 S.E.2d 36 (1991).

Homeowner's claim for allegedly illegal interest rates and fees on her second mortgage was dismissed because the two year statute of limitations pursuant to G.S. 75-16.2 had expired; the homeowner should have discovered any violation on the day of the closing. Faircloth v. Nat'l Home Loan Corp., 313 F. Supp. 2d 544, 2003 U.S. Dist. LEXIS 4206 (M.D.N.C. 2003).

Cigarette manufacturer's North Carolina Unfair and Deceptive Trade Practices Act claims arising from an alleged scheme by retailers and wholesalers to obtain discount payments from the manufacturer without passing the discount on to retail customers were not time-barred, as the complaint alleged that the fraud was discovered two years before the complaint was filed. R.J. Reynolds Tobacco Co. v. S K Everhart, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 13440 (M.D.N.C. July 31, 2003).

Plaintiffs' claims against a trust company and its trustee under G.S. 75-1.1 failed where the statute of limitations for the action began to accrue when plaintiffs closed on their property and as that was more than four years prior to the filing of the action, the statute of limitations in G.S. 75-16.2 had expired. Skinner v. Preferred Credit, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005).

In cases based on allegedly fraudulent conduct or negligent misrepresentation, the cause of action accrues at the time the fraud is discovered or should have been discovered with the exercise of reasonable diligence. Ordinarily, whether a person has exercised due diligence is a question for the jury; however, where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the mistake or discrepancy but failed to do so, the absence of reasonable diligence is established as a matter of law. Rich Food Servs., Inc. v. Rich Plan Corp., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27799 (E.D.N.C. Nov. 11, 2002).

It was error to dismiss the insured's negligence, fraud, constructive fraud, breach of contract, breach of covenant of good faith and fair dealing with punitive damages, unfair and deceptive trade practices, and breach of fiduciary duty claims as untimely under G.S. 1-56, 1-52(1), (5), and (9), and G.S. 75-16.2, as the claims accrued when the insured was denied underinsured motorist (UIM) coverage since: (1) the insured reasonably should have discovered the alleged fraud or negligence committed by the insurer and the agent in allegedly forging the insured's name on a rejection of UIM coverage form when the insured was denied UIM coverage, (2) the insured signed the policy in 1998, and was injured in a car accident in October 2000, (3) the insured filed suit in November 2005, (4) the insured was first informed that the policy did not include UIM coverage in February 2003, and (5) the insured would not have acquired any contractual right to such coverage if it existed until November 2004, when the insured exhausted the other driver's policy. Piles v. Allstate Ins. Co., 187 N.C. App. 399, 653 S.E.2d 181, 2007 N.C. App. LEXIS 2449 (2007).

Time of Filing. — Unfair trade practice claim was not necessarily barred by the four-year statute of limitations under this section, where the complaint alleged that defendants' unfair purchase was on March 19, 1984, and action was filed on Monday, March 21, 1988. Adams v. Moore, 96 N.C. App. 359, 385 S.E.2d 799 (1989), cert. denied, 326 N.C. 46, 389 S.E.2d 83 (1990).

When a consumer alleged that a debt collector violated G.S. 75-52(4) by calling the consumer at work, summary judgment was properly granted as to the consumer's claim because the consumer retired prior to the applicable limitations period in G.S. 75-16.2 which was before the time the consumer filed suit, so the consumer could not show that any violations by the collector of this provision occurred within the statute of limitations. Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 646 S.E.2d 381, 2007 N.C. App. LEXIS 1472 (2007).

Trademark Infringement. — Suit proper where some of the acts of trademark infringement occurred within the limitations period. Lyons Partnership, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 2001 U.S. App. LEXIS 3985 (4th Cir. 2001).

Since plaintiff failed to file her claim for unfair and deceptive trade practices within the four-year limitations period, the trial court did not err in granting defendants summary judgment. Jones v. Asheville Radiological Group, P.A., 134 N.C. App. 520, 518 S.E.2d 528 (1999).

Unfair and Deceptive Trade Practices Claim. — Insurance company which engaged in the act or practice of not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability had become reasonably clear, G.S. 58-63-15(11)(f), also violated G.S. 75-1.1, as a matter of law, without the necessity of an additional showing of frequency indicating a "general business practice," and allegations to that effect sufficiently stated an unfair and deceptive trade practices (UDTP) claim; while insureds' claims for breach of contract, breach of fiduciary duty, and bad faith were barred by the three-year statute of limitations, their UDTP claim was separate and distinct from the claims on the underlying insurance policy, was thus governed by the G.S. 75-16.2 four-year statute of limitations applicable to such claims, and was therefore timely. Page v. Lexington Ins. Co., 177 N.C. App. 246, 628 S.E.2d 427, 2006 N.C. App. LEXIS 862 (2006).

Telephone Harassment. — When consumers alleged that a debt collector violated G.S. 75-52(3) by placing harassing telephone calls to the consumers' residence, it was error to dismiss the claim on summary judgment because the collector's records showed the consumers were called at least 2,200 times in approximately six years, sometimes up to six times a day, and the consumers alleged the callers were rude and abrasive and that the calls were demeaning, and the claim was not barred by the statute of limitations in G.S. 75-16.2 because some calls were made within the period and the earlier calls could be used to prove the later calls. Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 646 S.E.2d 381, 2007 N.C. App. LEXIS 1472 (2007).

Denial of Insurance Coverage. — In an action in which an insured alleged that an insurer violated the Unfair and Deceptive Trade Practices Act, G.S. 75-1.1 et seq., by refusing to timely and adequately pay the full amount due under a commercial insurance policy for damage to property, the insured's claims were time-barred under G.S. 75-16.2 to the extent that the claims were based on conduct that occurred more than four years before the complaint was filed. Amatulli & Sons, LLC v. Great N. Ins. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 1589 (W.D.N.C. Jan. 8, 2008).

Applied in Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984); Norlin Indus., Inc. v. Music Arts, Inc., 67 N.C. App. 300, 313 S.E.2d 166 (1984); Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984); Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985); Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994); Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994); Medicare Rentals, Inc. v. Advanced Servs., 119 N.C. App. 767, 460 S.E.2d 361 (1995); Hinson v. United Fin. Servs., Inc., 123 N.C. App. 469, 473 S.E.2d 382 (1996); Jones v. Asheville Radiological Group, 129 N.C. App. 449, 500 S.E.2d 740 (1998); Wysong & Miles Co. v. Employers of Wausau, 4 F. Supp. 2d 421 (M.D.N.C. 1998).

Cited in Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986); Burgess v. Equilink Corp., 652 F. Supp. 1422 (W.D.N.C. 1987); Deadwyler v. Volkswagen of Am., Inc., 134 F.R.D. 128 (W.D.N.C. 1991); Jefferson-Pilot Life Ins. Co. v. Spencer, 110 N.C. App. 194, 429 S.E.2d 583 (1993).

§ 75-17. Lender may not require borrower to deal with particular insurer.

No person, firm, or corporation engaged in lending money on the security of real or personal property, and no trustee, director, officer, agent, employee, affiliate, or associate, of any such person, firm, or corporation, shall either directly or indirectly require or impose as a condition precedent

(1) To financing the purchase of such property, or

(2) To lending money upon the security of a mortgage, deed of trust, or other security instrument, or

(3) For the renewal or extension of any such loan, mortgage, or deed of trust, or

(4) For the performance of any other act in connection therewith,

that such person, firm or corporation

a. For whom such purchase is to be financed, or

b. To whom the money is to be loaned, or

c. For whom such extension, renewal, or other act is to be granted,

negotiate, procure, or otherwise obtain any policy of insurance or renewal, or extension thereof, covering such property, or a security interest therein, by or through a particular insurance company, agent, broker, or other person so specified or otherwise designated in any manner by the lenders, or their agents or employees or affiliated or related companies. (1969, c. 1032, s. 1.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-18. Lender may require nondiscriminatory approval of insurer.

Although the lender and other persons enumerated in G.S. 75-17 may not specify or designate as a condition precedent a particular insurance company or agent, those persons, firms, or corporations engaged in lending money may approve the insurer selected by the borrower on a reasonable, nondiscriminatory basis, related to the solvency of the company and the type and provisions of policy coverage. (1969, c. 1032, s. 2.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-19. Violators subject to fine and injunction.

The superior court, on complaint by any person that G.S. 75-17 or G.S. 75-18 is being violated, may issue an injunction against such violation and may fine all persons, firms, corporations, and officers, directors, trustees, agents, employees, or affiliates of such up to two thousand dollars ($2,000) per person for such violation. In event of a disregard of such injunction or other court order, the superior court shall hold such parties in contempt and prescribe such further penalties as the court in its discretion shall so determine. The clear proceeds of fines provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1969, c. 1032, s. 3; 1998-215, s. 100.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-20. Unsolicited checks to secure loans.

(a) No person, firm, or corporation engaged in lending money shall deliver to a person an unsolicited check made out to the recipient that upon cashing, obligates the recipient to repay the amount of the check plus interest and fees, unless all of the following requirements are satisfied:

(1) In addition to any disclosures otherwise required by law, the solicitation for loans using a facsimile or negotiable check shall disclose both of the following on the face of the check:

a. In at least 10-point boldface type a statement in substantially the following form: "THIS IS A SOLICITATION FOR A LOAN. READ THE ATTACHED DISCLOSURES BEFORE SIGNING THIS AGREEMENT."

b. In at least 6-point type a statement in substantially the following form: "By endorsing the back of this check, you accept our offer and agree to the terms of your loan agreement contained in the disclosure statement attached to this check."

(2) Notification of the loan agreement being activated by endorsement must be conspicuously printed in at least 6-point type on the back of the check in substantially the following form: "By endorsing this check, you agree to repay this loan according to the terms of the attached loan agreement."

(3) The check is attached to a disclosure statement that is detachable and that contains in at least 10-point boldface type a statement conspicuously placed in substantially the following form: "This is a loan solicitation. If you cash this check, you are agreeing to borrow the sum of $________ at the ________ % rate of interest for a period of ________ months. Your monthly payments will be $________ for ________ months. If you are late with a payment, you will be charged the following fees in addition to your monthly payment: (list fees). All other terms of this loan are clearly identified as loan terms and appear on the back of the check or on this attachment. Read these terms carefully before you cash this check. Cashing this check constitutes a loan transaction. You may cancel this loan by returning the amount of the check to the lender within 10 days of the date this check is cashed. You may prepay this loan agreement at anytime without penalty. READ THE AGREEMENT BEFORE SIGNING."

(4) The recipient has a right to cancel the loan by refunding to the lender the amount of the check within 10 days of the date the check is cashed. The loan is deemed refunded when a refund of the amount of the check is received by the lender within 10 days of the date the check is cashed.

(b) In the event an unsolicited check is stolen or otherwise obtained by someone other than the intended payee, and the check is cashed fraudulently or without authorization from the payee, the lender who issued the check shall provide the following recourse to the intended payee:

(1) The lender, upon receipt of notification that intended payee did not negotiate the check, shall promptly provide the intended payee with a statement or affidavit to be signed by the intended payee confirming that the intended payee did not deposit or cash the check or receive the proceeds of the check. The lender shall also provide the intended payee with the name and telephone number of a contact person designated by the lender to provide assistance to intended payees who have been victimized by the fraudulent negotiation of unsolicited checks. The lender shall cease all collection activity against the intended payee until the lender completes an investigation into the transaction.

(2) The intended payee shall be directed to complete and return the confirmation statement to the lender or an affiliate of the lender.

(3) Within 30 days of the receipt of the confirmation statement, the lender shall conduct a reasonable investigation and determine whether the check was fraudulently negotiated. Absent evidence to the contrary, the presumption shall be that the confirmation statement submitted by the intended payee is accurate. The lender shall notify the intended payee in writing of the results of the investigation. If it is determined that the check was cashed fraudulently, the lender shall take immediate action to remove the intended payee from all liability on the account and to request all credit reporting agencies to remove references to the transaction, if any, from the consumer's credit reports.

(4) A consumer who is an intended payee of an unsolicited check under this section may bring a civil action to recover damages, costs, and attorney fees for any violation of this subsection.

(c) The provisions of this section shall not apply to a transaction in which a consumer has submitted an application or requested an extension of credit from the lender before receiving the check or instrument, or where the lender has an existing account relationship with the consumer.

(d) A violation of this section is an unfair trade practice under G.S. 75-1.1 and is subject to all of the enforcement and penalty provisions of an unfair trade practice under this Article. (2001-391, s. 1.)

§§ 75-21 through 75-26: Reserved for future codification purposes.

§ 75-27. Unsolicited merchandise.

Unless otherwise agreed, where unsolicited goods are delivered to a person, he has a right to refuse to accept delivery of the goods and is not bound to return such goods to the sender. If such unsolicited goods are addressed to and intended for the recipient, they shall be deemed a gift to the recipient, who may use them or dispose of them in any manner without any obligation to the sender. (1969, c. 70, s. 1; 1977, c. 498.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-28. Unauthorized disclosure of tax information; violation a Class 1 misdemeanor.

Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for any person, firm or corporation employed or engaged to prepare, or who or which prepares or undertakes to prepare, for any other person or taxpayer any tax form, report or return, to disclose, divulge or make known in any manner or use for any purpose or in any manner other than in the preparation of such form, report or return, without the express consent of the taxpayer or person for whom the form or return is prepared, the name or address of the taxpayer or such other person, the amount of income, income tax or other taxes, or any other information shown on or included in such form, report or return, or any information which may be or may have been furnished by the taxpayer or such other person to the preparer of such form, report or return or to the person, firm or corporation so employed or engaged.

Nothing in this section shall be construed to prohibit the examination of any person, books, papers, records or other data in accordance with the authority provided in G.S. 105-258.

Any person, firm or corporation, or any officer, agent, clerk, employee, or former officer or employee, of any firm or corporation engaged or formerly engaged in the preparation of tax forms, reports or returns for others, whether acting for himself or as agent for such corporation, who or which shall violate the provisions of this section shall be guilty of a Class 1 misdemeanor. (1971, c. 231; 1993, c. 485, s. 32; c. 539, s. 561; 1994, Ex. Sess., c. 14, s. 43; c. 24, s. 14(c).)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Applied in Dixon, Odum & Co. v. Sledge, 59 N.C. App. 280, 296 S.E.2d 512 (1982).

§ 75-29. Unfair and deceptive trade names; use of term "wholesale" in advertising, etc.

(a) No person, firm or corporation shall advertise the sale of its merchandise using the term "wholesale" with regard to its sale prices, except as such word may appear in the company or firm name, unless such advertised sale or sales is, or are, to a customer or customers having a certificate of resale issued pursuant to G.S. 105-164.28 and recorded as required by G.S. 105-164.25 or unless the wholesale price is established by an independent agency not engaged in the manufacture, distribution or sale of such merchandise.

No person, firm or corporation shall utilize in any commercial transaction a company or firm name which contains the word "wholesale" unless such person, firm or corporation is engaged principally in sales at wholesale as defined in G.S. 105-164.3. For the purposes of determining whether sales are made principally at wholesale or retail, all sales to employees of any such person, firm or corporation, all sales to organizations subject to refunds pursuant to G.S. 105-164.14, and all exempt sales pursuant to G.S. 105-164.13 shall be considered sales at wholesale. Sales of merchandise for delivery by the seller to the purchaser at a location other than the seller's place of business shall be considered sales at wholesale for the purposes of this section.

(b) The violation of any provision of this section shall be considered an unfair trade practice, as prohibited by G.S. 75-1.1.

(c) This section shall not apply to the sales of farm products, fertilizers, insecticides, pesticides or petroleum. (1973, c. 1392, ss. 1, 2.)

§§ 75-30, 75-30.1: Repealed by Session Laws 2003-411, ss. 1, 2, effective October 1, 2003, and applicable to telephone solicitations made on or after that date.

Cross References. — As to present provisions pertaining to consumer protections from unwanted telephone solicitations, see G.S. 75-100 et seq.

§ 75-31. Work-at-home solicitations.

No person, firm, association, or corporation shall advertise, represent, or imply that any person can earn money by stuffing envelopes, addressing envelopes, mailing circulars, clipping newspaper and magazine articles, or performing similar work, unless the person, firm, association or corporation making the advertisement or representation:

(1) Actually pays a wage, salary, set fee, or commission to others for performing the represented tasks; and
(2) At no time requires the person who will perform the represented tasks to purchase from or make a deposit to the solicitor on any instructional booklets, brochures, kits, programs or similar information materials, mailing lists, directories, memberships in cooperative associations, or other items or services. (1979, c. 724, s. 1.)

§ 75-32. Representation of winning a prize.

No person, firm or corporation engaged in commerce shall, in connection with the sale or lease or solicitation for the sale or lease of any goods, property, or service, represent that any other person, firm or corporation has won anything of value or is the winner of any contest, unless all of the following conditions are met:
(1) The recipient of the prize must have been selected by a method in which no more than ten percent (10%) of the names considered are selected as winners of any prize;
(2) The recipient of the prize must be given the prize without any obligation; and
(3) The prize must be delivered to the recipient at no expense to him, within 10 days of the representation.
The use of any language that has a tendency to lead a reasonable person to believe he has won a contest or anything of value, including but not limited to "congratulations," and "you are entitled to receive," shall be considered a representation of the type governed by this section. (1979, c. 879, s. 1.)

CASE NOTES

Where plaintiff was the winner of a contest, it was not a violation of this statute for defendants to represent that fact to the public. Malone v. Topsail Area Jaycees, Inc., 113 N.C. App. 498, 439 S.E.2d 192 (1994).

Claim Shown. — Where plaintiff had been informed that he won a truck and then was later told that he did not win, plaintiff was able to state a cause of action for breach of contract and for violation of this section. Jones v. Capitol Broadcasting Co., 128 N.C. App. 271, 495 S.E.2d 172 (1998).

Remedies. — Under G.S. 75-16, a sweepstakes contestant was not entitled to damages for unfair and deceptive trade practices, pursuant to G.S. 75-1.1 and G.S. 75-32; even if the contest sponsor's actions constituted actionable conduct pursuant to G.S. 75-1.1 and G.S. 75-32, no reasonable person could have relied on the representations contained therein to conclude that he or she would be entitled to the entire contest prize because any actual injury suffered could not have been, as a matter of law, proximately caused by the sponsor's representations. Fozard v. Publrs. Clearing House, Inc., — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 22994 (M.D.N.C. Apr. 29, 1999).

§ 75-33. Representation of eligibility to win a prize.

(a) No person, firm or corporation engaged in commerce shall, in connection with the sale or lease or solicitation for sale or lease of any goods, property or service, represent that another person, firm, and/or corporation has a chance to receive any prize or item of value without clearly disclosing on whose behalf the contest or promotion is conducted, and all material conditions which a participant must meet. Additionally, each of the following must be clearly and prominently disclosed immediately adjacent to the description of the item or prize to which it relates:
(1) The actual retail value of each item or prize (the price at which substantial sales of the item were made in the area within the last 90 days, or if no substantial sales were made, the actual cost of the item

or prize to the person on whose behalf the contest or promotion is conducted);

(2) The actual number of each item or prize to be awarded;

(3) The odds of receiving each item or prize.

It shall be unlawful to make any representation of the type governed by this section, if it has already been determined which items will be given to the person to whom the representation is made.

(b) The provisions of this section shall not apply where (i) all that is asked of participants is that they complete and mail, or deposit at a local retail commercial establishment, an entry blank obtainable locally or by mail, or call in their entry by telephone, and (ii) at no time are participants asked to listen to a sales presentation.

(c) To the extent that representations of the type governed by this section are broadcast by radio or television or carried by cable-television, the required disclosures need not be made, if the required information is made available to interested persons on request without charge or cost to them.

(d) Nothing in this section shall create any liability for acts by the publisher, owner, agent or employee of a newspaper, periodical, radio station, television station, cable-television system or other advertising medium arising out of the publication or dissemination of any advertisement or promotion governed by this section, when the publisher, owner, agent or employee did not know that the advertisement or promotion violated the requirements of this section. (1979, c. 879, s. 1; 1981, c. 806; 1983, c. 721, s. 3.)

§ 75-34. Representation of being specially selected.

No person, firm or corporation engaged in commerce shall represent that any other person, firm or corporation has been specially selected in connection with the sale or lease or solicitation for sale or lease of any goods, property, or service, unless all of the following conditions are met:

(1) The selection process is designed to reach a particular type or particular types of person, firm or corporation;

(2) The selection process uses a source other than telephone directories, city directories, tax listings, voter registration records, purchased mailing lists, or similar common sources of names;

(3) No more than ten percent (10%) of those considered are selected.

The use of any language that has a tendency to lead a reasonable person to believe he has been specially selected, including but not limited to "carefully selected" and "you have been chosen," shall be considered a representation of the type governed by this selection [section]. (1979, c. 879, s. 1.)

§ 75-35. Simulation of checks and invoices.

No person engaged in commerce shall in any manner issue any writing which simulates or resembles: (i) a negotiable instrument; or (ii) an invoice, unless the intended recipient has actually contracted for goods, property, or services for which the issuer seeks proper payment. (1979, c. 879, s. 1.)

§ 75-36. Certain contracts relating to toner or inkjet cartridges void and unenforceable as a matter of public policy.

Any provision in any agreement or contract that prohibits the reusing, remanufacturing, or refilling of a toner or inkjet cartridge is void and unenforceable as a matter of public policy. Nothing in this section shall prevent any maintenance contract that warrants the performance of equipment under the contract from requiring the use of new or specified toner or inkjet cartridges in the equipment under contract. (2003-386, s. 1.)

§ 75-37. Declaration of State public policy.

It is the public policy of this State to protect its citizens from price gouging during states of disaster. The State also realizes the difficulty in regulating prices while not defeating the ability of the market in goods and services from bringing supply back in balance with demand and not defeating the function of price in allocating scarce resources. (2003-412, s. 1.)

Editor's Note. — This section was enacted as G.S. 75-36 and was redesignated as G.S. 75-37 at the direction of the Revisor of Statutes.

§ 75-38. Prohibit excessive pricing during states of disaster, states of emergency, or abnormal market disruptions.

(a) Upon a triggering event, it is prohibited and shall be a violation of G.S. 75-1.1 for any person to sell or rent or offer to sell or rent any goods or services which are consumed or used as a direct result of an emergency or which are consumed or used to preserve, protect, or sustain life, health, safety, or economic well-being of persons or their property with the knowledge and intent to charge a price that is unreasonably excessive under the circumstances. This prohibition shall apply to all parties in the chain of distribution, including, but not limited to, a manufacturer, supplier, wholesaler, distributor, or retail seller of goods or services. This prohibition shall apply in the area where the state of disaster or emergency has been declared or the abnormal market disruption has been found.

In determining whether a price is unreasonably excessive, it shall be considered whether:

(1) The price charged by the seller is attributable to additional costs imposed by the seller's supplier or other costs of providing the good or service during the triggering event.

(2) The price charged by the seller exceeds the seller's average price in the preceding 60 days before the triggering event. If the seller did not sell or rent or offer to sell or rent the goods or service in question prior to the time of the triggering event, the price at which the goods or service was generally available in the trade area shall be used as a factor in determining if the seller is charging an unreasonably excessive price.

(3) The price charged by the seller is attributable to fluctuations in applicable commodity markets; fluctuations in applicable regional, national, or international market trends; or to reasonable expenses and charges for attendant business risk incurred in procuring or selling the goods or services.

(b) In the event the Attorney General investigates a complaint for a violation of this section and determines that the seller has not violated the provisions of this section and if the seller so requests, the Attorney General shall promptly issue a signed statement indicating that the Attorney General has not found a violation of this section.

(c) For the purposes of this section, the end of a triggering event is the earlier of 45 days after the triggering event occurs or the expiration or termination of the triggering event unless the prohibition is specifically extended by the Governor.

(d) A "triggering event" means the declaration of a state of emergency pursuant to G.S. 166A-8 or Article 36A of Chapter 14 of the General Statutes, the proclamation of a state of disaster pursuant to G.S. 166A-6, or a finding of abnormal market disruption pursuant to G.S. 75-38(e).

(e) An "abnormal market disruption" means a significant disruption, whether actual or imminent, to the production, distribution, or sale of goods and services in North Carolina, which are consumed or used as a direct result of an emergency or used to preserve, protect, or sustain life, health, safety, or economic well-being of a person or his or her property. A significant disruption may result from a natural disaster, weather, acts of nature, strike, power or energy failures or shortages, civil disorder, war, terrorist attack, national or local emergency, or other extraordinary adverse circumstances. A significant market disruption can be found only if a declaration of a state of emergency, state of disaster, or similar declaration is made by the President of the United States or an issuance of Code Red/Severe Risk of Attack in the Homeland Security Advisory System is made by the Department of Homeland Security, whether or not such declaration or issuance applies to North Carolina.

(f) The existence of an abnormal market disruption shall be found and declared by the Governor pursuant to the definition in subsection (e) of this section. The duration of an abnormal market disruption shall be 45 days from the triggering event, but may be renewed by the Governor if the Governor finds and declares the disruption continues to affect the economic well-being of North Carolinians beyond the initial 45-day period. (2003-412, s. 1; 2006-245, s. 1; 2006-259, s. 41.)

Editor's Note. — This section was enacted as G.S. 75-36.1 and was redesignated as G.S. 75-38 at the direction of the Revisor of Statutes.

§ 75-39. Conditioning services on electric service prohibited.

(a) No municipality or other provider of water or sewer services may offer, or agree to provide, extend, enhance, or accelerate the provision of water or sewer services, or facilities or other municipal services or facilities, to any person in consideration of that person or another person agreeing to receive electric service from the municipality or another electric supplier.

(b) No municipality or other provider of water or sewer services may refuse to provide, or threaten or act to deny, delay, or terminate the provision of, water or sewer services or facilities, or other municipal services or facilities, to any person as a result of, or in an attempt to influence, the choice of an electric supplier by that person or another person.

(c) A violation of this section by any municipality or other provider of water or sewer services shall constitute an unfair method of competition and an unfair act or practice under G.S. 75-1.1. (2005-150, s. 1.)

§ 75-40. Deadline for mailing consumer rebates.

(a) Any person, firm, or corporation engaged in commerce that offers a rebate shall provide the rebate to the consumer within 60 days of the date of receipt by the person, firm, or corporation of the completed rebate form submitted by the consumer. If the rebate claim is submitted electronically, the rebate shall be provided to the consumer within 60 days of the date upon which the claim is submitted. However, a person, firm, or corporation shall not be responsible for delays in providing rebates to consumers caused by conditions beyond their reasonable control including, but not limited to, natural disasters, wars, terrorist acts, and states of emergency. As used in this section, the following apply:

(1) The term "rebate" means the return of a portion of the purchase price paid by a consumer for goods or services that is conditioned upon the consumer submitting a request for redemption after satisfying the terms and conditions of the offer.
(2) The term "rebate" shall not include any refund that may be given to a consumer in accordance with a company's frequent shopper customer rewards program.
(3) The term "consumer" does not apply to those individuals who are eligible for rebates as result of their eligibility under Medicaid.

(b) Rebate forms shall include the telephone number or e-mail address of the person, firm, or corporation that is offering the rebate. Rebate forms shall also include all of the following conspicuously printed on the rebate form:
(1) The terms of the rebate.
(2) Requirements for a valid claim, including any additional information to be submitted with the rebate form.
(3) The expiration date of the rebate offer, if applicable.

(c) A rebate offer shall provide a period of at least 30 days during which the consumer may submit the rebate form. The time period allowed for submission shall begin as soon as reasonably possible, but no later than six months, after the date of purchase.

(d) Nothing in this section shall apply to a rebate offer of five dollars ($5.00) or less.

(e) Nothing in this section shall be construed to create liability on the part of a retailer for a rebate offered by a manufacturer or liability on the part of a manufacturer for a rebate offered by a retailer.

(f) A violation of this section is an unfair trade practice under G.S. 75-1.1 and is subject to all of the enforcement and penalty provisions of an unfair trade practice under this Article. (2007-170, s. 1.)

Editor's Note. — Session Laws 2007-170, s. 2, made this section effective October 1, 2007, and applicable to sales of goods and services that occur on or after that date.

§ 75-41. Contracts with automatic renewal clauses.

(a) Any person, firm, or corporation engaged in commerce that sells, leases, or offers to sell or lease, any products or services to a consumer pursuant to a contract, where the contract automatically renews unless the consumer cancels the contract, shall disclose the automatic renewal clause clearly and conspicuously in the contract or contract offer.

(b) Any person, firm, or corporation engaged in commerce that sells, leases, or offers to sell or lease, any products or services to a consumer pursuant to a contract, where the contract automatically renews unless the consumer cancels the contract, shall disclose clearly and conspicuously how to cancel the contract in the initial contract, contract offer, or with delivery of products or services.

(c) A person, firm, or corporation that fails to comply with the requirements of this section is in violation of this section unless the person, firm, or corporation demonstrates that all of the following are its routine business practice:
(1) It has established and implemented written procedures to comply with this section and enforces compliance with the procedures.
(2) Any failure to comply with this section is the result of error.
(3) Where an error has caused the failure to comply with this section, it provides a full refund or credit for all amounts billed to or paid by the consumer from the date of the renewal until the date of the termination of the contract, or the date of the subsequent notice of renewal, whichever occurs first.

(d) This section does not apply to insurers licensed under Chapter 58 of the General Statutes, or to banks, trust companies, savings and loan associations, savings banks, or credit unions licensed or organized under the laws of any state or the United States, or any foreign bank maintaining a branch or agency licensed under the laws of the United States, or any subsidiary or affiliate thereof.

(e) A violation of this section renders the automatic renewal clause void and unenforceable. (2007-288, s. 1; 2007-507, s. 17.)

Editor's Note. — Session Laws 2007-288, s. 2, made this section effective October 1, 2007, and applicable to contracts entered into on or after October 1, 2007.

§ 75-42. Deceptive representation of geographical location in telephone directory, print advertisement, or on the Internet.

(a) A person who is in the business of supplying a perishable product shall not misrepresent the geographical location of the business in the listing of the business in a telephone directory, other directory assistance database, or on the Internet. A person misrepresents the geographical location of the business under this subsection if the name of the business, or any other part of the listing, indicates that the business is located in a geographical area and all of the following apply:

(1) The business is not located within the geographical area indicated.

(2) The listing fails to identify the municipality and state of the business's geographical location.

(3) A telephone call to the local telephone number listed in the telephone directory, directory assistance database, or on the Internet routinely is forwarded or transferred to a location that is outside the calling area covered by the telephone directory or directory assistance database in which the number is listed, or outside the local calling area for the local telephone number posted on the Internet.

(b) A person who is in the business of supplying a perishable product shall not misrepresent the geographical location of the business in print advertisement. A person misrepresents the geographical location of the business under this subsection if a fictitious business name, an assumed business name, or any other part of the advertisement is listed in print advertisement and all of the following apply:

(1) The name or any other part of the advertisement misrepresents the geographic location of the supplier.

(2) A telephone call to the local telephone number listed on the print advertisement routinely is forwarded or transferred to a location that is outside the calling area in which the number is listed.

(c) A person who misrepresents the geographical location of the business under subsection (a) or subsection (b) of this section is not in violation of this section if a conspicuous notice in the listing or in the print advertisement states the municipality and state in which the business is located and identifies this as the location of the business.

(d) For purposes of this section, a newspaper publisher, magazine or other publication, telephone directory or directory assistance service, its officer or agent, the owner or operator of a radio or television station, or any other owner or operator of a media primarily devoted to listing phone numbers or to advertising who publishes, broadcasts, or otherwise disseminates a directory, a database, or print advertisement in good faith without knowledge of its false, deceptive, or misleading character is immune from liability under this section unless the directory service, the database service, or the advertiser is the same person as the person, firm, or corporation that has committed the act prohibited by this section.

(e) A violation of this section is an unfair trade practice under G.S. 75-1.1. (2007-545, s. 1; 2009-199, s. 1.)

Editor's Note. — Session Laws 2007-545, s. 2, made this section effective October 1, 2007, and applicable to any telephone directory, directory assistance database, Internet Web site, or print advertisement provided, published, or posted on or after that date.

Effect of Amendments. — Session Laws 2009-199, s. 1, effective October 1, 2009, in subsection (a), in the introductory paragraph, substituted "the business, or any other part of the listing," for "the business"; in subsection (b), in the introductory paragraph, substituted "business name, an assumed business name, or any other part of the advertisement" for "business name or an assumed business name"; and in subdivision (b)(1), inserted "or any other part of the advertisement."

§§ 75-43 through 75-49: Reserved for future codification purposes.

ARTICLE 2.

Prohibited Acts by Debt Collectors.

§ 75-50. Definitions.

The following words and terms as used in this Article shall be construed as follows:

(1) "Consumer" means any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes.

(2) "Debt" means any obligation owed or due or alleged to be owed or due from a consumer.

(3) "Debt collector" means any person engaging, directly or indirectly, in debt collection from a consumer except those persons subject to the provisions of Article 70, Chapter 58 of the General Statutes. (1977, c. 747, s. 4; 1989, c. 770, s. 15.)

Editor's Note. — Session Laws 1989, c. 770, s. 15, effective August 12, 1989, substituted "Article 9C" for "Article 9" in subdivision (3). "Article 70, Chapter 58" has been substituted for "Article 9C, Chapter 66" at the direction of the Revisor of Statutes in view of the recodification of Article 9C of Chapter 66 in Chapter 58.

Legal Periodicals. — For comment on this article, see 56 N.C.L. Rev. 547 (1978).

For comment, "As If We Had Enough to Worry About . . . Attorneys and the Federal Fair Debt Collection Practices Act: Supreme Court Rules on Former Attorney Exemption," see 18 Campbell L. Rev. 165 (1996).

CASE NOTES

Exclusive Remedy For Unfair Debt Collection Practices. — North Carolina Debt Collection Act (NCDCA), G.S. 75-50 et seq., applies only when unfair and deceptive conduct occurs in the specific context of debt collection and, if the abusive conduct alleged pertains only to debt collection, the NCDCA provides a claimant's exclusive remedy; claims can only be asserted under the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1 et seq., if there is some abusive conduct alleged to have occurred outside the realm of debt collection. DIRECTV, Inc. v. Cephas, 294 F. Supp. 2d 760, 2003 U.S. Dist. LEXIS 22297 (M.D.N.C. 2003).

In a debtor's suit against a creditor based on a credit card debt from a credit card obtained by her deceased husband without the debtor's knowledge and consent, the debtor's claim for violation of the North Carolina Unfair and Deceptive Trade Practice Act, G.S. 75-1.1 et seq., based on allegedly abusive debt collection conduct failed because the North Carolina Debt Collection Act, G.S. 75-50 et seq., provided the exclusive remedy for such a claim. Johnson v.

MBNA Am. Bank, N.A., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 10533 (M.D.N.C. Mar. 9, 2006).

Article Inapplicable to Case of Mistaken Identity. — For a claimant to claim protection under this Article, he must have had at least some connection with the underlying debt or alleged debt. Because of the presence of the term "incurred" in subdivision (1), the words "alleged debt" could not include an instance in which a debt collector mistakenly identified the person who owed it money or allegedly owed it money. The legislature chose not to use the words "allegedly incurred". Thus, the language of the Article does not evidence an intent by the legislature to provide protection for a person mistakenly thought to have been the one who incurred an obligation. Such persons must rely on common-law remedies. Fisher v. Eastern Air Lines, 517 F. Supp. 672 (M.D.N.C. 1981).

Federal Law Preempted Plaintiffs' Claim. — The plaintiffs' state claims, alleging that the defendants' filing of each proof of claim, containing a disguised attorney fee, violated the North Carolina Fair Debt Collection Practices Act, G.S. 75-50 to 75-56, and the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1 to 75-35, were preempted by federal law, as obstacles to the accomplishment of the full purposes and objectives of federal bankruptcy law; the plaintiffs' alleged state law causes of action were based on the defendant's choice of process in a federal court proceeding, filing a proof of claim versus a fee application and involved procedures found in the Code and Part III of the Bankruptcy Rules and of uniquely federal concern. Tate v. NationsBanc Mtg. Corp., 253 Bankr. 653, 2000 Bankr. LEXIS 1168 (Bankr. W.D.N.C. 2000).

Learned Profession Exemption. — In their debt collection practice, defendants, a law firm and its president, were learned professionals, exempt under G.S. 75-1.1(b) from the North Carolina Debt Collection Act and the North Carolina Unfair and Deceptive Trade Practices Act; the court was unable to limit the exemption to attorneys licensed in North Carolina and no exception would be made for alleged insufficient supervision in connection with claims brought by plaintiff consumers. Godfredson v. JBC Legal Group, P.C., 387 F. Supp. 2d 543, 2005 U.S. Dist. LEXIS 17878 (E.D.N.C. 2005).

When a landlord's notice to a tenant informed her that she could be charged court costs if eviction papers were filed against her, the court cost was not a "debt," under G.S. 75-50, and a letter that incorrectly identified the court cost as an attorney's fee could not be found to be a false representation of a debt owed, under G.S. 75-54(4). Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

"Debt". — Attempt by landlord to collect a late fee for past due rent fell under G.S. Ch. 75, art. 2, the debt collection statute, because a late fee comes within the definition of "debt" under G.S. 75-50. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

North Carolina's definition of "debt" is not broad enough to encompass damages sought as a result of tortious or criminal conduct; an alleged thief was simply not a consumer, and damages for allegedly illegal conduct cannot be considered debt within the meaning of the North Carolina Debt Collection Act [G.S. 75-50 et seq.]. DIRECTV, Inc. v. Breedlove, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 24694 (E.D.N.C. Mar. 16, 2003).

"Injury." — When consumers alleged that a debt collector violated various statutory provisions of G.S. 75-50 et seq., those claims did not have to be dismissed for a failure to state actual damages because a consumer sufficiently offered evidence of injury proximately caused by the collector's harassing telephone calls when the evidence tended to show that the calls caused the consumer emotional distress; the consumer did not have to show out-of-pocket damages, as that would be inconsistent with G.S. 75-16, providing that a person "injured" as a result of conduct violating Ch. 75 had a right of action on account of such injury done, and if damages were assessed, judgment would be entered for treble the amount fixed by a verdict, so the statute distinguished between "injury" and "damages." Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 646 S.E.2d 381, 2007 N.C. App. LEXIS 1472 (2007).

Landlord, in seeking to recover past due rent and related charges, was a debt collector as defined under G.S. 75-50 of the North Carolina Debt Collection Act. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Theft Does Not Create a Debt. — North Carolina courts' limited treatment of the term "debt" and reliance on interpretations of the federal Fair Debt Collection Practices Act indicate that, if presented with the question, these courts would find alleged theft is not encompassed by the definition of debt set out in G.S. 75-50(2). DIRECTV, Inc. v. Cephas, 294 F. Supp. 2d 760, 2003 U.S. Dist. LEXIS 22297 (M.D.N.C. 2003).

Where a defendant claimed that a distributor of satellite television signals engaged in unfair debt collection practices in its attempt to recover for defendant's alleged theft of signals, the North Carolina Debt Collection Act, G.S. 75-50 et seq., did not apply since the alleged theft did not create a debt within the meaning of G.S. 75-50(2). DIRECTV, Inc. v. Cephas, 294 F. Supp. 2d 760, 2003 U.S. Dist. LEXIS 22297 (M.D.N.C. 2003).

Allegations Held Insufficient Under Section (b). — A claim under the North Carolina Debt Collection Act, alleging improper practices in the specific context of debt collection, must also satisfy the requirements of a more general claim under the North Carolina Unfair and Deceptive Trade Practices Act. Godfredson v. JBC Legal Group, P.C., 387 F. Supp. 2d 543, 2005 U.S. Dist. LEXIS 17878 (E.D.N.C. 2005).

Applied in Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981); Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826; Davis Lake Cmty. Ass'n v. Feldmann, 138 N.C. App. 292, 530 S.E.2d 865, 2000 N.C. App. LEXIS 598 (2000); Lofton v. Carolina Fin., LLC (In re Lofton), 385 B.R. 133, 2008 Bankr. LEXIS 1102 (Bankr. E.D.N.C. 2008).

Cited in Spinks v. Taylor, 47 N.C. App. 68, 266 S.E.2d 857 (1980); Forsyth Mem. Hosp. v. Contreras, 107 N.C. App. 611, 421 S.E.2d 167 (1992); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Wilkes Nat'l Bank v. Halvorsen, 126 N.C. App. 179, 484 S.E.2d 582 (1997); Reid v. Ayers, 138 N.C. App. 261, 531 S.E.2d 231, 2000 N.C. App. LEXIS 606 (2000).

§ 75-51. Threats and coercion.

No debt collector shall collect or attempt to collect any debt alleged to be due and owing from a consumer by means of any unfair threat, coercion, or attempt to coerce. Such unfair acts include, but are not limited to, the following:

(1) Using or threatening to use violence or any illegal means to cause harm to the person, reputation or property of any person.

(2) Falsely accusing or threatening to accuse any person of fraud or any crime, or of any conduct that would tend to cause disgrace, contempt or ridicule.

(3) Making or threatening to make false accusations to another person, including any credit reporting agency, that a consumer has not paid, or has willfully refused to pay a just debt.

(4) Threatening to sell or assign, or to refer to another for collection, the debt of the consumer with an attending representation that the result of such sale, assignment or reference would be that the consumer would lose any defense to the debt or would be subjected to harsh, vindictive, or abusive collection attempts.

(5) Representing that nonpayment of an alleged debt may result in the arrest of any person.

(6) Representing that nonpayment of an alleged debt may result in the seizure, garnishment, attachment, or sale of any property or wages unless such action is in fact contemplated by the debt collector and permitted by law.

(7) Threatening to take any action not in fact taken in the usual course of business, unless it can be shown that such threatened action was actually intended to be taken in the particular case in which the threat was made.

(8) Threatening to take any action not permitted by law. (1977, c. 747, s. 4.)

Legal Periodicals. — For note on intentional infliction of emotional distress, see 18 Wake Forest L. Rev. 624 (1982).

CASE NOTES

Unfair Practices. — Although in the area of debt collection, unfair or deceptive acts in commerce are limited to those acts set out in this article, those specific practices delineated as prohibited are examples of unfair practices within the broader scope of G.S. 75-1.1. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Plaintiffs' allegations of wrongful and intentional harm to their credit rating

and business prospects occurring less than four years before the filing date of their complaint were of a character clearly meant to be proscribed by the act and were therefore sufficient to state a claim for which relief could be granted under G.S. 75-1.1. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Nonpossessory, Nonpurchase Money Security Interest in Household Goods and Furnishings. — When debtor failed to make an election for an exemption under G.S. 1C-1601, allowing debtor to retain $2,500 worth of household goods and furnishings free from judgment, there was no unfair or deceptive practice on the part of a creditor who took a nonpossessory, nonpurchase money security interest in debtor's household goods and furnishings, even if creditor failed to inform debtor that such an exemption was available. See Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646, cert. denied, 323 N.C. 365, 373 S.E.2d 545 (1988).

Applied in Davis Lake Cmty. Ass'n v. Feldmann, 138 N.C. App. 292, 530 S.E.2d 865, 2000 N.C. App. LEXIS 598 (2000); DIRECTV, Inc. v. Cephas, 294 F. Supp. 2d 760, 2003 U.S. Dist. LEXIS 22297 (M.D.N.C. 2003).

Cited in Spinks v. Taylor, 47 N.C. App. 68, 266 S.E.2d 857 (1980); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994); Reid v. Ayers, 138 N.C. App. 261, 531 S.E.2d 231, 2000 N.C. App. LEXIS 606 (2000); Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 646 S.E.2d 381, 2007 N.C. App. LEXIS 1472 (2007).

§ 75-52. Harassment.

No debt collector shall use any conduct, the natural consequence of which is to oppress, harass, or abuse any person in connection with the attempt to collect any debt. Such unfair acts include, but are not limited to, the following:

(1) Using profane or obscene language, or language that would ordinarily abuse the typical hearer or reader.

(2) Placing collect telephone calls or sending collect telegrams unless the caller fully identifies himself and the company he represents.

(3) Causing a telephone to ring or engaging any person in telephone conversation with such frequency as to be unreasonable or to constitute a harassment to the person under the circumstances or at times known to be times other than normal waking hours of the person.

(4) Placing telephone calls or attempting to communicate with any person, contrary to his instructions, at his place of employment, unless the debt collector does not have a telephone number where the consumer can be reached during the consumer's nonworking hours. (1977, c. 747, s. 4.)

Legal Periodicals. — For note, "Consumer Protection — The Unfair Trade Practice Act and the Insurance Code: Does Per Se Necessarily Preempt?," see 10 Campbell L. Rev. 487 (1988).

CASE NOTES

Sufficient Evidence of Harassment. — When consumers alleged that a debt collector violated G.S. 75-52(3) by placing harassing telephone calls to the consumers' residence, it was error to dismiss the claim on summary judgment because the collector's records showed the consumers were called at least 2,200 times in approximately six years, sometimes up to six times a day, and the consumers alleged the callers were rude and abrasive and that the calls were demeaning, and the claim was not barred by the statute of limitations in G.S. 75-16.2 because some calls were made within the period and the earlier calls could be used to prove the later calls. Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 646 S.E.2d 381, 2007 N.C. App. LEXIS 1472 (2007).

Time Limitations. — When a consumer alleged that a debt collector violated G.S. 75-52(4) by calling the consumer at work, summary judgment was properly granted as to the consumer's claim because the consumer retired prior to the applicable limitations period in G.S. 75-16.2 which was before the time the consumer filed suit, so the consumer could not show that any violations by the collector of this provision occurred within the statute of limitations. Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 646 S.E.2d 381, 2007 N.C. App. LEXIS 1472 (2007).

Cited in City Fin. Co. v. Boykin, 86 N.C. App. 446, 358 S.E.2d 83 (1987).

§ 75-53. Unreasonable publication.

No debt collector shall unreasonably publicize information regarding a consumer's debt. Such unreasonable publication includes, but is not limited to, the following:

(1) Any communication with any person other than the debtor or his attorney, except:
  a. With the written permission of the debtor or his attorney given after default;
  b. To persons employed by the debt collector, to a credit reporting agency, to a person or business employed to collect the debt on behalf of the creditor, or to a person who makes a legitimate request for the information;
  c. To the spouse (or one who stands in place of the spouse) of the debtor, or to the parent or guardian of the debtor if the debtor is a minor and lives in the same household with such parent;
  d. For the sole purpose of locating the debtor, if no indication of indebtedness is made;
  e. Through legal process.

(2) Using any form of communication which ordinarily would be seen or heard by any person other than the consumer that displays or conveys any information about the alleged debt other than the name, address and phone number of the debt collector except as otherwise provided in this Article.

(3) Disclosing any information relating to a consumer's debt by publishing or posting any list of consumers, except for credit reporting purposes and the publication and distribution of otherwise permissible "stop lists" to the point-of-sale locations where credit is extended, or by advertising for sale any claim to enforce payment thereof or in any other manner other than through legal process. (1977, c. 747, s. 4; 1979, c. 910.)

§ 75-54. Deceptive representation.

No debt collector shall collect or attempt to collect a debt or obtain information concerning a consumer by any fraudulent, deceptive or misleading representation. Such representations include, but are not limited to, the following:

(1) Communicating with the consumer other than in the name (or unique pseudonym) of the debt collector and the person or business on whose behalf the debt collector is acting or to whom the debt is owed.

(2) Failing to disclose in all communications attempting to collect a debt that the purpose of such communication is to collect a debt.

(3) Falsely representing that the debt collector has in his possession information or something of value for the consumer.

(4) Falsely representing the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding; falsely representing that the collector is in any way connected with any agency of the federal, State or local government; or falsely representing the creditor's rights or intentions.

(5) Using or distributing or selling any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by a court, an official, or any other legally

constituted or authorized authority, or which creates a false impression about its source.

(6) Falsely representing that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges.

(7) Falsely representing the status or true nature of the services rendered by the debt collector or his business.

(8) Communicating with the consumer in violation of the provisions of G.S. 62-159.1(a), 153A-277(b1), or 160A-314(b1). (1977, c. 747, s. 4; 2009-302, s. 5.)

Effect of Amendments. — Session Laws 2009-302, s. 5, effective July 17, 2009, added subdivision (8).

CASE NOTES

Communicating with Customer. — Where hospital's collection procedures were handled through its holding company and correspondence was sent under the letterhead of the vice president for legal affairs for the holding company, the correspondence did not indicate the affiliation between holding company and hospital, and patients argued these written communications led them to believe the matter had been turned over to an independent attorney for collection or the account had been given to an independent third-party collection agency, the vice president's communications did not violate subsection (1) of this section. Forsyth Mem. Hosp. v. Contreras, 107 N.C. App. 611, 421 S.E.2d 167 (1992), cert. denied, 333 N.C. 344, 426 S.E.2d 705 (1993).

Padlocking Notice Did Not Simulate Legal Process. — A padlocking notice posted by defendant landlord on the doors of tenants who were late paying their rent did not simulate legal process in violation of this section, since the notice in question contained no signatures, no seal, no mention of an official or of a court, no date, and no reference to an amount due. Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981).

Letter to Debtor. — Defendant's contention that only a clear recitation of the statutory language satisfies the requirements of G.S. 75-54 would discourage debt collectors from providing even more clarity and guidance to debtors; thus, letter from bank to debtor was held not to violate subsection (2). Wilkes Nat'l Bank v. Halvorsen, 126 N.C. App. 179, 484 S.E.2d 582 (1997), cert. denied, 346 N.C. 557, 488 S.E.2d 826 (1997).

When a landlord's notice to a tenant informed her that she could be charged court costs if eviction papers were filed against her, the court cost was not a "debt," under G.S. 75-50, and a letter that incorrectly identified the court cost as an attorney's fee could not be found to be a false representation of a debt owed, under G.S. 75-54(6). Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Lease Provisions. — Residential lease provision that overstated the administrative fee that could be assessed against a tenant if ejectment proceedings were filed against her could support a finding that the landlord violated G.S. 75-54(4) by falsely representing the amount of a debt against the tenant when the landlord represented to the court in two ejectment complaints that the tenant owed the landlord this fee. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Residential lease provision stating a late fee exceeding five percent of the rent payment, which, therefore, violated the statutory limitation on late fees in G.S. 42-46(a), could support a finding that the landlord violated G.S. 75-54(6) by falsely representing that an existing obligation of the tenant could be increased by the addition of fees. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Residential lease provision stating a late fee exceeding five percent of the rent payment, which, therefore, violated the statutory limitation on late fees in G.S. 42-46(a), could support a finding that the landlord violated G.S. 75-54(4) by falsely representing the amount of a debt against the tenant when the landlord requested that late fee in three summary ejectment complaints, or "legal proceedings," against the tenant. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Applied in Spinks v. Taylor, 47 N.C. App. 68, 266 S.E.2d 857 (1980).

Cited in Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 646 S.E.2d 381, 2007 N.C. App. LEXIS 1472 (2007).

§ 75-55. Unconscionable means.

No debt collector shall collect or attempt to collect any debt by use of any unconscionable means. Such means include, but are not limited to, the following:

(1) Seeking or obtaining any written statement or acknowledgment in any form containing an affirmation of any debt by a consumer who has been declared bankrupt, an acknowledgment of any debt barred by the statute of limitations, or a waiver of any legal rights of the debtor without disclosing the nature and consequences of such affirmation or waiver and the fact that the consumer is not legally obligated to make such affirmation or waiver.

(2) Collecting or attempting to collect from the consumer all or any part of the debt collector's fee or charge for services rendered, collecting or attempting to collect any interest or other charge, fee or expense incidental to the principal debt unless legally entitled to such fee or charge.

(3) Communicating with a consumer (other than a statement of account used in the normal course of business) whenever the debt collector has been notified by the consumer's attorney that he represents said consumer.

(4) Bringing suit against the debtor in a county other than that in which the debt was incurred or in which the debtor resides if the distances and amounts involved would make it impractical for the debtor to defend the claim. (1977, c. 747, s. 4.)

CASE NOTES

Excessive Late Fees. — Residential lease provision stating a late fee exceeding five percent of the rent payment, which, therefore, violated the statutory limitation on late fees in G.S. 42-46(a), could support a finding that the landlord violated G.S. 75-55(2) by collecting or attempting to collect a charge incidental to the principal debt to which the landlord was not legally entitled. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Administrative Fee. — Residential lease provision that overstated the administrative fee that could be assessed against a tenant if ejectment proceedings were filed against her could support a finding that the landlord violated G.S. 75-55(2) by collecting or attempting to collect a charge incidental to the principal debt to which the landlord was not entitled. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Improper Fees. — When a consumer alleged that a debt collector violated G.S. 75-55(2) by wrongfully imposing various charges, summary judgment dismissing the consumer's claim was properly granted because the improper fees the consumer alleged were either waived or the consumer did not show the fee was not waived, so the consumer did not show the consumer was actually injured since any wrongful imposition of fees was corrected. Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 646 S.E.2d 381, 2007 N.C. App. LEXIS 1472 (2007).

Cited in In re Peterson, 297 B.R. 467, 2003 Bankr. LEXIS 1205 (Bankr. W.D.N.C. 2003).

§ 75-56. Application.

(a) The specific and general provisions of this Article shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article.

(b) Any debt collector who fails to comply with any provision of this Article with respect to any person is liable to such person in a private action in an amount equal to the sum of (i) any actual damage sustained by such person as a result of such failure and (ii) civil penalties the court may allow, but not less than five hundred dollars ($500.00) nor greater than four thousand dollars ($4,000) for each violation.

(c) The remedies provided by this section shall be cumulative and in addition to remedies otherwise available. Any punitive damages assessed against a debt collector shall not be reduced by the amount of the civil penalty assessed against such debt collector pursuant to subsection (d) of this section.

(d) Notwithstanding the provisions of G.S. 75-15.2 and G.S. 75-16, in private actions or actions instituted by the Attorney General, civil penalties in excess of four thousand dollars ($4,000) shall not be imposed.

(e) The clear proceeds of civil penalties imposed in actions instituted by the Attorney General shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1977, c. 747, s. 4; 1983, c. 417, s. 1; 1985 (Reg. Sess., 1986), c. 802; 1991, c. 68, s. 1; 1998-215, s. 101; 2009-573, s. 9.)

Editor's Note. — Session Laws 2009-573, s. 1, provides: "This act shall be known and may be cited as the 'Consumer Economic Protection Act of 2009."'

Effect of Amendments. — Session Laws 2009-573, s. 9, effective October 1, 2009, and applicable to foreclosures initiated, debt collection activities undertaken, and actions filed on or after that date, inserted the subsection (a), (d) and (e) designations; added subsections (b) and (c); and substituted "civil penalties in excess of four thousand dollars ($4,000) shall not be imposed" for "civil penalties in excess of two thousand dollars ($2,000) shall not be imposed, nor shall damages be trebled for any violation under this Article" at the end of subsection (d).

CASE NOTES

Unfair Practices. — Although in the area of debt collection, unfair or deceptive acts in commerce are limited to those acts set out in this Article, those specific practices delineated as prohibited are examples of unfair practices within the broader scope of G.S. 75-1.1. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Sending notices to a tenant regarding past due rent was a debt collection practice covered by G.S. ch. 75, art. 2, and that article exclusively constituted the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by the article, under G.S. 75-56, but the notices were not unfair or deceptive trade practices. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Award of an attorney's fee was appropriate for a violation of G.S. ch. 75, art. 2 in the same manner as any other part of ch. 75, and G.S. 75-56 did not limit an award of an attorney's fee as allowed by G.S. 75-16.1, but it was necessary for a trial court to make findings and conclusions to support an award of an attorney's fee. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Plaintiffs' allegations of wrongful and intentional harm to their credit rating and business prospects occurring less than four years before the filing date of their complaint were of a character clearly meant to be proscribed by the act and were therefore sufficient to state a claim for which relief could be granted under G.S. 75-1.1. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Penalties. — Under G.S. 75-56, for any unfair or deceptive acts or practices proscribed by G.S. 75-1.1 that were covered by G.S. ch. 75, art. 2, civil penalties were limited to $2,000 and any damages assessed could not be trebled. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

If a conclusion of law was made that a debt collector violated a provision of G.S. ch. 75, art. 2, then that violation could be a violation of G.S. 75-1.1; but a debt collector who violated a provision of G.S. ch. 75, art. 2 and thereby violated G.S. 75-1.1 was only subject to the damages and penalty provided for in G.S. 75-56 and was not subject to the damages provisions in G.S. ch. 75, art. 1. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Applied in Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993).

Cited in Forsyth Mem. Hosp. v. Contreras, 107 N.C. App. 611, 421 S.E.2d 167 (1992); Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994); Wall v. City of Raleigh, 121 N.C. App. 351, 465 S.E.2d 551 (1996); Wilkes Nat'l Bank v. Halvorsen, 126 N.C. App. 179, 484 S.E.2d 582 (1997); Reid v. Ayers, 138 N.C. App. 261, 531 S.E.2d 231, 2000 N.C. App. LEXIS 606 (2000); DIRECTV, Inc. v. Breedlove, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 24694 (E.D.N.C. Mar. 16, 2003).

§§ 75-57 through 75-59: Reserved for future codification purposes.

ARTICLE 2A.

Identity Theft Protection Act.

§ 75-60. Title.

This Article shall be known and may be cited as the "Identity Theft Protection Act". (2005-414, s. 1.)

§ 75-61. Definitions.

The following definitions apply in this Article:

(1) "Business". — A sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit. The term includes a financial institution organized, chartered, or holding a license or authorization certificate under the laws of this State, any other state, the United States, or any other country, or the parent or the subsidiary of any such financial institution. Business shall not include any government or governmental subdivision or agency.

(2) "Consumer". — An individual.

(3) "Consumer report" or "credit report". — Any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for any of the following:

  a. Credit to be used primarily for personal, family, or household purposes.

  b. Employment purposes.

  c. Any other purpose authorized under 15 U.S.C. § 1681(b).

(4) "Consumer reporting agency". — Any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.

(5) "Credit card". — Has the same meaning as in section 103 of the Truth in Lending Act (15 U.S.C. § 160, et seq.).

(6) "Debit card". — Any card or device issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account holding assets of the consumer at such financial institution, for the purpose of transferring money between accounts or obtaining money, property, labor, or services.

(7) "Disposal" includes the following:

  a. The discarding or abandonment of records containing personal information.

  b. The sale, donation, discarding, or transfer of any medium, including computer equipment or computer media, containing records of personal information, or other nonpaper media upon which records of personal information are stored, or other equipment for nonpaper storage of information.

(8) "Encryption". — The use of an algorithmic process to transform data into a form in which the data is rendered unreadable or unusable without use of a confidential process or key.

(9) "Person". — Any individual, partnership, corporation, trust, estate, cooperative, association, government, or governmental subdivision or agency, or other entity.

(10) "Personal information". — A person's first name or first initial and last name in combination with identifying information as defined in G.S. 14-113.20(b). Personal information does not include publicly available directories containing information an individual has voluntarily consented to have publicly disseminated or listed, including name, address, and telephone number, and does not include information made lawfully available to the general public from federal, state, or local government records.

(11) "Proper identification". — Information generally deemed sufficient to identify a person. If a person is unable to reasonably identify himself or herself with the information described above, a consumer reporting agency may require additional information concerning the consumer's employment and personal or family history in order to verify the consumer's identity.

(12) "Records". — Any material on which written, drawn, spoken, visual, or electromagnetic information is recorded or preserved, regardless of physical form or characteristics.

(13) "Redaction". — The rendering of data so that it is unreadable or is truncated so that no more than the last four digits of the identification number is accessible as part of the data.

(14) "Security breach". — An incident of unauthorized access to and acquisition of unencrypted and unredacted records or data containing personal information where illegal use of the personal information has occurred or is reasonably likely to occur or that creates a material risk of harm to a consumer. Any incident of unauthorized access to and acquisition of encrypted records or data containing personal information along with the confidential process or key shall constitute a security breach. Good faith acquisition of personal information by an employee or agent of the business for a legitimate purpose is not a security breach, provided that the personal information is not used for a purpose other than a lawful purpose of the business and is not subject to further unauthorized disclosure.

(15) "Security freeze". — Notice placed in a credit report, at the request of the consumer and subject to certain exceptions, that prohibits the consumer reporting agency from releasing all or any part of the consumer's credit report or any information derived from it without the express authorization of the consumer. (2005-414, s. 1.)

Editor's Note. — The definitions in this section were renumbered in alphabetical order at the direction of the Revisor of Statutes.

§ 75-62. Social security number protection.

(a) Except as provided in subsection (b) of this section, a business may not do any of the following:

(1) Intentionally communicate or otherwise make available to the general public an individual's social security number.

(2) Intentionally print or imbed an individual's social security number on any card required for the individual to access products or services provided by the person or entity.

(3) Require an individual to transmit his or her social security number over the Internet, unless the connection is secure or the social security number is encrypted.

(4) Require an individual to use his or her social security number to access an Internet Web site, unless a password or unique personal identification number or other authentication device is also required to access the Internet Web site.

(5) Print an individual's social security number on any materials that are mailed to the individual, unless state or federal law requires the social security number to be on the document to be mailed.

(6) Sell, lease, loan, trade, rent, or otherwise intentionally disclose an individual's social security number to a third party without written consent to the disclosure from the individual, when the party making the disclosure knows or in the exercise of reasonable diligence would have reason to believe that the third party lacks a legitimate purpose for obtaining the individual's social security number.

(b) Subsection (a) of this section shall not apply in the following instances:

(1) When a social security number is included in an application or in documents related to an enrollment process, or to establish, amend, or terminate an account, contract, or policy; or to confirm the accuracy of the social security number for the purpose of obtaining a credit report pursuant to 15 U.S.C. § 1681(b)(2). A social security number that is permitted to be mailed under this section may not be printed, in whole or in part, on a postcard or other mailer not requiring an envelope, or visible on the envelope or without the envelope having been opened.

(2) To the collection, use, or release of a social security number for internal verification or administrative purposes.

(3) To the opening of an account or the provision of or payment for a product or service authorized by an individual.

(4) To the collection, use, or release of a social security number to investigate or prevent fraud, conduct background checks, conduct social or scientific research, collect a debt, obtain a credit report from or furnish data to a consumer reporting agency pursuant to the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., undertake a permissible purpose enumerated under Gramm Leach Bliley, 12 C.F.R. § 216.13-15, or locate an individual who is missing, a lost relative, or due a benefit, such as a pension, insurance, or unclaimed property benefit.

(5) To a business acting pursuant to a court order, warrant, subpoena, or when otherwise required by law.

(6) To a business providing the social security number to a federal, state, or local government entity, including a law enforcement agency, court, or their agents or assigns.

(7) To a social security number that has been redacted.

(c) A business covered by this section shall make reasonable efforts to cooperate, through systems testing and other means, to ensure that the requirements of this Article are implemented.

(d) A violation of this section is a violation of G.S. 75-1.1. (2005-414, s. 1.)

Editor's Note. — Session Laws 2005-414, s. 11, provides that subdivisions (a)(2), (3), (4) and (5) of this section become effective October 1, 2006. The remainder of the section becomes effective December 1, 2005.

§ 75-63. Security freeze.

(a) A consumer may place a security freeze on the consumer's credit report by making a request to a consumer reporting agency in accordance with this subsection. A security freeze shall prohibit, subject to exceptions in subsection (l) of this section, the consumer reporting agency from releasing the consumer's credit report or any information from it without the express authorization of the consumer. When a security freeze is in place, a consumer reporting agency may not release the consumer's credit report or information to a third party without prior express authorization from the consumer. This subsection does not prevent a consumer reporting agency from advising a third party that a security freeze is in effect with respect to the consumer's credit report, provided that the consumer reporting agency does not state or otherwise imply to the third party that the consumer's security freeze reflects a negative credit score, history, report, or rating. A consumer reporting agency shall place a security freeze on a consumer's credit report if the consumer requests a security freeze by any of the following methods:

(1) First-class mail.
(2) Telephone call.
(3) Secure Web site or secure electronic mail connection.

(a1) A nationwide consumer reporting agency, as defined in section 603(p) [15 U.S.C. § 1681a(p)] of the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., that receives a request from a consumer residing in this State to place a security freeze on the consumer's file, shall provide a notice communicating to the consumer that the freeze is only placed with the consumer reporting agency to which the consumer directed the request. The notice shall provide to the consumer the Web site, postal address, and telephone number of the other nationwide consumer reporting agencies and of the North Carolina Attorney General's Office and shall inform the consumer that he or she may use this information to contact other nationwide consumer reporting agencies to make security freeze requests and obtain information on combating identity theft. No part of the notice to the consumer shall be used to make a solicitation for other goods and services.

(b) A consumer reporting agency shall place a security freeze on a consumer's credit report no later than three business days after receiving a written request from the consumer by mail. A consumer reporting agency that receives such a request electronically or by telephone shall comply with the request within 24 hours of receiving the request.

(c) The consumer reporting agency shall send a written confirmation of the security freeze to the consumer within three business days of placing the freeze and at the same time shall provide the consumer with a unique personal identification number or password, other than the consumer's social security number, to be used by the consumer when providing authorization for the release of the consumer's credit report for a specific period of time, or to a specific party, or for permanently lifting the freeze.

(d) If the consumer wishes to allow the consumer's credit report to be accessed for a specific period of time or by a specific party while a freeze is in place, the consumer shall contact the consumer reporting agency by mail, phone, or electronically, request that the freeze be lifted or lifted with respect to a specific party, and provide all of the following:

(1) Proper identification.
(2) The unique personal identification number or password provided by the consumer reporting agency pursuant to subsection (c) of this section.
(3) The proper information regarding the third party who is authorized to receive the consumer credit report or the time period for which the report shall be available to users of the credit report.

(e) Repealed by Session Laws 2009-355, s. 1, effective October 1, 2009.

(f) A consumer reporting agency that receives a request by mail from a consumer to lift a freeze on a credit report pursuant to subsection (d) of this section shall comply with the request no later than three business days after receiving the request. A consumer reporting agency that receives such a request electronically or by telephone shall comply with the request within 15 minutes of receiving the request.

(g) A consumer reporting agency shall remove, temporarily lift, or lift with respect to a specific third party a freeze placed on a consumer's credit report only in the following cases:

(1) Upon the consumer's request, pursuant to subsections (d) or (j) of this section.

(2) If the consumer's credit report was frozen due to a material misrepresentation of fact by the consumer. If a consumer reporting agency intends to remove a freeze upon a consumer's credit report pursuant to this subdivision, the consumer reporting agency shall notify the consumer in writing prior to removing the freeze on the consumer's credit report.

(g1) A consumer reporting agency need not meet the time requirements provided in this section, only for such time as the occurrences prevent compliance, if any of the following occurrences apply:

(1) The consumer fails to meet the requirements of subsection (d) or (j) of this section.

(2) The consumer reporting agency's ability to remove, place, temporarily lift, or lift with respect to a specific party the security freeze is prevented by any of the following:

a. An act of God, including fire, earthquakes, hurricanes, storms, or similar natural disaster or phenomena.

b. Unauthorized or illegal acts by a third party, including terrorism, sabotage, riot, vandalism, labor strikes or disputes disrupting operations, or similar occurrences.

c. Operational interruption, including electrical failure, unanticipated delay in equipment or replacement part delivery, computer hardware or software failures inhibiting response time, or similar disruption.

d. Governmental action, including emergency orders or regulations, judicial or law enforcement action, or similar directives.

e. Regularly scheduled maintenance, during other than normal business hours, of, or updates to, the consumer reporting agency's systems.

f. Commercially reasonable maintenance of, or repair to, the consumer reporting agency's systems that is unexpected or unscheduled.

g. Receipt of a request outside of normal business hours.

(h) If a third party requests access to a consumer credit report on which a security freeze is in effect and this request is in connection with an application for credit or any other use and the consumer does not allow the consumer's credit report to be accessed for that specific period of time, the third party may treat the application as incomplete.

(i) If a consumer requests a security freeze pursuant to this section, the consumer reporting agency shall disclose to the consumer the process of placing and temporarily lifting a security freeze and the process for allowing access to information from the consumer's credit report for a specific period of time or to a specific third party while the security freeze is in place.

(j) A security freeze shall remain in place until the consumer requests that the security freeze be temporarily lifted for a specific period of time or to a specific third party or removed. A consumer reporting agency shall remove a security freeze within 15 minutes of receiving an electronic request for removal from the consumer or within three business days of receiving a written or telephonic request for removal from the consumer, who provides all of the following:

(1) Proper identification.
(2) The unique personal identification number or password provided by the consumer reporting agency pursuant to subsection (c) of this section.

(k) A consumer reporting agency shall require proper identification of the person making a request to place or remove a security freeze.

(*l*) The provisions of this section do not apply to the use of a consumer credit report by any of the following:

(1) A person, or the person's subsidiary, affiliate, agent, subcontractor, or assignee with whom the consumer has, or prior to assignment had, an account, contract, or debtor-creditor relationship for the purposes of reviewing the active account or collecting the financial obligation owing for the account, contract, or debt.
(2) A subsidiary, affiliate, agent, assignee, or prospective assignee of a person to whom access has been granted under subsection (d) of this section for purposes of facilitating the extension of credit or other permissible use.
(3) Any person acting pursuant to a court order, warrant, or subpoena.
(4) A state or local agency, or its agents or assigns, which administers a program for establishing and enforcing child support obligations.
(5) A state or local agency, or its agents or assigns, acting to investigate fraud, including Medicaid fraud, or acting to investigate or collect delinquent taxes or assessments, including interest and penalties, unpaid court orders, or to fulfill any of its other statutory responsibilities.
(6) A federal, state, or local governmental entity, including law enforcement agency, court, or their agent or assigns.
(7) A person for the purposes of prescreening as defined by the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq.
(8) Any person for the sole purpose of providing for a credit file monitoring subscription service to which the consumer has subscribed.
(9) A consumer reporting agency for the purpose of providing a consumer with a copy of the consumer's credit report upon the consumer's request.
(10) Any depository financial institution for checking, savings, and investment accounts.
(11) Any property and casualty insurance company for use in setting or adjusting a rate, adjusting a claim, or underwriting for property and casualty insurance purposes.
(12) A person for the purpose of furnishing or using credit reports for employment purposes pursuant to 15 U.S.C. § 1681b(b) or tenant screening pursuant to 15 U.S.C. § 1681b(a)(3)(F).
(13) A person for the purpose of criminal background record information.

(m) If a security freeze is in place, a consumer reporting agency shall not change any of the following official information in a credit report without sending a written confirmation of the change to the consumer within 30 days of the change being posted to the consumer's file: name, date of birth, social security number, and address. Written confirmation is not required for technical modifications of a consumer's official information, including name and street abbreviations, complete spellings, or transposition of numbers or letters. In the case of an address change, the written confirmation shall be sent to both the new address and the former address.

(n) The following persons are not required to place in a credit report a security freeze pursuant to this section provided, however, that any person that is not required to place a security freeze on a credit report under the provisions of subdivision (3) of this subsection shall be subject to any security freeze placed on a credit report by another consumer reporting agency from which it obtains information:

(1) A check services or fraud prevention services company, which reports on incidents of fraud or issues authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers, or similar methods of payment.

(2) A deposit account information service company, which issues reports regarding account closures due to fraud, substantial overdrafts, ATM abuse, or other similar negative information regarding a consumer to inquiring banks or other financial institutions for use only in reviewing a consumer request for a deposit account at the inquiring bank or financial institution.

(3) A consumer reporting agency that does all of the following:

a. Acts only to resell credit information by assembling and merging information contained in a database of one or more credit reporting agencies.

b. Does not maintain a permanent database of credit information from which new credit reports are produced.

(o) A consumer reporting agency shall not charge a fee to put a security freeze in place, remove a freeze, or lift a freeze pursuant to subsection (d) or (j) of this section, provided that any such request is made electronically. If a request to put a security freeze in place is made by telephone or by mail, a consumer reporting agency may charge a fee to a consumer not to exceed three dollars ($3.00), except that a consumer reporting agency may not charge any fee to a consumer over the age of 62, to a victim of identity theft who has submitted a copy of a valid investigative or incident report or complaint with a law enforcement agency about the unlawful use of the victim's identifying information by another person, or to the victim's spouse. A consumer reporting agency shall not charge an additional fee to a consumer who requests to temporarily lift for a specific period of time or to a specific third party, reinstate, or remove a security freeze. A consumer reporting agency shall not charge a consumer for a onetime reissue of a replacement personal identification number. A consumer reporting agency may charge a fee not to exceed three dollars ($3.00) to provide any subsequent replacement personal identification number.

(o1) A parent or guardian of a minor residing in this State may, upon appropriate proof of identity and proof of their relationship to the minor, inquire of a nationwide consumer reporting agency, as defined in section 603(p) [15 U.S.C. § 1681a(p)] of the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., as to the existence of a credit report for the minor of the parent or guardian. If a credit report for the minor exists, the nationwide consumer reporting agency shall make reasonable efforts to prevent providing a credit report on the minor until the minor reaches the age of majority. If a credit report for the minor does not exist, the nationwide consumer reporting agency has no obligation to create one.

(p) At any time that a consumer is required to receive a summary of rights required under section 609 of the federal Fair Credit Reporting Act, the following notice shall be included:

"North Carolina Consumers Have the Right to Obtain a Security Freeze.

You have a right to place a "security freeze" on your credit report pursuant to North Carolina law. The security freeze will prohibit a consumer reporting agency from releasing any information in your credit report without your express authorization. A security freeze can be requested in writing by first-class mail, by telephone, or electronically. You also may request a freeze by visiting the following Web site: [URL] or calling the following telephone number: [NUMBER].

The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent. However, you should be aware that using a security freeze to take control over who gains access to the personal and financial information in your credit report may delay, interfere with, or prohibit the timely approval of any subsequent request or application you make regarding new loans, credit, mortgage, insurance, rental housing, employment, investment, license, cellular phone, utilities, digital signature, Internet credit card transactions, or other services, including an extension of credit at point of sale.

The freeze will be placed within three business days if you request it by mail, or within 24 hours if you request it by telephone or electronically. When you place a security freeze on your credit report, within three business days, you will be sent a personal identification number or a password to use when you want to remove the security freeze, temporarily lift it, or lift it with respect to a particular third party.

A freeze does not apply when you have an existing account relationship and a copy of your report is requested by your existing creditor or its agents or affiliates for certain types of account review, collection, fraud control, or similar activities.

You should plan ahead and lift a freeze if you are actively seeking credit or services as a security freeze may slow your applications, as mentioned above.

You can remove a freeze, temporarily lift a freeze, or lift a freeze with respect to a particular third party by contacting the consumer reporting agency and providing all of the following:

(1) Your personal identification number or password,
(2) Proper identification to verify your identity, and
(3) Proper information regarding the period of time you want your report available to users of the credit report, or the third party with respect to which you want to lift the freeze.

A consumer reporting agency that receives a request from you to temporarily lift a freeze or to lift a freeze with respect to a particular third party on a credit report shall comply with the request no later than three business days after receiving the request by mail and no later than 15 minutes after receiving a request by telephone or electronically. A consumer reporting agency may charge you up to three dollars ($3.00) to institute a freeze if your request is made by telephone or by mail. A consumer reporting agency may not charge you any amount to freeze, remove a freeze, temporarily lift a freeze, or lift a freeze with respect to a particular third party, if any of the following are true:

(1) Your request is made electronically.
(2) You are over the age of 62.
(3) You are the victim of identity theft and have submitted a copy of a valid investigative or incident report or complaint with a law enforcement agency about the unlawful use of your identifying information by another person, or you are the spouse of such a person.

You have a right to bring a civil action against someone who violates your rights under the credit reporting laws. The action can be brought against a consumer reporting agency or a user of your credit report."

(q) A violation of this section is a violation of G.S. 75-1.1. (2005-414, s. 1; 2006-158, s. 1; 2009-355, s. 1; 2009-550, s. 5.)

Editor's Note. — Session Laws 2006-158, s. 2, provides that from July 23, 2006, through July 1, 2007, there shall be no fee charged by a consumer reporting agency for the removal of a security freeze by persons who, prior to the expiration date of the 2006 amendment, placed a freeze under G.S. 75-63(o)(2) and G.S. 75-63(o)(3), as set forth by the 2006 amendment to subsection (o).

Session Laws 2006-158, s. 3, provides, in part, that s. 1, which amended subsection (o), shall be effective for a minimum of 90 days from July 23, 2006, but otherwise shall expire on January 1, 2007, or upon the United States Department of Veterans Affairs implementing a program that will pay for a subscription to a credit monitoring program for persons eligible for a fee waiver under G.S. 75-63(o)(2) and G.S. 75-63(o)(3), whichever event occurs first.

Effect of Amendments. — Session Laws 2009-355, s. 1, effective October 1, 2009, rewrote the section.

Session Laws 2009-550, s. 5, effective August 28, 2009, deleted "removal" following "Receipt of a" in subdivision (g1)(2)g.

§ 75-64. Destruction of personal information records.

(a) Any business that conducts business in North Carolina and any business that maintains or otherwise possesses personal information of a resident of North Carolina must take reasonable measures to protect against unauthorized access to or use of the information in connection with or after its disposal.

(b) The reasonable measures must include:

(1) Implementing and monitoring compliance with policies and procedures that require the burning, pulverizing, or shredding of papers containing personal information so that information cannot be practicably read or reconstructed.

(2) Implementing and monitoring compliance with policies and procedures that require the destruction or erasure of electronic media and other nonpaper media containing personal information so that the information cannot practicably be read or reconstructed.

(3) Describing procedures relating to the adequate destruction or proper disposal of personal records as official policy in the writings of the business entity.

(c) A business may, after due diligence, enter into a written contract with, and monitor compliance by, another party engaged in the business of record destruction to destroy personal information in a manner consistent with this section. Due diligence should ordinarily include one or more of the following:

(1) Reviewing an independent audit of the disposal business's operations or its compliance with this statute or its equivalent.

(2) Obtaining information about the disposal business from several references or other reliable sources and requiring that the disposal business be certified by a recognized trade association or similar third party with a reputation for high standards of quality review.

(3) Reviewing and evaluating the disposal business's information security policies or procedures or taking other appropriate measures to determine the competency and integrity of the disposal business.

(d) A disposal business that conducts business in North Carolina or disposes of personal information of residents of North Carolina must take all reasonable measures to dispose of records containing personal information by implementing and monitoring compliance with policies and procedures that protect against unauthorized access to or use of personal information during or after the collection and transportation and disposing of such information.

(e) This section does not apply to any of the following:

(1) Any bank or financial institution that is subject to and in compliance with the privacy and security provision of the Gramm Leach Bliley Act, 15 U.S.C. § 6801, et seq., as amended.

(2) Any health insurer or health care facility that is subject to and in compliance with the standards for privacy of individually identifiable health information and the security standards for the protection of electronic health information of the Health Insurance Portability and Accountability Act of 1996.

(3) Any consumer reporting agency that is subject to and in compliance with the Federal Credit Reporting Act, 15 U.S.C. § 1681, et seq., as amended.

(f) A violation of this section is a violation of G.S. 75-1.1, but any damages assessed against a business because of the acts or omissions of its nonmanagerial employees shall not be trebled as provided in G.S. 75-16 unless the business was negligent in the training, supervision, or monitoring of those employees. No private right of action may be brought by an individual for a violation of this section unless such individual is injured as a result of the violation. (2005-414, s. 1.)

§ 75-65. Protection from security breaches.

(a) Any business that owns or licenses personal information of residents of North Carolina or any business that conducts business in North Carolina that owns or licenses personal information in any form (whether computerized, paper, or otherwise) shall provide notice to the affected person that there has been a security breach following discovery or notification of the breach. The disclosure notification shall be made without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subsection (c) of this section, and consistent with any measures necessary to determine sufficient contact information, determine the scope of the breach and restore the reasonable integrity, security, and confidentiality of the data system. For the purposes of this section, personal information shall not include electronic identification numbers, electronic mail names or addresses, Internet account numbers, Internet identification names, parent's legal surname prior to marriage, or a password unless this information would permit access to a person's financial account or resources.

(b) Any business that maintains or possesses records or data containing personal information of residents of North Carolina that the business does not own or license, or any business that conducts business in North Carolina that maintains or possesses records or data containing personal information that the business does not own or license shall notify the owner or licensee of the information of any security breach immediately following discovery of the breach, consistent with the legitimate needs of law enforcement as provided in subsection (c) of this section.

(c) The notice required by this section shall be delayed if a law enforcement agency informs the business that notification may impede a criminal investigation or jeopardize national or homeland security, provided that such request is made in writing or the business documents such request contemporaneously in writing, including the name of the law enforcement officer making the request and the officer's law enforcement agency engaged in the investigation. The notice required by this section shall be provided without unreasonable delay after the law enforcement agency communicates to the business its determination that notice will no longer impede the investigation or jeopardize national or homeland security.

(d) The notice shall be clear and conspicuous. The notice shall include all of the following:

(1) A description of the incident in general terms.

(2) A description of the type of personal information that was subject to the unauthorized access and acquisition.

(3) A description of the general acts of the business to protect the personal information from further unauthorized access.

(4) A telephone number for the business that the person may call for further information and assistance, if one exists.

(5) Advice that directs the person to remain vigilant by reviewing account statements and monitoring free credit reports.

(6) The toll-free numbers and addresses for the major consumer reporting agencies.

(7) The toll-free numbers, addresses, and Web site addresses for the Federal Trade Commission and the North Carolina Attorney General's Office, along with a statement that the individual can obtain information from these sources about preventing identity theft.

(e) For purposes of this section, notice to affected persons may be provided by one of the following methods:

(1) Written notice.

(2) Electronic notice, for those persons for whom it has a valid e-mail address and who have agreed to receive communications electronically if the notice provided is consistent with the provisions regarding electronic records and signatures for notices legally required to be in writing set forth in 15 U.S.C. § 7001.

(3) Telephonic notice provided that contact is made directly with the affected persons.

(4) Substitute notice, if the business demonstrates that the cost of providing notice would exceed two hundred fifty thousand dollars ($250,000) or that the affected class of subject persons to be notified exceeds 500,000, or if the business does not have sufficient contact information or consent to satisfy subdivisions (1), (2), or (3) of this subsection, for only those affected persons without sufficient contact information or consent, or if the business is unable to identify particular affected persons, for only those unidentifiable affected persons. Substitute notice shall consist of all the following:

a. E-mail notice when the business has an electronic mail address for the subject persons.

b. Conspicuous posting of the notice on the Web site page of the business, if one is maintained.

c. Notification to major statewide media.

(e1) In the event a business provides notice to an affected person pursuant to this section, the business shall notify without unreasonable delay the Consumer Protection Division of the Attorney General's Office of the nature of the breach, the number of consumers affected by the breach, steps taken to investigate the breach, steps taken to prevent a similar breach in the future, and information regarding the timing, distribution, and content of the notice.

(f) In the event a business provides notice to more than 1,000 persons at one time pursuant to this section, the business shall notify, without unreasonable delay, the Consumer Protection Division of the Attorney General's Office and all consumer reporting agencies that compile and maintain files on consumers on a nationwide basis, as defined in 15 U.S.C. § 1681a(p), of the timing, distribution, and content of the notice.

(g) Any waiver of the provisions of this Article is contrary to public policy and is void and unenforceable.

(h) A financial institution that is subject to and in compliance with the Federal Interagency Guidance Response Programs for Unauthorized Access to Consumer Information and Customer Notice, issued on March 7, 2005, by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision; or a credit union that is subject to and in compliance with the Final Guidance on Response Programs for Unauthorized Access to Member Information and Member Notice, issued on April 14, 2005, by the National Credit Union Administration; and any revisions, additions, or substitutions relating to any of the said interagency guidance, shall be deemed to be in compliance with this section.

(i) A violation of this section is a violation of G.S. 75-1.1. No private right of action may be brought by an individual for a violation of this section unless such individual is injured as a result of the violation.

(j) Causes of action arising under this Article may not be assigned. (2005-414, s. 1; 2009-355, s. 2; 2009-573, s. 10.)

Editor's Note. — Session Laws 2009-573, s. 1, provides: "This act shall be known and may be cited as the 'Consumer Economic Protection Act of 2009.'"

Effect of Amendments. — Session Laws 2009-355, s. 2, effective October 1, 2009, in subsection (d), in the introductory language, substituted "all" for "a description," added "A description of" at the beginning of subdivisions (d)(1) through (d)(3), in subdivision (d)(4), inserted "for the business," added subdivisions (d)(6) and (d)(7), and made minor stylistic changes; and added subsection (e1).

Session Laws 2009-573, s. 10, effective October 1, 2009, and applicable to foreclosures initiated, debt collection activities undertaken, and actions filed on or after that date, in subsection (h), inserted "or a credit union that is subject to and in compliance with the Final Guidance on Response Programs for Unauthorized Access to Member Information and Member Notice, issued on April 14, 2005, by the National Credit Union Administration" and substituted "relating to any of the said" for "relating to said."

§ 75-66. Publication of personal information.

(a) It shall be a violation of this section for any person to knowingly broadcast or publish to the public on radio, television, cable television, in a writing of any kind, or on the Internet, the personal information of another with actual knowledge that the person whose personal information is disclosed has previously objected to any such disclosure.

(b) As used in this section, "person" means any individual, partnership, corporation, trust, estate, cooperative, association, or other entity, but does not include any:

(1) Government, government subdivision or agency.

(2) Entity subject to federal requirements pursuant to the Health Insurance Portability and Accountability Act (HIPAA).

(c) As used in this section, the phrase "personal information" includes a person's first name or first initial and last name in combination with any of the following information:

(1) Social security or employer taxpayer identification numbers.

(2) Drivers license, State identification card, or passport numbers.

(3) Checking account numbers.

(4) Savings account numbers.

(5) Credit card numbers.

(6) Debit card numbers.

(7) Personal Identification (PIN) Code as defined in G.S. 14-113.8(6).

(8) Digital signatures.

(9) Any other numbers or information that can be used to access a person's financial resources.

(10) Biometric data.

(11) Fingerprints.

(12) Passwords.

(d) Nothing in this section shall:

(1) Limit the requirements or obligations under any other section of this Article, including, but not limited to, G.S. 75-62 and G.S. 75-65.

(2) Apply to the collection, use, or release of personal information for a purpose permitted, authorized, or required by any federal, state, or local law, regulation, or ordinance.

(e) Any person whose property or person is injured by reason of a violation of this section may sue for civil damages pursuant to the provisions of G.S. 1-539.2C. (2007-534, s. 2.)

Editor's Note. — Session Laws 2007-534, s. 4, made this section effective December 1, 2007, and applicable to offenses and violations committed on or after that date.

§§ 75-67 through 75-79: Reserved for future codification purposes.

ARTICLE 3.

Motor Fuel Marketing Act.

§ 75-80. Title.

This Article shall be known and may be cited as the "Motor Fuel Marketing Act". (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-81. Definitions.

The following terms shall have the meanings ascribed to them in this section unless otherwise stated and unless the context or subject matter clearly indicates otherwise:

(1) "Person" shall mean any person, firm, association, organization, partnership, business trust, joint stock company, company, corporation or legal entity.

(2) "Sale" shall mean selling, offering for sale or advertising for sale.

(3) "Motor Fuel" means motor fuel, as defined in G.S. 105-449.60, and alternative fuel, as defined in G.S. 105-449.130.

(4) "Cost" or "Costs" shall mean as follows:

  a. For a refiner or terminal supplier, costs shall be presumed to be the refiner's or terminal supplier's prevailing price to the wholesale class of trade at the terminal used by the refiner or terminal supplier to obtain the motor fuel in question or the lowest prevailing price within 10 days prior to a sale alleged to be in violation of G.S. 75-82 hereof plus all transportation expenses including freight expenses (incurred and not otherwise included in the cost of the motor fuel), and motor fuel taxes. If a refiner or terminal supplier does not regularly sell to the wholesale class of trade at the terminal in question, then such refiner or terminal supplier shall use as the prevailing price either (i) the lowest price to the wholesale class of trade of those other refiners or terminal suppliers at the same terminal who regularly sell to the wholesaler class or (ii) a price determined by using standard functional accounting procedures.

  b. For all other sellers, cost includes the invoice or replacement cost, whichever is less, of the grade, brand or blend, of motor fuel within 10 days prior to the date of sale, in the quantity or quantities last purchased, less all rebates and discounts received including prompt payment discounts and plus all applicable State, federal and local taxes, and transportation expenses including freight expenses, incurred and not otherwise included in the cost of the motor fuel.

(5) "Prompt Payment Discounts" shall mean any allowance for payment within a specified time, but shall not include discounts for cash made to the motoring public at motor fuel outlets.

(6) "Affiliate" shall mean any person who (other than by means of a franchise) controls, is controlled by or is under common control with, any other person.

(7) "Motor Fuel Merchant" is any person selling motor fuel to the public.

(8) "Motor Fuel Outlet" is any retail facility selling motor fuel to the motoring public.

(9) "New Retail Outlet" shall mean a new retail facility constructed from the ground or an existing retail facility that is offering motor fuel to the motoring public for the first time.

(10) "Refiner" shall mean any person engaged in the production or refining of motor fuel, whether such production or refining occurs in this State or elsewhere, and includes any affiliate of such person or firm.

(11) "Terminal Supplier" shall mean any person engaged in selling or brokering motor fuel to wholesalers or retailers from a storage facility of more than 2,000,000 gallons capacity and such person has an ownership interest in or control of the storage facility. (1985 (Reg. Sess., 1986), c. 972, s. 1; 1991 (Reg. Sess., 1992), c. 1007, s. 36; 1995, c. 390, s. 12; 1997-456, s. 27.)

§ 75-82. Unlawful below-cost selling; exceptions.

(a) It shall be unlawful where the intent is to injure competition for any motor fuel merchant or the affiliate of any motor fuel merchant to sell with such frequency as to indicate a general business practice of selling at a motor fuel outlet any grade, brand or blend of motor fuel for less than the cost of that grade, brand or blend of motor fuel except where (i) the price is established in good faith to meet or compete with the lower price of a competitor in the same market area on the same level of distribution selling the same or comparable product of like quality, (ii) the price remains in effect for no more than 10 days after the first sale of that grade, brand or blend by the merchant at a new retail outlet, (iii) the sale is made in good faith to dispose of a grade, brand or blend of motor fuel for the purpose of discontinuing sales of that product, or (iv) the sale is made pursuant to the order or authority of any court or governmental agency.

(b) For purposes of this Article, motor fuel cost shall be computed separately for each grade, brand or blend of each motor fuel at each location where said motor fuel is offered for sale; however, nothing in this subsection shall prevent a motor fuel merchant from using a weighted average motor fuel cost for comparable grade, brand or blend when such motor fuel merchant is supplied by more than one refiner or terminal supplier at one or more terminals.

(c) This Article shall apply only to retail sales of motor fuel at motor fuel outlets. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-83. Unlawful inducement; civil penalty.

It shall be unlawful to knowingly induce, or to knowingly attempt to induce, a violation of this Article, whether by otherwise lawful or unlawful means. In any action initiated by the Attorney General, anyone found to have violated this provision shall be subject to the civil penalty applicable to the sales made in violation of this Article; or, if no sales were made, to a civil penalty of one thousand dollars ($1,000). The clear proceeds of any civil penalties imposed in any actions initiated by the Attorney General under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1985 (Reg. Sess., 1986), c. 972, s. 1; 1998-215, s. 102.)

§ 75-84. Separate offenses; injunctions.

Each act of establishing a price in violation of this Article shall constitute a separate offense by the seller and the civil penalty for each offense shall be not more than one thousand dollars ($1,000). Upon a proper showing by the Attorney General or his delegate, further violations may be temporarily or permanently enjoined.

The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1985 (Reg. Sess., 1986), c. 972, s. 1; 1998-215, s. 103.)

§ 75-85. Investigations by Attorney General.

The Attorney General is authorized to investigate any allegation of a violation of this Article made by a motor fuel merchant or by an association or group of motor fuel merchants. If an investigation discloses a violation, the Attorney General may exercise the authority under this Article to seek an injunction and he may also seek civil penalties. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1985 (Reg. Sess., 1986), c. 972, s. 1; 1998-215, s. 104.)

§ 75-86. Private actions.

Any person, corporation, or other business entity which is engaged in the sale of motor fuel for resale or consumption and which is directly or indirectly injured by a violation of this Article may bring an action in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the violation is alleged to have occurred to recover actual damages, exemplary damages, costs and reasonable attorneys' fees. The court shall also grant such equitable relief as is proper, including a declaratory judgment and injunctive relief. Any action under this Article must be brought within one year of the alleged violation. (1985 (Reg. Sess., 1986), c. 972, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 97.)

§ 75-87. Private action presumptions.

(a) In any private action brought under this Article, a violation shall be presumed to have occurred if: (i) the prevailing price under G.S. 75-81(4)(a) for any grade, brand or blend of a motor fuel sold by a refiner or terminal supplier to a wholesaler or retailer is greater than the price of the same grade, brand or blend of motor fuel sold by such refiner or terminal supplier directly through its own motor fuel outlet or through the outlet of an affiliate of said refiner or terminal supplier; or (ii) if the product price of any grade, brand or blend of a motor fuel sold by a wholesaler to a retailer is greater than the retail price of the same grade, brand or blend of motor fuel sold by such wholesaler through its own motor fuel outlet or the outlet of an affiliate of said wholesaler, provided the method of delivery and quantities of each delivery of motor fuel to the retailer and to the wholesaler's outlet or affiliate's outlet are the same or comparable.

(b) A party may rebut the presumption created by this section by presenting evidence to establish his cost of the grade, brand or blend of motor fuel in question, or by qualifying for an exception under G.S. 75-82. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-88. Public disclosure.

Any refiner or terminal supplier computing prevailing price under the provisions of G.S. 75-81(4)(a)(i) or (ii) shall be required to publicly disclose said price. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-89. Powers and remedies supplementary.

The powers and remedies provided by this Article shall be cumulative and supplementary to all powers and remedies otherwise provided by law. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-90. Availability of gasoline suitable for blending with fuel alcohol; blender of record.

(a) The following definitions apply in this section:
  (1) Blender. — Defined in G.S. 105-449.60.
  (2) Distributor. — Defined in G.S. 105-449.60.
  (3) Fuel Alcohol. — Defined in G.S. 105-449.60.
  (4) Gasoline. — Defined in G.S. 105-449.60(22)a.
  (5) Retailer. — Defined in G.S. 105-449.60.
  (6) Supplier. — Defined in G.S. 105-449.60.

(b) A supplier that imports gasoline into the State shall offer gasoline for sale to a distributor or retailer that is not preblended with fuel alcohol and that is suitable for subsequent blending with fuel alcohol.

(c) The General Assembly finds that use of blended fuels reduces dependence on imported oil and is therefore in the public interest. The General Assembly further finds that gasoline may be blended with fuel alcohol below the terminal rack by distributors and retailers as well as above the terminal rack by suppliers and that there is no reason to restrict or prevent blending by suppliers, distributors, or retailers. Therefore, any provision of any contract that would restrict or prevent a distributor or retailer from blending gasoline with fuel alcohol or from qualifying for any federal or State tax credit due to blenders is contrary to public policy and is void. This subsection does not impair the obligation of existing contracts, but does apply if such contract is modified, amended, or renewed. (2008-198, s. 11.7; 2008-222, s. 1.)

Editor's Note. — Session Laws 2008-222, s. 2, made this section effective August 17, 2008.

Session Laws 2008-198, s. 11.7, was contingent on Senate Bill 1339 becoming law, which it did. Senate Bill 1339 was enacted as Session Laws 2008-222.

Effect of Amendments. — Session Laws 2008-198, s. 11.7, effective August 8, 2008, substituted "G.S. 105-449.60(22)a" for "G.S. 105-449.60(15)a" in subdivision (a)(4).

§§ 75-91 through 75-99: Reserved for future codification purposes.

Article 4.

Telephone Solicitations.

§ 75-100. Findings.

The General Assembly finds all of the following:
  (1) The use of the telephone to market goods and services to the home is now pervasive due to the increased use of cost-effective telephone solicitation technologies and techniques.
  (2) While some consumers enjoy and benefit from telephone solicitations from legitimate telephone solicitors, many others object to these telephone solicitations as an intrusive invasion of their privacy in the home.
  (3) In addition, the proliferation of telephone solicitations, especially during the evening hours, creates a nuisance and a disturbance upon the home and family life of telephone subscribers during a time of day used by many families for traditional family activities.
  (4) North Carolina residents should have the freedom to choose whether or not to permit telephone solicitors to contact them.
  (5) Individual privacy rights, personal safety, prevention of fraud, and commercial freedom of speech and trade must be balanced in a way

that protects the privacy of individuals and permits legitimate telephone solicitation practices.

(6) Legitimate telephone solicitors have no interest in continuing to invade the privacy of those telephone subscribers who affirmatively express their desires to receive no further telephone solicitations.

(7) Many telephone subscribers who have transacted business with firms that employ telephone solicitations have experienced problems with their checking and credit card accounts being debited before they can evaluate the terms and conditions of the transaction, before they can evaluate the merchandise or service to be delivered, or without their agreement to enter into the transaction or authorize such transactions in the first place. Other telephone subscribers have had unauthorized charges placed on their telephone bill and have had their long-distance carrier switched without their authorization as a result of telephone solicitations.

(8) New technologies that make telephone solicitations more cost-effective also allow for the creation of a "Do Not Call" Registry through which North Carolina consumers can easily register their desires not to receive further telephone solicitations and telephone solicitors can easily access and employ lists of consumers who have registered those desires.

(9) The public interest requires an efficient mechanism for telephone subscribers to notify telephone solicitors that their telephone numbers cannot be called and additional protections for North Carolina residents who enter into consumer transactions initiated through telephone solicitations. (2003-411, s. 3.)

Cross References. — As to notification of opportunity to object to telephone solicitation, see G.S. 62-54.

Editor's Note. — Session Laws 2003-411, s. 6, provides: "Should one or more of the terms or provisions of this act or any application thereof be held or declared unenforceable or invalid to any extent, the remainder of this act, and the applications thereof that have not been held or declared unenforceable or invalid, shall remain in effect. In the specific event that the provisions of G.S. 75-102, 75-103, 75-104, or 75-105 as enacted in Section 3 of this act, are declared to be preempted or otherwise unenforceable in relation to interstate telephone calls, those provisions shall remain in force and effect with respect to intrastate telephone calls."

Session Laws 2003-411, s. 7, provides: "Consistent with protected speech rights of businesses that engage in telephone solicitations, the provisions of this act shall be given broad construction so as to protect telephone subscribers from unwanted telephone solicitations and from problematic sales techniques and payment procedures often associated with these solicitations."

§ 75-101. Definitions.

The following definitions apply in this Article:

(1) Affiliate. — A business establishment, business, or other legal entity that wholly or substantially owns, is wholly or substantially owned by, or is under common ownership with a telephone solicitor.

(2) Automatic dialing and recorded message player. — Any automatic equipment that incorporates a storage capability of telephone numbers to be called or a random or a sequential number generator capable of producing numbers to be called that, working alone or in conjunction with other equipment, disseminates a prerecorded message to the telephone number called.

(3) "Do Not Call" Registry. — The registry created and maintained by the Federal Trade Commission pursuant to the Telemarketing Sales Rule. It also means any other telemarketing registry created by the federal government, including the Federal Communications Commission. It

also means any registry created by the Attorney General pursuant to G.S. 75-102(n).

(4) Doing business in this State. — To make or cause to be made any telephone solicitation to North Carolina telephone subscribers, whether the telephone solicitations are made from a location inside North Carolina or outside North Carolina.

(5) Established business relationship. — A relationship between a seller and a consumer based on:

a. The consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and the seller or one or more of its affiliates within the 18 months immediately preceding the date of a telephone solicitation; or

b. The consumer's inquiry or application regarding a product or service offered by the seller within the three months immediately preceding the date of a telephone solicitation.

(6) Express invitation or permission. — Any invitation or permission that is registered by the telephone subscriber on an independent form and that contains the telephone number to which calls can be placed and the signature of the telephone subscriber. The form may be completed and signed electronically.

(7) Person. — Any individual, business establishment, business, or other legal entity.

(8) Telemarketing Sales Rule. — The federal regulation promulgated by the Federal Trade Commission, 16 C.F.R. Part 310 (January 29, 2003 Edition), as amended, to implement the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108, as amended.

(9) Telephone solicitation. — A voice communication, whether prerecorded, live, or a facsimile, over a telephone line or wireless telephone network or via a commercial mobile radio service that is made by a telephone solicitor to a telephone subscriber for the purpose of soliciting or encouraging the purchase or rental of, or investment in, property, goods, or services; obtaining or providing information that will or may be used for that purpose; soliciting or encouraging a telephone subscriber's participation in any contest, sweepstakes, raffle, or lottery, whether legal or illegal; or obtaining a charitable donation. "Telephone solicitation" also includes those transactions that are defined as "telemarketing" under the Telemarketing Sales Rule.

(10) Telephone solicitor. — Any individual, business establishment, business, or other legal entity doing business in this State that, directly or through salespersons or agents, makes or attempts to make telephone solicitations or causes telephone solicitations to be made. "Telephone solicitor" also includes any party defined as a "telemarketer" under the Telemarketing Sales Rule.

(11) Telephone subscriber. — An individual who subscribes to a residential telephone service from a local exchange company, a competing local provider certified to do business in North Carolina, or a wireless telephone company; or the individuals living or residing with that individual.

(12) Unsolicited telephone call. — A voice communication, whether prerecorded, live, or a facsimile, over a telephone line or wireless telephone network or via a commercial mobile radio service that is made by a person to a telephone subscriber without prior express invitation or permission. (2003-411, s. 3.)

§ 75-102. Restrictions on telephone solicitations.

(a) Except as provided in G.S. 75-103, no telephone solicitor shall make a telephone solicitation to a telephone subscriber's telephone number if the telephone subscriber's telephone number appears in the latest edition of the "Do Not Call" Registry.

(b) No telephone solicitor shall make a telephone solicitation to a telephone subscriber's telephone number if the telephone subscriber previously has communicated to the telephone solicitor a desire to receive no further telephone solicitations from the telephone solicitor to that number.

(c) Any telephone solicitor who makes a telephone solicitation shall do all of the following:

(1) At the beginning of the telephone solicitation, state clearly the identity of the telephone solicitor and identify the individual making the telephone solicitation.

(2) Upon request, provide the telephone subscriber with the telephone number or address at which the telephone solicitor may be contacted.

(3) If the telephone subscriber requests to be taken off the contact list of the telephone solicitor, the telephone solicitor shall take all steps necessary to remove the telephone subscriber's name and telephone number from the contact list of the telephone solicitor and stop calling the telephone subscriber within 30 business days.

(4) If the telephone subscriber objects to the telephone solicitation, terminate the telephone solicitation and promptly disconnect from the telephone line of the person receiving the call.

(5) Notwithstanding subdivision (3) of this subsection, if a telephone solicitor relies on the established business relationship of an affiliate to solicit a residential telephone subscriber whose telephone number is listed in the latest edition of the "Do Not Call" Registry and the person called communicates a desire to receive no further telephone solicitations from the telephone solicitor, the telephone solicitor shall take all steps necessary to remove that telephone subscriber's telephone number from the contact lists of the telephone solicitor and that affiliate, unless the telephone subscriber indicates otherwise, and the telephone solicitor and that affiliate shall stop calling the telephone subscriber at that number within 60 business days.

(d) Every telephone solicitor shall implement systems and written procedures to prevent further telephone solicitations to any telephone subscriber who has asked not to be called again at a specific number or numbers or whose telephone number appears in the "Do Not Call" Registry. Every telephone solicitor shall train, monitor, and enforce compliance by its employees and shall monitor and enforce compliance by its independent contractors in those systems and procedures. Every telephone solicitor shall ensure that lists of telephone numbers that may not be contacted by the telephone solicitor are maintained and recorded. Compliance with the time requirements within the Telemarketing Sales Rule for incorporating and complying with updated versions of the "Do Not Call" Registry shall constitute compliance with North Carolina law.

(e) Except as provided in G.S. 75-103, no telephone solicitor shall violate any requirement of section 310.3 of the Telemarketing Sales Rule (Deceptive telemarketing acts or practices), section 310.4 of the Telemarketing Sales Rule (Abusive telemarketing acts or practices), and section 310.5 of the Telemarketing Sales Rule (Record keeping requirements).

(f) No telephone solicitor shall make a telephone solicitation before 8:00 A.M. or after 9:00 P.M.

(g) A telephone solicitor shall inquire as to whether the telephone subscriber is under the age of 18. If the telephone subscriber purports to be less than 18 years of age, the telephone solicitor shall discontinue the call immediately. No inquiry is required where the solicitor has taken reasonable steps to remove all telephone contacts who are less than 18 years of age from its list of subscribers being contacted or can demonstrate that it does not target subscribers who are less than 18 years of age.

(h) No telephone solicitor shall engage in threats, intimidation, or the use of profane or obscene language.

(i) No telephone solicitor shall knowingly use any method to block or otherwise circumvent a telephone subscriber's use of a caller identification service. No provider of telephone caller identification services shall be held liable for violations of this subsection committed by other individuals or entities.

(j) A telephone solicitor or its agent that makes telephone solicitations on its behalf, provided that the telephone solicitor ensures compliance by its agent, shall keep a record for a period of 24 months from the date a telephone solicitation is made of the legal name, any fictitious name used, the resident address, the telephone number, and the job title of each individual who makes a telephone solicitation for that telephone solicitor. If an individual who makes telephone solicitations for a telephone solicitor uses a fictitious name, the fictitious name shall be traceable only to the specific individual.

(k) Nothing in this section prohibits a telephone solicitor from contacting by nontelephonic notice a telephone subscriber whose telephone number appears in the "Do Not Call" Registry to obtain the telephone subscriber's express invitation or permission allowing the telephone solicitor to make telephone solicitations to the telephone subscriber. A telephone solicitor shall not contact a telephone subscriber by telephone to obtain this express invitation or permission.

(*l*) Nothing in this section prohibits a telephone solicitor from advertising in a general medium or contacting by nontelephonic notice a telephone subscriber whose telephone number appears in the "Do Not Call" Registry to encourage the telephone subscriber to initiate telephone calls to the telephone solicitor. A telephone solicitor shall not contact a telephone subscriber by telephone to obtain this express invitation or permission.

(m) The Attorney General, in consultation with the Public Staff of the Public Utilities Commission, shall draft the contents of a bill insert or bill message, a direct mailing, and an e-mail that notifies consumers of the existence of the "Do Not Call" Registry and provides information to consumers on how to use it and the other provisions of this Article to object to receiving telephone solicitations. Local exchange companies shall distribute the notification pursuant to G.S. 62-54.

(n) In the event that the federal "Do Not Call" Registry is not operational by January 1, 2004, or ceases to operate for any reason after January 1, 2004, the Attorney General may develop, operate, and maintain such a registry for the benefit of North Carolina telephone subscribers.

(o) In telephone solicitation transactions involving telephone subscribers, no contract or purchase agreement entered into during a telephone solicitation is valid, and no money from the prospective purchaser is due thereunder, unless all the following conditions are satisfied:

(1) The contract and the sales representations that precede it are not deceptive or abusive telemarketing acts or practices as elaborated in sections 310.3 and 310.4 of the Telemarketing Sales Rule only to the extent that this Article requires telephone solicitors to comply with these regulations.

(2) The telephone solicitor has complied with the record keeping requirements of section 310.5 of the Telemarketing Sales Rule only to the extent that this Article requires telephone solicitors to comply with these regulations.

(3) The contract and the sales representations that precede it comply with all other applicable federal and State laws, including Article 1 of this Chapter. (2003-411, ss. 3, 4; 2009-122, s. 1.)

Editor's Note. — Session Laws 2003-411, s. 6, provides: "Should one or more of the terms or provisions of this act or any application thereof be held or declared unenforceable or invalid to any extent, the remainder of this act, and the applications thereof that have not been held or declared unenforceable or invalid, shall remain in effect. In the specific event that the provisions of G.S. 75-102, 75-103, 75-104, or 75-105 as enacted in Section 3 of this act, are declared to be preempted or otherwise unenforceable in relation to interstate telephone calls, those provisions shall remain in force and effect with respect to intrastate telephone calls."

Effect of Amendments. — Session Laws 2009-122, s. 1, effective October 1, 2009, in subsection (m), inserted "or bill message, a direct mailing, and an e-mail" near the middle, and substituted "notification" for "insert" near the end.

§ 75-103. Limited exceptions.

(a) G.S. 75-102(a) does not apply to any of the following telephone solicitations that are made:

(1) To any telephone subscriber with the telephone subscriber's prior express invitation or permission.

(2) To any telephone subscriber with whom the telephone solicitor has an established business relationship.

(3) By or on behalf of a tax-exempt nonprofit organization.

(4) By or on behalf of a telephone solicitor that employs fewer than 10 full-time or part-time direct employees, the telephone solicitations are made by the direct employees, and the direct employees collectively make or attempt to make no more than an average of 10 telephone solicitations to telephone subscribers per week during a calendar year.

(5) To any telephone subscriber for the sole purpose of arranging a subsequent face-to-face meeting between the telephone solicitor and the telephone subscriber and the telephone solicitor does none of the following during the telephone solicitation:

a. Seek payment from the telephone subscriber in connection with the sale or rental of, or investment in, property, goods, or services.

b. Complete the sale or rental of, or investment in, property, goods, or services.

c. Obtain provisional acceptance of a sale, rental, or investment.

d. Obtain the agreement of the telephone subscriber to participate in any contest, sweepstakes, raffle, or lottery.

e. Directly following the telephone solicitation, go or cause an individual to go to the telephone subscriber to collect a payment or deliver any item purchased.

(6) By a person primarily soliciting the sale of a subscription for a newspaper of general circulation.

(b) G.S. 75-102(c)(3), 75-102(d), 75-102(g), and 75-102(j) do not apply to any telephone solicitations described in G.S. 75-103(a)(1), (2), (3), (4), and (5).

(c) G.S. 75-102(e) does not apply to any of the telephone solicitations described in subdivisions (a)(4) and (a)(5) of this section.

(d) G.S. 75-102(e) does not apply to any of the telephone solicitations described in subdivisions (a)(1), (a)(2), and (a)(3) of this section, except that these types of telephone solicitations shall comply with sections 310.3(a)(2), (a)(3), and (a)(4), 310.3(c), 310.3(d), 310.4(a), 310.4(b)(1)(i) and (iv), (b)(2), (b)(3), and (b)(4), and 310.4(e) of the Telemarketing Sales Rule.

(e) In any dispute regarding whether a telephone subscriber has provided an express invitation or permission under subsection (a) of this section, the telephone solicitor has the burden of proving that the telephone subscriber has provided this permission by producing the original document, a facsimile document, or an electronic form, signed by the telephone subscriber, or other authentication that evidences permission. A telephone subscriber may subsequently retract express invitation or permission by indicating a desire not to receive further telephone solicitations under G.S. 75-102(b). (2003-411, s. 3.)

Editor's Note. — Session Laws 2003-411, s. 6, provides: "Should one or more of the terms or provisions of this act or any application thereof be held or declared unenforceable or invalid to any extent, the remainder of this act, and the applications thereof that have not been held or declared unenforceable or invalid, shall remain in effect. In the specific event that the provisions of G.S. 75-102, 75-103, 75-104, or 75-105 as enacted in Section 3 of this act, are declared to be preempted or otherwise unenforceable in relation to interstate telephone calls, those provisions shall remain in force and effect with respect to intrastate telephone calls."

§ 75-104. Restrictions on use of automatic dialing and recorded message players.

(a) Except as provided in this section, no person may use an automatic dialing and recorded message player to make an unsolicited telephone call.

(b) Notwithstanding subsection (a) of this section, a person may use an automatic dialing and recorded message player to make an unsolicited telephone call only under one or more of the following circumstances:

(1) All of the following are satisfied:
  a. The person making the call is any of the following:
    1. A tax-exempt charitable or civic organization.
    2. A political party or political candidate.
    3. A governmental official.
    4. An opinion polling organization, radio station, television station, cable television company, or broadcast rating service conducting a public opinion poll.
  b. No part of the call is used to make a telephone solicitation.
  c. The person making the call clearly identifies the person's name and contact information and the nature of the unsolicited telephone call.

(2) Prior to the playing of the recorded message, a live operator complies with G.S. 75-102(c), states the nature and length in minutes of the recorded message, and asks for and receives prior approval to play the recorded message from the person receiving the call.

(3) The unsolicited telephone call is in connection with an existing debt or contract for which payment or performance has not been completed at the time of the unsolicited telephone call, and both of the following are satisfied:
  a. No part of the call is used to make a telephone solicitation.
  b. The person making the call clearly identifies the person's name and contact information and the nature of the unsolicited telephone call.

(4) The unsolicited telephone call is placed by a person with whom the telephone subscriber has made an appointment, provided that the call is conveying information only about the appointment, or by a utility, telephone company, cable television company, satellite television company, or similar entity for the sole purpose of conveying information or news about network outages, repairs or service interruptions, and confirmation calls related to restoration of service, and both of the following are satisfied:
  a. No part of the call is used to make a telephone solicitation.

b. The person making the call clearly identifies the person's name and contact information and the nature of the unsolicited telephone call.

(5) The person plays the recorded message in order to comply with section 16 C.F.R. Part 310.4(b)(4) of the Telemarketing Sales Rule.

(6) The unsolicited telephone call is placed by, or on behalf of, a health insurer as defined in G.S. 58-51-115(a)(2) from whom the telephone subscriber or other covered family member of the health insurer receives health care coverage or the administration of such coverage, provided that the call is conveying information related to the telephone subscriber or family member's health care, preventive services, medication or other covered benefits, and both of the following are satisfied:

a. No part of the call is used to make a telephone solicitation.

b. The person making the call clearly identifies the person's name and contact information and the nature of the unsolicited telephone call.

(7) No part of the call is used to make a telephone solicitation, the person making the call clearly identifies the person's contact information and the nature of the unsolicited telephone call, and the sole purpose of the unsolicited telephone call is to protect the public health, safety, or welfare, by informing the telephone subscriber of any of the following:

a. That the telephone subscriber has purchased a product that is subject to a recall by the product's manufacturer, distributor or retailer, or by the federal Consumer Product Safety Commission or another government agency or department with legal authority to recall the product which is the subject of the call, due to safety or health concerns, provided that (i) there is a reasonable basis to believe that the telephone subscriber has purchased the product, and (ii) the message complies with any requirements imposed by any government agency instituting the recall.

b. That the telephone subscriber may have received a prescription or over-the-counter medication that is subject to a recall by the product's manufacturer, distributor or retailer, or by the federal Food and Drug Administration or another government agency or department with legal authority to recall the product which is the subject of the call, due to safety or health concerns, provided that (i) the call and its message comply with the requirements of the Health Insurance Portability and Accountability Act (P.L. 104-191) (HIPAA) and any corresponding regulations pertaining to privacy, (ii) there is a reasonable basis to believe that the telephone subscriber has purchased or received the medication, and (iii) the message complies with any requirements imposed by the government agency or product manufacturer, distributor, or retailer instituting the recall.

c. That the telephone subscriber has not picked up a filled prescription drug for which a valid prescription is on file with a pharmacy licensed pursuant to G.S. 90-85.21 and the telephone subscriber requested that the prescription be filled, provided that the call and its message comply with the requirements of the Health Insurance Portability and Accountability Act (P.L. 104-191) (HIPAA) and any corresponding regulations pertaining to privacy. (2003-411, s. 3; 2008-124, s. 10.3; 2009-364, s. 1.)

Editor's Note. — Session Laws 2003-411, s. 6, provides: "Should one or more of the terms or provisions of this act or any application thereof be held or declared unenforceable or invalid to any extent, the remainder of this act, and the applications thereof that have not been held or declared unenforceable or invalid, shall remain in effect. In the specific event that the provisions of G.S. 75-102, 75-103, 75-104, or 75-105 as enacted in Section 3 of this act, are declared to be preempted or otherwise unenforceable in relation to interstate telephone calls, those provisions shall remain in force and effect with respect to intrastate telephone calls."

Session Laws 2008-124, s. 11.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-124, s. 10.3, effective July 28, 2008, added subdivision (b)(6).

Session Laws 2009-364, s. 1, effective July 27, 2009, in subdivision (b)(3), added "and both of the following are satisfied:" at the end of the introductory language, and added subdivisions (b)(3)a and (b)(3)b; in subdivision (b)(4), added "and both of the following are satisfied:" at the end of the introductory language, and added subdivisions (b)(4)a and (b)(4)b; in subdivision (b)(6), added "and both of the following are satisfied:" at the end of the introductory language, and added subdivisions (b)(6)a and (b)(6)b; and added subdivision (b)(7).

§ 75-105. Enforcement.

(a) The Attorney General may investigate any complaints received alleging violation of this Article. If the Attorney General finds that there has been a violation of this Article, the Attorney General may bring an action to impose civil penalties and to seek any other appropriate relief pursuant to this Chapter, including equitable relief to restrain the violation. If the Attorney General brings an action on behalf of telephone subscribers pursuant to subsection (b) of this section, the Attorney General may not seek treble damages on behalf of telephone subscribers pursuant to G.S. 75-16. Actions for civil penalties under this section shall be consistent with the provisions of this Chapter except that the penalty imposed for a violation of this Article shall be either of the following:

(1) Five hundred dollars ($500.00) for the first violation, one thousand dollars ($1,000) for the second violation, and five thousand dollars ($5,000) for the third and any other violation that occurs within two years of the first violation.

(2) One hundred dollars ($100.00) for each violation within two years of the first violation, if the solicitor can show that the violations are the result of a mistake and the telephone solicitor either made the telephone solicitation under G.S. 75-103(a)(1), (2), (3), (4), and (5), or can show that the telephone solicitor complied with G.S. 75-102(d).

(b) A telephone subscriber who has received a telephone solicitation from or on behalf of a telephone solicitor in violation of this Article may bring any of the following actions in civil court:

(1) An action to enjoin further violations of this Article by the telephone solicitor.

(2) An action to recover five hundred dollars ($500.00) for the first violation, one thousand dollars ($1,000) for the second violation, and five thousand dollars ($5,000) for the third and any other violation that occurs within two years of the first violation.

(c) No action may be brought under subsection (b) of this section if the violations are a result of mistake and the telephone solicitor either made the telephone solicitation under G.S. 75-103(a)(1), (2), (3), (4), and (5), or can show that the telephone solicitor complied with G.S. 75-102(d).

(d) In an action brought pursuant to this Article, the court may award a prevailing plaintiff reasonable attorneys' fees if the court finds the defendant willfully engaged in the act or practice, and the court may award reasonable attorneys' fees to a prevailing defendant if the court finds that the plaintiff knew, or should have known, that the action was frivolous and malicious.

(e) A citizen of this State may also bring an action in civil court to enforce the private rights of action established by federal law under 47 U.S.C. § 227(b)(3) and 47 U.S.C. § 227(c)(5).

(f) Actions brought by telephone subscribers pursuant to this section shall be tried in the county where the plaintiff resides at the time of the commencement of the action. (2003-411, s. 3.)

Editor's Note. — Session Laws 2003-411, s. 6, provides: "Should one or more of the terms or provisions of this act or any application thereof be held or declared unenforceable or invalid to any extent, the remainder of this act, and the applications thereof that have not been held or declared unenforceable or invalid, shall remain in effect. In the specific event that the provisions of G.S. 75-102, 75-103, 75-104, or 75-105 as enacted in Section 3 of this act, are declared to be preempted or otherwise unenforceable in relation to interstate telephone calls, those provisions shall remain in force and effect with respect to intrastate telephone calls."

§§ 75-106 through 75-114: Reserved for future codification purposes.

ARTICLE 5.

Unsolicited Facsimiles.

§ 75-115. Definitions.

The following definitions apply in this Article:

(1) Established business relationship. —
  a. A relationship between a seller and a consumer based on:
    1. The consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and the seller or one or more of its affiliates within the 18 months immediately preceding the date of an unsolicited advertisement; or
    2. The consumer's inquiry or application regarding a product or service offered by the seller within the three months immediately preceding the date of an unsolicited advertisement.
  b. A relationship between a tax-exempt nonprofit organization and a person based on:
    1. The person's association with the tax-exempt nonprofit organization as a member, contributor, or volunteer of the tax-exempt nonprofit organization within the 18 months immediately preceding the date of an unsolicited advertisement;
    2. The person's subscription to or use of the services of the tax-exempt nonprofit organization within the 18 months immediately preceding the date of an unsolicited advertisement; or
    3. The person's inquiry regarding the tax-exempt nonprofit organization within the three months immediately preceding the date of an unsolicited advertisement.

(2) Telephone facsimile machine. — Equipment that has the capacity to do either or both of the following:
  a. Transcribe text or images or both from paper into an electronic signal and to transmit that signal over a regular telephone line.
  b. Transcribe text or images or both from an electronic signal received over a regular telephone line onto paper.

(3) Unsolicited advertisement. — Any material advertising the commercial availability or quality of any property, goods, or services that is transmitted to any person or entity without that person's or entity's prior express invitation or permission. Prior express invitation or permission may be obtained for a specific or unlimited number of

advertisements and may be obtained for a specific or unlimited period of time. (2006-207, s. 1.)

Editor's Note. — Session Laws 2006-207, s. 2, made this Article effective September 1, 2006, and applicable to offenses committed on or after that date.

§ 75-116. Prohibition of unsolicited facsimiles; exception.

(a) No person or entity, if either the person or entity or the recipient is located within the State of North Carolina, shall (i) use any telephone facsimile machine, computer, or other device to send or (ii) cause another person or entity to use a telephone facsimile machine to send an unsolicited advertisement to a telephone facsimile machine.

(b) This section shall not apply to a person or entity that has an established business relationship with the recipient of the facsimile. However, the person or entity who sends an unsolicited advertisement under this subsection shall provide a notice in the unsolicited advertisement that: (i) is clear and conspicuous and on the first page of the unsolicited advertisement; (ii) states that the recipient may make a request to the sender to "do not send" any future unsolicited advertisements to a telephone facsimile machine and that the sender's failure to comply with the request is unlawful; and (iii) includes a toll-free domestic telephone number or facsimile machine number that the recipient may call at any time on any day of the week to transmit a request to "do not send" future facsimiles. (2006-207, s. 1.)

§ 75-117. Facsimiles to contain identifying material.

(a) It shall be a violation of this Article for any person or entity, if either the person or entity or the recipient is located in the State of North Carolina, to do either of the following:

(1) Initiate any communication using a telephone facsimile machine that does not clearly mark in a margin at the top or bottom of each transmitted page or on the first page of each transmission the date and time sent; an identification of the business, other entity, or person sending the message, and the telephone number of the sending machine or of the business, other entity, or person.

(2) Use a computer or other electronic device to send any message via a telephone facsimile machine unless it is clearly marked in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission the date and time it is sent, the identification of the business, other entity, or person sending the message, and the telephone number of the sending machine or of the business, other entity, or person.

(b) This section shall not apply to a facsimile sent by or on behalf of a professional or trade association that is a tax-exempt nonprofit organization and in furtherance of the association's tax-exempt purpose to a member of the association if all of the following conditions are met:

(1) The member voluntarily provided the association the facsimile number to which the facsimile was sent.

(2) The facsimile is not primarily for the purpose of advertising the commercial availability or quality of any property, goods, or services of one or more third parties.

(3) The member who is sent the facsimile has not requested that the association stop sending facsimiles. (2006-207, s. 1.)

§ 75-118. Enforcement.

(a) A person or entity who receives an unsolicited advertisement in violation of this Article may bring any of the following actions in civil court:

(1) An action to enjoin further violations of this Article by the person or entity who sent the unsolicited advertisement.

(2) An action to recover five hundred dollars ($500.00) for the first violation, one thousand dollars ($1,000) for the second violation, and five thousand dollars ($5,000) for the third and any other violation that occurs within two years of the first violation.

(b) In an action brought pursuant to this Article, the court may award a prevailing plaintiff reasonable attorneys' fees if the court finds the defendant willfully engaged in the act or practice, and the court may award reasonable attorneys' fees to a prevailing defendant if the court finds that the plaintiff knew, or should have known, that the action was frivolous and malicious.

(c) Actions brought by a person or entity pursuant to this section shall be tried in the county where the plaintiff resides at the time of the commencement of the action.

(d) This section shall not be construed to alter or restrict any remedy a person may have under federal law, including the Junk Fax Prevention Act of 2005, against a person or entity who sends an unsolicited advertisement.

(e) A violation of G.S. 75-116 is a violation of G.S. 75-1.1. (2006-207, s. 1.)

§§ 75-119 through 75-124: Reserved for future codification purposes.

ARTICLE 6.

Truth in Music Advertising Act.

§ 75-125. Short title and definitions.

(a) Short Title. — This Article may be cited as the Truth in Music Advertising Act.

(b) Definitions. — The following definitions apply in this Article:

(1) Performing group. — A vocal or instrumental group seeking to use the name of another group that has previously released a commercial sound recording under that name.

(2) Recording group. — A vocal or instrumental group at least one of whose members has previously released a commercial sound recording under that group's name and in which the member or members have a legal right by virtue of use or operation under the group name without having abandoned the name or affiliation with the group.

(3) Sound recording. — A work that results from the fixation on a material object of a series of musical, spoken, or other sounds regardless of the nature of the material object, such as a disk, tape, or other phonorecord, in which the sounds are embodied. (2009-284, s. 1.)

Editor's Note. — Session Laws 2009-284, s. 2, made this Article effective October 1, 2009, and applicable to acts occurring on or after that date.

§ 75-126. Production.

No person shall advertise or conduct a live musical performance or production in this State through the use of a false, deceptive, or misleading affiliation, connection, or association between a performing group and a recording group. This section does not apply if any of the following apply:

(1) The performing group is the authorized registrant and owner of a federal service mark for that group registered in the United States Patent and Trademark Office.

(2) At least one member of the performing group was a member of the recording group and has a legal right by virtue of use or operation under the group name without having abandoned the name or affiliation with the group.

(3) The live musical performance or production is identified in all advertising and promotion as a salute or tribute, or the vocal or instrumental group performing is not so closely related or similar to that used by the recording group that it would tend to confuse or mislead the public.

(4) The advertising does not relate to a live musical performance or production taking place in this State.

(5) The performance or production is expressly authorized by the recording group. (2009-284, s. 1.)

§ 75-127. Penalty.

A person who violates G.S. 75-126 is liable to the State for a civil penalty of not less than five thousand dollars ($5,000) nor more than fifteen thousand dollars ($15,000) per violation, which civil penalty shall be in addition to any other relief which may be granted under other applicable laws. Each performance or production in violation of G.S. 75-126 shall constitute a separate violation. (2009-284, s. 1.)

§ 75-128. Unfair and deceptive trade practice.

A violation of this Article shall be an unfair and deceptive trade practice under G.S. 75-1.1. (2009-284, s. 1.)

§§ 75-129 through 75-132: Reserved for future codification purposes.

ARTICLE 7.

Credit Monitoring Services Act.

§ 75-133. Title.

This Article shall be known and may be cited as the "Credit Monitoring Services Act." (2009-355, s. 7.)

Editor's Note. — Session Laws 2009-355, s. 8, made this Article effective October 1, 2009.

§ 75-134. Definitions.

The following definitions apply in this Article:

(1) Consumer. — An individual.

(2) Consumer report. — As defined in G.S. 75-61(3).

(3) Credit monitoring service. — Any person who offers, for a fee or compensation, to obtain, provide, or monitor a credit report on behalf of a consumer, or to assist a consumer in obtaining or monitoring the

consumer's credit report, and provides or purports to provide the foregoing services. The term also includes any person who offers, for a fee or compensation, to obtain or provide a fraud alert on behalf of a consumer or to assist a consumer in obtaining such fraud alert. The term does not include the following activities of a consumer reporting agency, as defined in section 603(f) [15 U.S.C. § 1681a(f)] of the federal Fair Credit Reporting Act, provided that, while the excluded activities themselves do not fall within the definition of the term "credit monitoring service" none of these excluded activities exempts a consumer reporting agency from the duty to provide the notice required under G.S. 75-135 where the sale of a credit monitoring service occurs as a result of an offer for the credit monitoring service made at a time during communications involving such activities:

a. Providing a credit report to another party that monitors a credit report on behalf of a consumer;

b. Providing a disclosure to a consumer of the information in the consumer's file pursuant to section 609(a) [15 U.S.C. § 1681g(a)] of the federal Fair Credit Reporting Act and also imposing a charge permitted under section 612(f) [15 U.S.C. § 1681j(f)] of the federal Fair Credit Reporting Act;

c. Providing the disclosure of a score pursuant to section 609(f) [15 U.S.C. § 1681g(f)] of the federal Fair Credit Reporting Act and also imposing a charge permitted under section 609(f)(8) [15 U.S.C. § 1681g(f)(8)] of the federal Fair Credit Reporting Act;

d. Providing a notice required by G.S. 75-63(m); or

e. Providing a monitoring service to individuals who receive a notice provided by a person who experienced a security breach and where the monitoring service was paid for by the person who experienced the security breach.

(4) Fraud alert. — As defined in the federal Fair Credit Reporting Act, 15 U.S.C. § 1681c-1.

(5) Person. — Any individual, partnership, corporation, association, business establishment, or any other legal or commercial entity. (2009-355, s. 7.)

Editor's Note. — The definitions in the section above have been set out in alphabetical order pursuant to direction from the Revisor of Statutes.

§ 75-135. Required disclosure.

(a) Prior to charging or collecting any fee or compensation from a consumer for obtaining, providing, or monitoring the consumer's credit report on behalf of the consumer, a credit monitoring service shall provide a clear and conspicuous written description of a consumer's right to one free credit report per year pursuant to section 612(a) [15 U.S.C. § 1681j(a)] of the federal Fair Credit Reporting Act, and how to obtain those credit reports from each of the nationwide consumer reporting agencies, as defined in section 603(p) [15 U.S.C. § 1681a(p)] of the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq.

(b) If the credit monitoring service is offered and fees are collected during a telephone call, the notice required by subsection (a) of this section will be offered in the same manner.

(c) A violation of this section is a violation of G.S. 75-1.1, except that compliance with the requirement that the notice required by this section be clear and conspicuous shall be enforced exclusively by the Attorney General under G.S. 75-15. (2009-355, s. 7.)

Chapter 75A.
Boating and Water Safety.

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ARTICLE 1.
Boating Safety Act.

§ 75A-1. Declaration of policy.

It is the policy of this State to promote safety for persons and property in and connected with the use, operation, and equipment of vessels, and to promote uniformity of laws relating thereto. (1959, c. 1064, s. 1.)

CASE NOTES

Cited in Grindstaff v. Watts, 254 N.C. 568, 119 S.E.2d 784 (1961); Klutz v. Beam, 374 F. Supp. 1129 (W.D.N.C. 1973).

§ 75A-2. Definitions.

As used in this Chapter, unless the context clearly requires a different meaning:

(1) "Abandoned vessel" means a vessel that has been relinquished, left, or given up by the lawful owner without the intention to later resume any right or interest in the vessel. The term does not include a vessel that is left by an owner or agent of the owner with any person or business for the purpose of storage, maintenance, or repair and that is not subsequently reclaimed.

(1a) "Certificate of number" means the document and permanent identification number issued by the Wildlife Resources Commission for the purpose of registering a vessel in this State.

(1b) "Commission" means the Wildlife Resources Commission.

(1c) "Director" means the Executive Director of the Wildlife Resources Commission.

(1d) "Electric generating facility" means any plant facilities and equipment used for the purposes of producing, generating, transmitting, delivering, or furnishing electricity for the production of power.

(1e) "Motorboat" means any vessel equipped with propulsion machinery of any type, whether or not the machinery is the principal source of propulsion: Provided, that "propulsion machinery" as used in this section shall not include an electric motor when used as the only means of mechanical propulsion of any vessel.

(1f) "No-wake speed" means idle speed or slow speed creating no appreciable wake.

(2) "Operate" means to navigate or otherwise use or occupy any motorboat or vessel that is afloat.

(3) "Owner" means a person, other than a lienholder, having the property in or title to a vessel. The term includes a person entitled to the use or possession of a vessel subject to an interest in another person, reserved or created by agreement and securing payment or performance of an obligation, but the term excludes a lessee under a lease not intended as security.

(4) "Person" means an individual, partnership, firm, corporation, association, or other entity.

(4a) "Underway" means a vessel that is not at anchor, or made fast to the shore, or aground.

(5) "Vessel" means every description of watercraft or structure, other than a seaplane on the water, used or capable of being used as a means of transportation or habitation on the water.

(6) "Waters of this State" means any waters within the territorial limits of this State, and the marginal sea adjacent to this State and the high seas when navigated as a part of a journey or ride to or from the shore of this State, but does not include private ponds as defined in G.S. 113-129.

(7) Redesignated as subdivision (1d). (1959, c. 1064, s. 2; 1965, c. 634, s. 1; 1969, c. 87; 1975, c. 340, s. 1; 1983, c. 446, s. 1; 1993 (Reg. Sess., 1994), c. 753, s. 2; 2006-185, s. 1.)

§ 75A-3. Wildlife Resources Commission to administer Chapter; Vessel Committee; funds for administration.

(a) The Commission shall enforce and administer the provisions of this Chapter.

(b) The chair of the Commission shall designate from among the members of the Commission three members who shall serve as the Vessel Committee of the Commission, and who shall, in their activities with the Commission, place special emphasis on the administration and enforcement of this Chapter.

(c) The Boating Account is established within the Wildlife Resources Fund created under G.S. 143-250. Interest and other investment income earned by the Account accrues to the Account. All moneys collected pursuant to the numbering and titling provisions of this Chapter shall be credited to this Account. Motor fuel excise tax revenue is credited to the Account under G.S. 105-449.126. The Commission shall use revenue in the Account, subject to the Executive Budget Act and the Personnel Act, for the administration and enforcement of this Chapter; for activities relating to boating and water safety including education and waterway marking and improvement; and for boating access area acquisition, development, and maintenance. The Commission shall use at least three dollars ($3.00) of each one-year certificate of number fee and at least nine dollars ($9.00) of each three-year certificate of number fee collected under the numbering provisions of G.S. 75A-5 for boating access area acquisition, development, and maintenance. (1959, c. 1064, s. 3; 1961, c. 644; 1963, c. 1003; 1981 (Reg. Sess., 1982), c. 1182, s. 2; 1993, c. 422, s. 1; 1995, c. 390, s. 13; 1999-392, s. 5; 2006-185, s. 1; 2007-485, s. 4.1.)

Effect of Amendments. — Session Laws 2007-485, s. 4.1, effective January 1, 2008, added the second sentence in subsection (c).

State Government Reorganization. — The Wildlife Resources Commission was transferred to the Department of Natural and Economic Resources (now the Department of Environment and Natural Resources) by former G.S. 143A-118, enacted by Session Laws 1971, c. 864.

§ 75A-4. Identification numbers required.

Every vessel on the waters of this State shall be numbered, except those vessels exempted from numbering under G.S. 75A-7. No person shall operate or give permission for the operation of any vessel on the waters of this State unless all of the following conditions are met:

(1) The vessel is numbered in accordance with this Chapter, or in accordance with applicable federal law, or in accordance with a federally approved numbering system of another state.

(2) The certificate of number awarded to the vessel is in full force and effect.

(3) The identification number set forth in the certificate of number is displayed on each side of the bow of the vessel. (1959, c. 1064, s. 4; 1983, c. 446, s. 1; 1999-392, s. 1; 2006-185, s. 1.)

§ 75A-5. Application for certificate of number and fees; reciprocity; change of ownership; conformity with federal regulations; records; award of certificates; renewal of certificates; transfer of partial interest; destroyed or junked vessels; abandonment; change of address; duplicate certificates; display.

(a) Application for Certificate of Number and Fees. — The owner of each vessel requiring numbering by this State shall file an application for a certificate of number with the Commission. The Commission shall furnish application forms and shall prescribe the information contained in the application form. The application shall be signed by the owner of the vessel or the owner's agent and shall be accompanied by a fee. The fee is fifteen dollars ($15.00) for a one-year period or forty dollars ($40.00) for a three-year period. The fee does not apply to vessels owned and operated by nonprofit rescue squads if they are operated exclusively for rescue purposes, including rescue training. The owner shall have the option of selecting a one-year numbering period or a three-year numbering period. Upon receipt of the application in approved form, the Commission shall enter the application in its records and issue the owner a certificate of number stating the identification number awarded to the vessel and the name and address of the owner, and a validation decal indicating the expiration date of the certificate of number. The owner shall paint on or attach to each side of the bow of the vessel the identification number in such manner as may be prescribed by rules of the Commission in order that it may be clearly visible. The identification number shall be maintained in legible condition. The validation decal shall be displayed on the starboard bow of the vessel immediately following the number. The certificate of number shall be pocket size and shall be available for inspection on the vessel for which the certificate is issued at all times the vessel is in operation. Any person charged with failing to so carry a certificate of number shall not be convicted if the person produces in court a certificate of number previously issued to the owner that was valid at the time of the alleged violation.

(b) Reciprocity. — The owner of any vessel already covered by a number in full force and effect pursuant to federal law or a federally approved numbering system of another state shall record the identification number prior to operating the vessel on the waters of this State in excess of the 90-day reciprocity period provided for in G.S. 75A-7(a)(1). The recordation shall be made pursuant to subsection (a) of this section, except that no additional or substitute identification number shall be issued.

(c) Change of Ownership. — Should the ownership of a vessel change, a new application form with a fee in the amount set in subsection (a) of this section shall be filed with the Commission and a new certificate bearing the same identification number shall be awarded to the new owner in the same manner as an original certificate of number. Possession of the certificate shall in cases involving prosecution for violation of any provision of this Chapter be prima facie evidence that the person whose name appears on the certificate is the owner of the vessel referred to on the certificate.

(d) Conformity With Federal Regulations. — In the event that an agency of the federal government shall have in force an over-all system of identification numbering for vessels within the United States, the numbering system employed pursuant to this Chapter by the Commission shall be in conformity therewith.

(e) Repealed by Session Laws 2006-185, s. 1.

(f) Records. — All records of the Commission made or kept pursuant to this section shall be public records.

(g) Award of Certificates. — Each certificate of number awarded pursuant to this Chapter, unless sooner terminated or discontinued in accordance with the provisions of this Chapter, shall continue in full force and effect to and including the last day of the month during which the certificate was awarded after the lapse of one year in the case of a one-year certificate or three years in the case of a three-year certificate. No person shall willfully remove a validation decal from any vessel during the continuance of its validity or alter, counterfeit, or otherwise tamper with a validation decal attached to any vessel for the purpose of changing or obscuring the indicated date of expiration of the certificate of number of the vessel.

(h) Renewal of Certificates. — An owner of a vessel awarded a certificate of number pursuant to this Chapter shall renew the certificate on or before the first day of the month after which the certificate expires; otherwise, the certificate shall lapse and be void until such time as it may thereafter be renewed. Application for renewal shall be submitted on a form approved by the Commission and shall be accompanied by a fee in the amount set in subsection (a) of this section. No fee is required for a period of one year for renewal of certificates of number that have been previously issued to commercial fishing vessels as defined in G.S. 75A-5.1, upon compliance with all of the requirements of that section.

(i) Transfer of Partial Interest. — The owner shall furnish the Commission notice of the transfer of any part of the owner's interest other than the creation of a security interest in a vessel numbered in this State pursuant to subsections (a) and (b) of this section within 15 days of the transfer. A transfer of partial interest in a vessel shall not affect the owner's right to operate the vessel, nor shall a transfer of partial interest in a vessel terminate the certificate of number.

(i1) Destroyed or Junked Vessels. — The owner of any destroyed or junked vessel shall furnish the Commission notice of the destruction or junking of that vessel within 15 days of its occurrence. Destruction or junking terminates the certificate of number and renders the hull identification number invalid for that vessel.

(i2) Abandonment. — A person may acquire ownership of an abandoned vessel by providing proof to the Commission that the lawful owner has actually abandoned the vessel. The Commission shall adopt rules by which a person seeking to acquire ownership may demonstrate that the vessel is actually abandoned. At a minimum, the rules shall provide for a reasonable attempt to locate the lawful owner and, if the owner is located, notice by the claimant of an intention to claim ownership of the vessel.

(j) Change of Address. — Whenever any person, after applying for or obtaining the certificate of number of a vessel, moves from the address shown in the application or upon the certificate of number, that person shall notify the Commission of the change of address within 30 days of moving in a form acceptable to the Commission.

(j1) Duplicate Certificates. — The Commission shall issue a duplicate certificate of number for a vessel upon application by the person entitled to hold the certificate, if the Commission is satisfied that the original certificate of number has been lost, stolen, mutilated, or destroyed, or has become illegible. The Commission shall charge a fee of five dollars ($5.00) for issuance of each duplicate certificate.

(k) Display. — No number other than the identification number set forth in the certificate of number or granted reciprocity pursuant to this Chapter shall be painted, attached, or otherwise displayed on either side of the bow of a vessel, except the validation decal required by subsection (a) of this section.

(*l*) Repealed by Session Laws 2006-185, s. 1. (1959, c. 1064, s. 5; 1961, c. 469, s. 1; 1963, c. 470; 1975, c. 483, ss. 1, 2; 1977, c. 566; 1979, c. 761, ss. 1-7; 1981, c. 161; 1983, c. 194; c. 446, ss. 1, 2; 1987, c. 827, s. 4; 1993, c. 422, ss. 2-4; c. 539, ss. 563, 564; 1994, Ex. Sess., c. 24, s. 14(c); 1998-225, s. 4.1; 1999-248, ss. 1, 2; 1999-392, ss. 2-4; 2006-185, s. 1; 2007-485, ss. 4.2, 4.3, 4.4.)

Cross References. — As to the issuance of permanent certificates of number to motorboats owned by governmental entities and nonprofit rescue squads, see G.S. 75A-7.

Effect of Amendments. — Session Laws 2007-485, ss. 4.2 through 4.4, effective January 1, 2008, in subsection (a), substituted "fee" for "fee of ten dollars ($10.00)" in the third sentence, in the fourth sentence, added "The fee is fifteen dollars ($15.00)", substituted "forty dollars ($40.00)" for "by a fee of twenty five dollars ($25.00)" and "period" for "period; provided, however, there shall be no fee charged for", and added "The fee does not apply to" to the beginning of the fifth sentence; substituted "in the amount set in subsection (a) of this section" for "of ten dollars ($10.00) for a one-year period or by a fee of twenty-five dollars ($25.00) for a three-year period" in the first sentence of subsection (c); and substituted "in the amount set in subsection (a) of this section. No fee is" for "of ten dollars ($10.00) for a one-year period or by a fee of twenty-five dollars ($25.00) for a three-year period; provided, there shall be no fee" in the second sentence of subsection (h).

CASE NOTES

A "certificate of number" required by this section is not a "certificate of title" to be compared with that required by G.S. 20-50 for vehicles intended to be operated on the highways. Lane v. Honeycutt, 14 N.C. App. 436, 188 S.E.2d 604, cert. denied, 281 N.C. 622, 190 S.E.2d 466 (1972).

New Certificate Issued upon Change of Ownership. — Upon the change of ownership of a motorboat, subsection (c) authorizes the issuance of a new "certificate of number" to the transferee upon proper application. The application for transfer of the number, among other things, requires the seller's signature. Lane v. Honeycutt, 14 N.C. App. 436, 188 S.E.2d 604, cert. denied, 281 N.C. 622, 190 S.E.2d 466 (1972).

§ 75A-5.1. Commercial fishing vessels; renewal of identification number.

(a) The owner of any commercial fishing vessel that is registered under the provisions of G.S. 113-168.6 may renew the certificate of number of the vessel free of charge for a one-year period when the owner has complied with all of the conditions of this section.

(b) As used in this section, "commercial fishing vessel" is a vessel used in a commercial fishing operation, as defined in G.S. 113-168.

(c) In order to be entitled to renewal of certificate of number under the provisions of this section, the owner of the vessel shall submit both of the following to the Commission:

(1) The regular application for renewal of the certificate of number of the vessel, as provided by G.S. 75A-5.

(2) Satisfactory proof that the vessel owner possesses a valid commercial fishing vessel registration.

(3) Repealed by Session Laws 2006-185, s. 1.

(d) Any person who willfully gives false information upon an application or statement required by this section or who falsifies any certificate of number fee receipt required by this section is guilty of a Class 1 misdemeanor. (1961, c. 469, s. 2; 1965, c. 957, s. 8; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1983, c. 446, s. 2; 1989, c. 727, s. 218(16); 1993, c. 539, s. 565; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.119(a); 1998-225, s. 4.2; 2006-185, s. 1.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

§ 75A-5.2. Vessel agents.

(a) In order to facilitate the convenience of the public, the efficiency of administration, the need to keep statistics and records affecting the conservation of wildlife resources, boating, water safety, and other matters within the jurisdiction of the Commission, and to facilitate vessel transactions, the Commission may conduct vessel transactions through any of the following:

(1) Vessel agents.
(2) The Commission's headquarters.
(3) Employees of the Commission.
(4) Two or more of those sources simultaneously.

(b) When there are substantial reasons for differing treatment, the Commission may conduct vessel transactions by one method in one locality and by another method in another locality.

(c) As compensation for services rendered to the Commission and to the general public, vessel agents shall receive the following specified commission from the statutory fee for each listed transaction:

(1) Renewal of certificate of number — $1.25.
(2) Transfer of ownership and certificate of number — $3.00.
(3) Issuance of new certificate of number — $3.00.
(4) Issuance of duplicate certificate of number — $0.50.
(5) Issuance or transfer of certificate of title — $3.00.

(d) When certificates of number are to be issued by vessel agents as provided by subsection (a) of this section, the Commission may adopt rules to provide for any of the following:

(1) Qualifications of the vessel agents.
(2) Duties of the vessel agents.
(3) Methods and procedures to ensure accountability and security for proceeds and unissued certificates of number.
(4) Types and amounts of evidence that a vessel agent must submit to relieve the agent of responsibility for losses due to occurrences beyond the control of the agent.
(5) Any other reasonable requirement or condition that the Commission deems necessary to expedite and control the issuance of certificates of number by vessel agents.

(e) The Commission may adopt rules to authorize the Director to take any of the following actions related to vessel agents:

(1) Select and appoint vessel agents in the areas most convenient to the boating public.
(2) Limit the number of vessel agents in any one area if necessary for efficiency of operation.
(3) Require prompt and accurate reporting and remittance of public funds or documents by vessel agents.
(4) Conduct periodic and special audits of accounts.
(5) Suspend or terminate the authorization of any vessel agent found to be noncompliant with rules adopted by the Commission or when State funds or property are reasonably believed to be in jeopardy.
(6) Require the immediate surrender of all equipment, forms, supplies, records, and State funds and property issued by or belonging to the Commission, in the event of the termination of a license agent.

(f) The Commission is exempt from the contested case provisions of Chapter 150B of the General Statutes with respect to determinations of whether to authorize or terminate the authority of a person to conduct vessel transactions as a vessel agent of the Commission.

(g) If any check or bank account draft of any vessel agent for the issuance of certificates of number shall be returned by the banking facility upon which the same is drawn for lack of funds, the vessel agent shall be liable to the Commission for a penalty of five percent (5%) of the amount of the check or bank account draft, but in no event shall the penalty be less than five dollars ($5.00) or more than two hundred dollars ($200.00). Vessel agents shall be assessed a penalty of twenty-five percent (25%) of their issuing fee on all remittances to the Commission after the fifteenth day of the month immediately following the month of sale.

(h) It is a Class 1 misdemeanor for a vessel agent to do any of the following:
(1) Withhold or misappropriate funds generated from vessel transactions.
(2) Falsify records of vessel transactions.
(3) Willfully and knowingly assist or allow a person to obtain a certificate of number or certificate of title for which the person is ineligible.
(4) Willfully issue a backdated certificate of number or certificate of title.
(5) Willfully include false information or omit material information on vessel transaction forms and records regarding either:
  a. A person's entitlement to a particular certificate of number or certificate of title.
  b. The applicability or term of a particular certificate of number.
(6) Charge or accept any fee, remuneration, or other item of value that exceeds the fee amounts provided by statute.
(7) Charge or accept any additional fee, remuneration, or other item of value in association with any activity set out in subdivisions (1) through (5) of this subsection. (2006-185, s. 1.)

Editor's Note. — Session Laws 2006-185, s. 3, makes this section effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007.

§ 75A-6. Classification; rules.

(a) Vessels subject to the provisions of this Chapter shall be divided into five categories as follows:
(1) Class A. Less than 16 feet in length.
(2) Class 1. Sixteen feet or over and less than 26 feet in length.
(3) Class 2. Twenty-six feet or over and less than 40 feet in length.
(4) Class 3. Forty feet or over and not more than 65 feet in length.
(5) Class 4. More than 65 feet in length.

(b) through (e) Repealed by Session Laws 1993, c. 361, s. 2.

(f) through (j) Repealed by Session Laws 2006-185, s. 1.

(k) Repealed by Session Laws 1993, c. 361, s. 2.

(*l*) No person shall operate or give permission for the operation of a vessel that is not equipped as required by this section.

(m) The Commission may adopt rules to conform to the Federal Boat Safety Act of 1971 and the federal regulations adopted pursuant thereto.

(n) All vessels propelled by machinery of 10 hp or less that are operated on the public waters of this State shall carry at least one personal flotation device, life belt, ring buoy, or other device of the sort prescribed by rules of the Commission for each person on board, and from one-half hour after sunset to one-half hour before sunrise shall carry a white light in the stern or shall have on board a hand flashlight in good working condition, which light shall be ready at hand and shall be temporarily displayed in sufficient time to prevent collision.

(o) The Commission for Public Health shall adopt rules establishing standards for sewage treatment devices and holding tanks for marine toilets installed in vessels operating on the inland fishing waters of the State as designated by the Commission and the inland lake waters of the State. The Commission shall not issue a certificate of number for any vessel operating on the inland fishing waters of the State as designated by the Commission and the inland lake waters of this State that is equipped with a marine toilet unless the vessel is provided with a sewage treatment device or holding tank approved by the Commission for Public Health. All vessels operating on the inland fishing waters of the State as designated by the Commission and the inland lake waters of the State that are equipped with a marine toilet shall provide a sewage treatment device or holding tank approved by the Commission for Public Health. Wildlife protectors may inspect vessels on the inland fishing waters of the State as designated by the Commission and the inland lake waters to determine if approved treatment devices or holding tanks are properly installed and if they are operating in a satisfactory manner. A vessel registered, documented, or otherwise licensed in another state and equipped with a marine toilet not prohibited in such state may be operated on the inland fishing waters of the State as designated by the Commission, without regard to the provisions of this subsection while making an interstate trip. (1959, c. 1064, s. 6; 1963, c. 396; 1965, c. 634, s. 2; 1967, cc. 230, 1075; 1971, c. 296, ss. 1, 2; 1973, c. 476, s. 128; 1975, c. 340, s. 2; c. 483, s. 3; 1989 (Reg. Sess., 1990), c. 1004, s. 55; 1993, c. 361, s. 2; 2006-185, s. 1; 2007-182, s. 2.)

Local Modification. — Alexander, Burke, Caldwell: 1995, c. 19, s. 1; Catawba, Gaston, Iredell, and Lincoln: 1983, c. 200; McDowell: 1995, c. 19, s. 1; Mecklenburg: 1983, c. 200; 1987 (Reg. Sess., 1988), c. 944.

CASE NOTES

Cited in Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973).

§ 75A-6.1. Navigation rules.

(a) Every vessel operated on the waters of this State that is required to obtain an identification number pursuant to this Chapter, has a valid marine document issued by the federal Bureau of Customs or any federal agency successor to it, or issued pursuant to a federally approved numbering system of another state shall comply with the navigation rules, including requirements for navigational lights, sound-signaling devices, and other equipment, contained in the Inland Navigational Rules Act of 1980, codified as amended at 33 U.S.C. §§ 2001-2038, 2071-2073 (1993) and rules adopted pursuant thereto, see 33 C.F.R. Part 84 (1992).

(b) The Commission is responsible for the enforcement of the rules specified in subsection (a) of this section. The rules specified in subsection (a) of this section are also enforceable by all peace officers with general subject matter jurisdiction.

(c) Violation of the navigation rules specified in subsection (a) of this section shall constitute a Class 3 misdemeanor and is punishable only by a fine not to exceed one hundred dollars ($100.00). (1993, c. 361, s. 1; 1994, Ex. Sess., c. 14, s. 44; 2006-185, s. 1.)

§ 75A-7. Exemption from numbering requirements.

(a) A vessel shall not be required to be numbered under this Chapter if it is:

(1) A vessel that is required to be awarded an identification number pursuant to federal law or a federally approved numbering system of another state, and for which an identification number has been so awarded: Provided, that any such vessel shall not have been within this State for a period in excess of 90 consecutive days.

(2) A vessel from a country other than the United States temporarily using the waters of this State.

(3) A vessel whose owner is the United States, a state or a subdivision thereof.

(4) A ship's lifeboat.

(5) A vessel that has a valid marine document issued by the federal Bureau of Customs or any federal agency successor thereto.

(6) A sailboat of not more than 14 feet on the load water line (LWL).

(7) A vessel with no means of propulsion other than drifting or manual paddling, poling, or rowing.

(b) The Commission is hereby empowered to permit the voluntary numbering of vessels owned by the United States, a state or a subdivision thereof.

(c) Those vessels owned by the United States, a state or a subdivision thereof and those owned by nonprofit rescue squads may be assigned a certificate of number bearing no expiration date but which shall be stamped with the word "permanent" and shall not be renewable so long as the vessel remains the property of the governmental entity or nonprofit rescue squad. If the ownership of any such vessel is transferred from one governmental entity to another or to a nonprofit rescue squad or if a vessel owned by a nonprofit rescue squad is transferred to another nonprofit rescue squad or governmental entity, the Commission shall issue a new permanent certificate of number, displaying the same identification number, without charge to the successor entity. When any such vessel is sold to a private owner or is otherwise transferred to private ownership, the applicable certificate of number shall be deemed to have expired immediately prior to the transfer. Prior to further use on the waters of this State, the new owner shall obtain a certificate of number pursuant to the provisions of this Chapter. The provisions of this subsection applicable to a vessel owned by a nonprofit rescue squad apply only to a vessel operated exclusively for rescue purposes, including rescue training. (1959, c. 1064, s. 7; 1981, c. 162; 1983, c. 446, ss. 1-3; 2006-185, s. 1.)

Cross References. — As to allowing nonprofit rescue squads to apply for numbers without payment of a fee, see G.S. 75A-5.

§ 75A-8. Vessel liveries.

An owner of a vessel livery shall not rent a vessel to any person unless the provisions of this Chapter have been complied with. An owner of a vessel livery shall equip all vessels rented as required by this Chapter. (1959, c. 1064, s. 8; 1975, c. 340, s. 3; 1983, c. 446, s. 1; 2006-185, s. 1.)

§ 75A-9. Muffling devices.

(a) Every internal combustion engine used on a vessel shall have effective muffling equipment installed and used on the exhaust to muffle the noise in a reasonable manner. The use of cutouts is prohibited.

(b) Every internal combustion engine with an open-air exhaust that is used on a vessel that has a capacity of operating at more than 4,000 revolutions per minute shall have effective muffling equipment installed and used on each exhaust manifold stack. This subsection shall not apply to a licensed commercial fishing vessel.

(c) This section shall not apply to vessels competing in a regatta or race approved by the United States Coast Guard, for such vessels while on trial runs during a period not to exceed 48 hours immediately preceding the regatta or race, and for such vessels while competing in official trials for speed records during a period not to exceed 48 hours immediately following the regatta or race. (1959, c. 1064, s. 9; 2006-185, s. 1.)

Local Modification. — Catawba, Iredell, Lincoln, and Mecklenburg (Lakes Norman, Wylie and Mountain Island only): 1981 (Reg. Sess., 1982), c. 1266.

§ 75A-9.1: Repealed by Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007.

§ 75A-10. Operating vessel or manipulating water skis, etc., in reckless manner; operating, etc., while intoxicated, etc.; depositing or discharging litter, etc.

(a) No person shall operate any motorboat or vessel, or manipulate any water skis, surfboard, or similar device on the waters of this State in a reckless or negligent manner so as to endanger the life, limb, or property of any person.

(b) No person shall manipulate any water skis, surfboard, nonmotorized vessel, or similar device on the waters of this State while under the influence of an impairing substance.

(b1) No person shall operate any vessel while underway on the waters of this State:

(1) While under the influence of an impairing substance, or

(2) After having consumed sufficient alcohol that the person has, at any relevant time after the boating, an alcohol concentration of 0.08 or more.

(b2) The fact that a person charged with violating this subsection is or has been legally entitled to use alcohol or a drug is not a defense to a charge under subsections (b) and (b1) of this section. The relevant definitions contained in G.S. 20-4.01 shall apply to subsections (b), (b1), and (b2) of this section.

(b3) A person who violates a provision of subsection (a), (b), or (b1) of this section is guilty of a Class 2 misdemeanor.

(c) No person shall place, throw, deposit, or discharge or cause to be placed, thrown, deposited, or discharged on the waters of this State or into the inland lake waters of this State, any litter, raw sewage, bottles, cans, papers, or other liquid or solid materials which render the waters unsightly, noxious, or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment and safety of the water for recreational purposes.

(d) No person shall place, throw, deposit, or discharge or cause to be placed, thrown, deposited, or discharged on the waters of this State or into the inland lake waters of this State any medical waste as defined by G.S. 130A-290 which renders the waters unsightly, noxious, or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment and safety of the water for recreational purposes.

(e) A person who willfully violates subsection (d) of this section is guilty of a Class 1 misdemeanor. A person who willfully violates subsection (d) of this section and in so doing releases medical waste that creates a substantial risk of physical injury to any person who is not a participant in the offense is guilty of a Class F felony which may include a fine not to exceed fifty thousand dollars ($50,000) per day of violation. (1959, c. 1064, s. 10; 1965, c. 634, s. 3; 1985, c. 615, ss. 1-5; 1989, c. 742, s. 1; 1995, c. 506, s. 14; 2006-185, s. 1.)

Editor's Note. — Session Laws 1989, c. 742, which added subsection (d), provided in s. 9: "Neither the definition of 'medical waste' nor any other provision of this act shall be construed to require that rules or standards adopted by the Commission for Health Services [now the Commission for Public Health] for the management of infectious and noninfectious medical waste be identical or similar. Neither the definition of 'medical waste' nor any other provision of this act shall be construed to prohibit any discharge of waste into a sanitary sewer or sewer system which is otherwise allowed under any provision of the General Statutes or under any rule adopted by the Commission for Health Services [now the Commission for Public Health] or the Environmental Management Commission."

Legal Periodicals. — For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

CASE NOTES

Operating a motor boat while impaired (DWI boating) is not a lesser-included offense of involuntary manslaughter because a finding of intoxication is essential in DWI boating, but not essential to a conviction of involuntary manslaughter. State v. Hudson, 345 N.C. 729, 483 S.E.2d 436 (1997).

Cited in Grindstaff v. Watts, 254 N.C. 568, 119 S.E.2d 784 (1961); In re Howser, 227 F. Supp. 81 (W.D.N.C. 1964); Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973); State v. Pike, 139 N.C. App. 96, 532 S.E.2d 543, 2000 N.C. App. LEXIS 805 (2000).

OPINIONS OF ATTORNEY GENERAL

Waste Dumped Within Three Miles of Seashore. — North Carolina General Statutes specifically prohibit the dumping of waste materials such as bags of medical refuse, and other forms of ocean dumping or the introduction of other pollutants in coastal waters if the waste materials were dumped within three miles of the Atlantic seashore. See opinion of the Attorney General to Lieutenant Governor Robert B. Jordan, III, 58 N.C.A.G. 57 (1988).

§ 75A-10.1. Family purpose doctrine applicable.

The family purpose doctrine, as applicable in this State to tort cases arising from the operation of motor vehicles, shall apply to tort cases arising from the operation of motorboats and vessels as those terms are defined in this Chapter. (1971, c. 450, s. 1.)

Legal Periodicals. — For note discussing the extension of the family purpose doctrine to motorcycles and private property, see 14 Wake Forest L. Rev. 699 (1978).

For note on use of the family purpose doctrine when no outsiders are involved, in light of Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984), see 21 Wake Forest L. Rev. 243 (1985).

CASE NOTES

Cited in Williams v. Wachovia Bank & Trust Co., 292 N.C. 416, 233 S.E.2d 589 (1977); Moore v. Crumpton, 55 N.C. App. 398, 285 S.E.2d 842 (1982).

§ 75A-10.2. Proof of ownership of a vessel.

(a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a vessel, proof of ownership of such vessel at the time of the accident or collision shall be prima facie evidence that the vessel was being operated and used with the authority, consent and knowledge of the owner in the very transaction out of which the injury or cause of action arose.

(b) Proof of the certificate of number stating the identification number awarded to the vessel in the name of any person, firm, or corporation as required by this Chapter, or proof of the licensing, registration, or documentation of the vessel as required by other state or federal law in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that the vessel was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of the operator's employment. (1971, c. 652, s. 1; 2006-185, s. 1.)

§ 75A-11. Duty of operator involved in collision, accident, casualty, or other occurrence.

(a) For the purposes of this section, the term "occurrence" means a collision, accident, casualty, or other similar occurrence involving a vessel. The operator of a vessel involved in an occurrence, so far as the operator is able to do so without serious danger to the operator's vessel, crew, and passengers (if any), shall render persons affected by the occurrence any assistance as may be practicable and necessary in order to save them from or minimize any danger caused by the occurrence, and also to give the operator's name, address, and identification of the operator's vessel in writing to any person injured and to the owner of any property damaged in the occurrence.

(b) If an occurrence results in the death, injury, or disappearance indicating death or injury of a person or damage to a vessel or other property of two thousand dollars ($2,000) or more, or if there is complete loss of any vessel, the operator of the vessel shall file with the Commission a full description of the occurrence, including any information the agency may, by rule, require. If an occurrence results in death, disappearance, or injury, the operator of the vessel shall file the report with the Commission within 48 hours of the occurrence. If the occurrence results in vessel or property damage, or complete loss of any vessel, the operator of the vessel shall file the report with the Commission within 10 days of the occurrence. When the operator of the vessel cannot submit the report, the owner of the vessel shall submit the report. Reports filed pursuant to this subsection shall not be admissible as evidence.

(c) When, as a result of an occurrence that involves a vessel or its equipment, a person dies or disappears from a vessel, the operator of the vessel shall, without delay and by the most expeditious means available, notify the nearest law enforcement agency of all of the following:

(1) The date, time, and exact location of the occurrence.
(2) The name of each person who died or disappeared.
(3) The certificate of number and name of the vessel.
(4) The name and address of the vessel owner or owners and the vessel operator.

(d) If the operator of the vessel cannot give notice required by this section, each person on board the vessel shall notify the law enforcement agency or determine that notice has been given. Upon receiving notice under this section, a law enforcement agency shall immediately provide the Commission and the United States Coast Guard with the information required by this section. (1959, c. 1064, s. 11; 1999-248, s. 3; 2006-185, s. 1.)

CASE NOTES

Cited in In re Howser, 227 F. Supp. 81 (W.D.N.C. 1964).

§ 75A-12. Furnishing information to agency of United States.

In accordance with any request duly made by an authorized official or agency of the United States, any information compiled or otherwise available to the Commission pursuant to G.S. 75A-11(b) shall be transmitted to the requesting official or agency of the United States. (1959, c. 1064, s. 12; 2006-185, s. 1.)

§ 75A-13. Water skis, surfboards, etc.

(a) No person shall operate a vessel on any water of this State for towing a person or persons on water skis, a surfboard, or similar device unless at least one of the following conditions is met:

(1) There is in the vessel a person, in addition to the operator, in a position to observe the progress of the person or persons being towed.
(2) The persons being towed wear a personal flotation device.
(3) The vessel is equipped with a rear view mirror.

(b) No person shall operate a vessel on any water of this State towing a person or persons on water skis, a surfboard, or similar device, nor shall any person engage in water skiing, surfboarding, or similar activity at any time between the hours from one hour after sunset to one hour before sunrise.

(c) The provisions of subsections (a) and (b) of this section do not apply to a performer engaged in a professional exhibition.

(d) No person shall operate or manipulate any vessel, tow rope, or other device by which the direction or location of water skis, a surfboard, or similar device may be affected or controlled in such a way as to cause the water skis, surfboard, or similar device, or any person thereon to collide with any object or person. (1959, c. 1064, s. 13; 2006-185, s. 1.)

§ 75A-13.1. Skin and scuba divers.

(a) No person shall engage in skin diving or scuba diving in the waters of this State that are open to boating, or assist in such diving, without displaying a diver's flag from a mast, buoy, or other structure at the place of diving; and no person shall display such flag except when diving operations are under way or in preparation.

(b) The diver's flag shall be square, not less than 12 inches on a side, and shall be of red background with a diagonal white stripe, of a width equal to one fifth of the flag's height, running from the upper corner adjacent to the mast downward to the opposite outside corner.

(c) No operator of a vessel under way in the waters of this State shall permit the vessel to approach closer than 50 feet to any structure from which a diver's flag is then being displayed, except where the flag is so positioned as to constitute an unreasonable obstruction to navigation; and no person shall engage in skin diving or scuba diving or display a diver's flag in any locality that will unreasonably obstruct vessels from making legitimate navigational use of the water.

(d) A person who violates a provision of this section is guilty of a Class 3 misdemeanor and shall only be subject to a fine not to exceed twenty-five dollars ($25.00). (1969, c. 97, s. 1; 2006-185, s. 1.)

§ 75A-13.2: Repealed by Session Laws 1999-447, s. 3.

§ 75A-13.3. Personal watercraft.

(a) No person shall operate a personal watercraft on the waters of this State at any time between sunset and sunrise. For purposes of this section, "personal watercraft" means a small vessel that uses an outboard or propeller-driven motor, or an inboard motor powering a water jet pump, as its primary source of motive power and which is designed to be operated by a person sitting, standing, or kneeling on, or being towed behind the vessel, rather than in the conventional manner of sitting or standing inside the vessel.

(a1) No person shall operate a personal watercraft on the waters of this State at greater than no-wake speed within 100 feet of an anchored or moored vessel, a dock, pier, swim float, marked swimming area, swimmers, surfers, persons engaged in angling, or any manually operated propelled vessel, unless the personal watercraft is operating in a narrow channel. No person shall operate a personal watercraft in a narrow channel at greater than no-wake speed within 50 feet of an anchored or moored vessel, a dock, pier, swim float, marked swimming area, swimmers, surfers, persons engaged in angling, or any manually operated propelled vessel.

(b) **(Effective until May 1, 2010)** Except as otherwise provided in this subsection, no person under 16 years of age shall operate a personal watercraft on the waters of this State, and it is unlawful for the owner of a personal watercraft or a person who has temporary or permanent responsibility for a person under the age of 16 to knowingly allow that person to operate a personal watercraft. A person of at least 14 years of age but under 16 years of age may operate a personal watercraft on the waters of this State if:

(1) The person is accompanied by a person of at least 18 years of age who physically occupies the watercraft; or

(2) The person (i) possesses on his or her person while operating the watercraft, identification showing proof of age and a boating safety certification card issued by the Commission or proof of other satisfactory completion of a boating safety education course approved by the National Association of State Boating Law Administrators (NASBLA); and (ii) produces that identification and certification card upon the request of an officer of the Commission or local law enforcement agency.

(b) **(Effective May 1, 2010)** Except as otherwise provided in this subsection, no person under 16 years of age shall operate a personal watercraft on the waters of this State, and it is unlawful for the owner of a personal watercraft or a person who has temporary or permanent responsibility for a person under the age of 16 to knowingly allow that person to operate a personal watercraft. A person of at least 14 years of age but under 16 years of age may operate a personal watercraft on the waters of this State if:

(1) The person is accompanied by a person of at least 18 years of age who physically occupies the watercraft and who is in compliance with G.S. 75A-16.2; or

(2) The person (i) possesses on his or her person while operating the watercraft, identification showing proof of age and a boating safety certification card issued by the Commission, proof of other satisfactory completion of a boating safety education course approved by the National Association of State Boating Law Administrators (NASBLA), or proof of other boating safety education in compliance with G.S. 75A-16.2; and (ii) produces that identification and proof upon the request of an officer of the Commission or local law enforcement agency.

(b1) A person under 16 years of age who operates a personal watercraft in violation of the provisions of subsection (b) of this section is guilty of an infraction as provided in G.S. 14-3.1.

(c) No livery shall lease, hire, or rent a personal watercraft to or for operation by a person under 16 years of age, except as provided in subsection (b) of this section.

(c1) No person, firm, or corporation shall engage in the business of renting personal watercraft to the public for operation by the rentee unless the person, firm, or corporation has secured insurance for the liability of the person, firm, or corporation and that of the rentee, in such an amount as is hereinafter provided, from an insurance company duly authorized to sell liability insurance in this State. Each personal watercraft rented must be covered by a policy of liability insurance insuring the owner and rentee and their agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident arising out of the operation of such personal watercraft, subject to the following minimum limits: three hundred thousand dollars ($300,000) per occurrence.

(c2) A vessel livery that fails to carry liability insurance in violation of subsection (c1) of this section is guilty of a Class 2 misdemeanor and shall only be subject to a fine not to exceed one thousand dollars ($1,000).

(c3) **(Effective May 1, 2010)** A vessel livery shall provide the operator of a leased personal watercraft with basic safety instruction prior to allowing the operation of the leased personal watercraft. "Basic safety instruction" shall include direction on how to safely operate the personal watercraft and a review of the safety provisions of this section. A vessel livery that fails to provide basic safety instruction is guilty of a Class 3 misdemeanor.

(d) No person shall operate a personal watercraft on the waters of this State, nor shall the owner of a personal watercraft knowingly allow another person to operate that personal watercraft on the waters of this State, unless:

(1) Each person riding on or being towed behind the vessel is wearing a type I, type II, type III, or type V personal flotation device approved by the United States Coast Guard. Inflatable personal flotation devices do not satisfy this requirement; and

(2) In the case of a personal watercraft equipped by the manufacturer with a lanyard-type engine cut-off switch, the lanyard is securely attached to the person, clothing, or flotation device of the operator at all times while the personal watercraft is being operated in such a manner to turn off the engine if the operator dismounts while the watercraft is in operation.

(d1) No person shall operate a personal watercraft towing another person on water skis, a surfboard, or similar device unless:

(1) The personal watercraft has on board, in addition to the operator, an observer who shall monitor the progress of the person or persons being towed, or the personal watercraft is equipped with a rearview mirror; and

(2) The total number of persons operating, observing, and being towed does not exceed the number of passengers identified by the manufacturer as the maximum safe load for the vessel.

(e) A personal watercraft must at all times be operated in a reasonable and prudent manner. Maneuvers that endanger life, limb, or property shall constitute reckless operation of a vessel as provided in G.S. 75A-10, and include any of the following:

(1) Unreasonably or unnecessarily weaving through congested vessel traffic.

(2) Jumping the wake of another vessel within 100 feet of the other vessel or when visibility around the other vessel is obstructed.

(3) Intentionally approaching another vessel in order to swerve at the last possible moment to avoid collision.

(4) Repealed by Session Laws 2000-52, s. 2.

(5) Operating contrary to the "rules of the road" or following too closely to another vessel, including another personal watercraft. For purposes of this subdivision, "following too closely" means proceeding in the same direction and operating at a speed in excess of 10 miles per hour when approaching within 100 feet to the rear or 50 feet to the side of another vessel that is underway unless that vessel is operating in a narrow channel, in which case a personal watercraft may operate at the speed and flow of other vessel traffic.

(f) The provisions of this section do not apply to a performer engaged in a professional exhibition, a person or persons engaged in an activity authorized under G.S. 75A-14, or a person attempting to rescue another person who is in danger of losing life or limb.

(f1) For purposes of this section, "narrow channel" means a segment of the waters of the State 300 feet or less in width.

(g) Repealed by Session Laws 1999-447, s. 1.

(h) Nothing in this section prohibits units of local government, marine commissions, or local lake authorities from regulating personal watercraft pursuant to the provisions of G.S. 160A-176.2 or any other law authorizing such regulation, provided that the regulations are more restrictive than the provisions of this section or regulate aspects of personal watercraft operation that are not covered by this section. Whenever a unit of local government, marine commission, or local lake authority regulates personal watercraft pursuant to this subsection, it shall conspicuously post signs that are reasonably calculated to provide notice to personal watercraft users of the stricter regulations. (1997-129, s. 1; 1999-447, s. 1; 2000-52, ss. 1-4; 2005-161, s. 1; 2006-185, s. 1; 2009-282, s. 2.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until May 1, 2010. The second version of subsection (b) set out above is effective May 1, 2010.

Editor's Note. — G.S. 75A-14, referred to in subsection (f) above, has been repealed.

Session Laws 1997-129, s. 1, was codified as this section at the direction of the Revisor of Statutes. Furthermore, subsections (a1), (a2), and (b) through (e) have been redesignated as subsections (b) through (g), respectively, at the direction of the Revisor of Statutes.

Session Laws 2005-161, s. 2, provides in part that the age requirement of 14 years of age in the act does not apply to persons who are 12 years of age or older prior to November 1, 2005.

Effect of Amendments. — Session Laws 2009-282, s. 2, effective May 1, 2010, in subdivision (b)(1), inserted "and who is in compliance with G.S. 75A-16.2" near the end; in subdivision (b)(2), inserted "or proof of other boating safety education in compliance with G.S. 75A-16.2" and made related stylistic and punctuation changes near the middle, and substituted "proof" for "certification card" near the end; and added subsection (c3).

§ 75A-14: Repealed by Session Laws 1999-248, s. 4.

§ 75A-14.1. Lake Norman No-Wake Zone.

It is unlawful to operate a vessel at greater than no-wake speed within 50 yards of a vessel launching area, bridge, dock, pier, marina, vessel storage structure, or vessel service area on the waters of Lake Norman. (1997-129, s. 4; 1997-257, s. 10; 1998-217, s. 49; 2006-185, s. 1.)

Editor's Note. — Session Laws 1998-217, s. 49, effective October 31, 1998, codified the first paragraph of Session Laws 1997-129, s. 4, as amended by Session Laws 1997-257, s. 10, as G.S. 75A-14.1.

Session Laws 1997-129, s. 4 provides in part: "With regard to marking the no-wake speed zone established in this section, each of the boards of commissioners of Catawba, Iredell, Lincoln, and Mecklenburg Counties may place and maintain navigational aids and regulatory markers of a general nature on the waters of Lake Norman within the boundaries of each respective county. Provided the counties exercise their supervisory responsibility, they may delegate the actual process of placement or maintenance of the markers to some other agency, corporation, group, or individual. With regard to marking the restricted zones, markers may be placed and maintained by the individuals using the protected areas and facilities in accordance with the Uniform Waterway Marking System and any supplementary standards for that system adopted by the Wildlife Resources Commission.

"This section is enforceable under G.S. 75A-17 as if it were a provision of Chapter 75A of the General Statutes."

For similar provisions regarding the establishment of no-wake zones, see Session Laws 1987 (Reg. Sess., 1988), c. 1045 (no-wake zone in Brunswick County); Session Laws 1993, c. 67 (no-wake zone in city of Southport); Session Laws 1993, c. 434, as amended by 1993, c. 637 (no-wake zone on Waccamaw and Pamlico Rivers in Columbus County and city of Washington); Session Laws 1995 (Reg. Sess., 1996), c. 559 (no-wake zone on Lake Hickory in Catawba County); Session Laws 2001-65, as amended by Session Laws 2005-433, s. 4 (no-wake zone on

Intercoastal Waterway between Markers 44 and 46B in area abutting Town of Cedar Point); Session Laws 2002-23 (no-wake zone around Eagle Point Nature Preserve on High Rock Reservoir in Rowan County); Session Laws 2002-39 (no-wake zone in vicinity of Roanoke River Bridge on Highway 17 in Bertie County); Session Laws 2002-141, s. 9.1(a)-(f) (no-wake zone on the Roanoke River in Bertie County); Session Laws 2003-189, ss. 1-5 (no-wake zone on Pembroke Creek in Cowan County); and Session Laws 2008-100 (no-wake speed zone near towns of Holden Beach and Oak Island in Brunswick County).

Session Laws 2008-100, s. 1, provides: "It is unlawful to operate a vessel at greater than a no-wake speed in the Intracoastal Waterway adjacent to the Town of Holden Beach and the Town of Oak Island within 1,000 feet of the center of the intersection of the inlet at the Lockwood Folly River. No-wake speed is idle speed or a slow speed creating no appreciable wake."

§ 75A-14.2. Temporary waiver of enforcement of no-wake zones.

The Wildlife Resources Commission may temporarily and conditionally waive enforcement of a no-wake zone upon petition by a unit of local government that encompasses or abuts the no-wake zone if, after investigation of the reasons given for the temporary and conditional waiver, the Commission determines that public safety and the public welfare will not be significantly compromised by the waiver. (2007-46, s. 1.)

§ 75A-15. Rules on water safety; adoption of the United States Aids to Navigation System.

(a) In accordance with subsection (b) of this section, the Commission is empowered to adopt rules, for the local water in question, as to:

(1) Operation of vessels, including restrictions concerning speed zones, and type of activity conducted.

(2) Promotion of boating and water safety generally by occupants of vessels, swimmers, fishermen, and others using the water.

(3) Placement and maintenance of navigation aids and markers, in conformity with governing provisions of law.

Prior to the adoption of any rules, the Commission shall investigate the water recreation and safety needs of the local water in question. In conducting the investigation, the Commission in its discretion may hold public hearings on the rules proposed and the general needs of the local water in question. After completion of the investigation and application of standards, the Commission may in its discretion adopt the rules requested, adopt them in an amended form, or refuse to adopt them. After adoption, the Commission may amend or repeal the rules after first holding a public hearing.

(b) Any subdivision of this State may, but only after public notice, make formal application to the Commission for rules on waters within the subdivision's territorial limits as to the matters listed in subsection (a) of this section. The Commission may adopt rules applicable to local areas of water defined by the Commission that are found to be heavily used for water recreation purposes by persons from other areas of the State and as to which there is not coordinated local interest in regulation.

(b1) The Commission may adopt rules to prohibit entry of vessels into public swimming areas and to establish speed zones at public vessel launching ramps, marinas, or vessel service areas and on other congested water areas where there are demonstrated water safety hazards. Enforcement of rules adopted pursuant to this subsection shall be dependent upon placement and maintenance of regulatory markers in accordance with the United States Aids to Navigation System by the Commission or an agency designated by the Commission.

(c) The United States Aids to Navigation System, as established by 33 Code of Federal Regulations Part 62 (July 1, 2005 edition), is hereby adopted for use on the waters of North Carolina. The Commission is authorized to adopt rules implementing the marking system and may:

(1) Modify provisions as necessary to meet the special water recreational and safety needs of this State, provided that the modifications do not depart in any essential manner from the uniform standards being adopted in other states.

(2) Modify provisions as necessary to conform with amendments to the marking system that may be proposed for adoption by the states.

(3) Enact supplementary standards regarding design, construction, placement, and maintenance of markers.

(4) Enact clarifying rules as to matters not covered with precision in the United States Aids to Navigation System.

(5) Enact implementing rules as to matters left to State discretion in the United States Aids to Navigation System.

(6) Enact rules forbidding or restricting the placement of markers either throughout the State or in certain classes or areas of waters without prior permission having been obtained from the Commission or some agency or official designated by the Commission.

(c1) It is unlawful to place or maintain any marker of the sort covered by the marking system in the waters of North Carolina that does not conform to or is in violation of the marking system and the implementing rules of the Commission.

(d) Rules enacted under the authority of subsections (a), (b), and (b1) of this section shall supersede all local rules in conflict or incompatible with such rules. As used in this subsection, "local rules" shall include provisions relating to boating, water safety, or other recreational use of local waters in special local, or private acts, in ordinances or rules of local governing bodies, or in ordinances or rules of local water authorities. Except as may be authorized in subsections (a), (b), and (b1) of this section, no local rules may be made respecting the United States Aids to Navigation System and its implementation or respecting supplemental safety equipment on vessels.

(e) The Commission may adopt rules prohibiting entry or use by vessels or swimmers of waters of the State immediately surrounding impoundment structures and powerhouses associated with electric generating facilities that are found to pose a hazard to water safety. This subsection shall not apply to the Person-Caswell Lake Authority, Carolina Power and Light Company Lake (Hyco). (1959, c. 1064, s. 15; 1965, c. 394; 1969, c. 1093, s. 4; 1977, c. 424; 1983 (Reg. Sess., 1984), c. 1082, ss. 4, 5; 1987, c. 827, s. 5; 1993 (Reg. Sess., 1994), c. 753, s. 3; 2006-185, s. 1.)

CASE NOTES

Cited in Croker v. Yadkin, Inc., 130 N.C. App. 64, 502 S.E.2d 404 (1998).

§ 75A-16: Repealed by Session Laws 1979, c. 830, s. 9, effective July 1, 1980.

Cross References. — For game laws generally, see G.S. 113-127 et seq.

Editor's Note. — Session Laws 1979, c. 830, s. 2 provided: "The repeal of Article 6 and Subchapters IIA and III and of parts of Subchapter IV of Chapter 113 of the General Statutes and of all special, local, and private acts and ordinances regulating the conservation of wildlife resources is made subject to such temporary retention of local acts and former provisions of Chapter 113 of the General Statutes as may be specified in Subchapter IV. The repeal of acts which themselves repeal former acts is not intended to revive the former acts."

For repealed sections and local acts continued in effect as to particular counties, see G.S. 113-133.1.

§ 75A-16.1. Boating safety course.

(a) The Commission shall institute and coordinate a statewide course of instruction in boating safety, and in so doing may cooperate with any political subdivision of the State or with any reputable organization having as one of its objectives the promotion of boating safety.

(b) The Commission shall designate those persons or agencies authorized to conduct the course of instruction, and this designation shall be valid until revoked by the Commission. Within 30 days of completion of a course of instruction, a designated person or agency shall submit to the Commission a list of the names of all persons who successfully completed the course of instruction conducted by the designated person or agency.

(c) The Commission may conduct the course in boating safety using Commission personnel or other persons at times or in areas in which competent agencies are unable or unwilling to meet the demand for instruction.

(d) The Commission shall issue a boating safety certification card to each person who successfully completes the course of instruction.

(e) The Commission shall adopt rules to provide for the course of instruction and the issuance of boating safety certification cards consistent with the purposes of this section.

(f) Any person who presents a fictitious boating safety certification card or who attempts to obtain a boating safety certification card through fraud is guilty of a Class 2 misdemeanor. (2006-185, s. 1.)

Editor's Note. — Session Laws 2006-185, s. 3, makes this section effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007.

§ 75A-16.2. (Effective May 1, 2010) Boating safety education required.

(a) No person shall operate a vessel with a motor of 10 horsepower or greater on the public waters of this State unless the operator has met the requirements for boating safety education.

(b) A person shall be considered in compliance with the requirements of boating safety education if the person does one of the following:

(1) Completes and passes the boating safety course instituted by the Wildlife Resources Commission under G.S. 75A-16.1 or another boating safety course that is approved by the National Association of State Boating Law Administrators (NASBLA) and accepted by the Wildlife Resources Commission;

(2) Passes a proctored equivalency examination that tests the knowledge of information included in the curriculum of an approved course;

(3) Possesses a valid or expired license to operate a vessel issued to maritime personnel by the United States Coast Guard;

(4) Possesses a State-approved nonrenewable temporary operator's certificate to operate a vessel for 90 days that was issued with the certificate of number for the vessel, if the boat was new or was sold with a transfer of ownership;

(5) Possesses a rental or lease agreement from a vessel rental or leasing business that lists the person as the authorized operator of the vessel;

(6) Properly displays Commission-issued dealer registration numbers during the demonstration of the vessel;

(7) Operates the vessel under onboard direct supervision of a person who is at least 18 years of age and who meets the requirements of this section;

(8) Demonstrates that he or she is not a resident, is temporarily using the waters of this State for a period not to exceed 90 days, and meets any applicable boating safety education requirements of the state or nation of residency;

(9) Has assumed operation of the vessel due to the illness or physical impairment of the initial operator, and is returning the vessel to shore in order to provide assistance or care for the operator;

(10) Is registered as a commercial fisherman or a person who is under the onboard direct supervision of a commercial fisherman while operating the commercial fisherman's boat; or

(11) Provides proof that he or she is at least 26 years of age.

Any person who operates a vessel with a motor of 10 horsepower or greater on the waters of this State shall, upon the request of a law enforcement officer, present to the officer a certification card or proof that the person has complied with the provisions of this section.

(c) Any person who violates a provision of this section or a rule adopted pursuant to this section is guilty of an infraction, as provided in G.S. 14-3.1. The court shall assess court costs for each violation but shall not assess a penalty. A person may not be convicted of violating this section if, when tried for the offense, the person produces in court a certification card or proof that the person has completed and passed a boating safety course in compliance with subdivision (b)(1) of this section.

(d) No unit of local government shall enact any ordinance or rule relating to boating safety education, and this law preempts all existing ordinances or rules.

(e) An operator of a personal watercraft on the public waters of this State remains subject to any more specific provision of law found in G.S. 75A-13.3. (2009-282, s. 1.)

Editor's Note. — Session Laws 2009-282, s. 3, makes this section effective May 1, 2010.

§ 75A-17. Enforcement of Chapter.

(a) Every wildlife protector and every other law-enforcement officer of this State and its subdivisions shall have the authority to enforce the provisions of this Chapter and in the exercise thereof shall have authority to stop any vessel subject to this Chapter. Wildlife protectors or other law enforcement officers of this State, after having identified themselves as law enforcement officers, shall have authority to board and inspect any vessel subject to this Chapter.

(b) In order to secure broader enforcement of the provisions of this Chapter, the Commission is authorized to enter into an agreement with the Department of Environment and Natural Resources whereby the enforcement personnel of the Department shall assume responsibility for enforcing the provisions of this Chapter in the territory and area normally policed by enforcement personnel of the Commission and whereby the Commission shall contribute a share of the expense of such personnel according to a ratio of time and effort expended by them in enforcing the provisions of this Chapter, when the ratio has been agreed upon by both of the contracting agencies. The agreement may be modified from time to time as conditions may warrant.

(c) Law enforcement vessels may use a flashing blue light on the waters of this State whenever they are engaged in law enforcement or public safety activities. The use of a blue light by any other vessel is prohibited. A person other than a law enforcement officer who activates, installs, or operates a flashing blue light on a vessel other than a law enforcement vessel is guilty of a Class 1 misdemeanor.

(d) A siren may not be used on any vessel other than an official law enforcement vessel or other official emergency response vessel.

(e) Vessels operated on the waters of this State shall stop when directed to do so by a law enforcement officer. When stopped, vessels shall remain at idle speed, or shall maneuver in such a way as to permit the officer to come alongside the vessel. Law enforcement officers may direct vessels to stop by using a flashing blue light, a siren, or an oral command by officers in uniform. A person who violates this subsection is guilty of a Class 2 misdemeanor.

(f) Vessels operated on the waters of this State shall slow to a no-wake speed when passing within 100 feet of a law enforcement vessel that is displaying a flashing blue light unless the vessel is in a narrow channel. Vessels operated on the waters of this State in a narrow channel shall slow to a no-wake speed when passing within 50 feet of a law enforcement vessel that is displaying a flashing blue light. A person who violates this subsection is guilty of a Class 3 misdemeanor. (1959, c. 1064, s. 17; 1965, c. 957, s. 9; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(17); 1997-443, s. 11A.119(a); 2006-185, s. 1.)

CASE NOTES

Subsection (a) of this section contains no requirement of reasonableness and no effort to balance legitimate state interest against the boat owner's right to be secure under the Fourth Amendment against unreasonable searches and seizures. Klutz v. Beam, 374 F. Supp. 1129 (W.D.N.C. 1973).

Taken literally, this section extends an inspection authority that is absolutely unlimited as to time and place and convenience of occupants. Klutz v. Beam, 374 F. Supp. 1129 (W.D.N.C. 1973).

But Warrantless Search May Impose Unconstitutional Burden. — The power of a state to inspect boats for reasons of health and safety is not denied. However, possible emergencies aside, warrantless searches against the owner's will of a boat on a land-locked lake, which can be repeated by that inspector or any other inspector who chooses to board the boat, are an oppressive, unreasonable and unconstitutional burden not justified by considerations of sanitation and safety. Klutz v. Beam, 374 F. Supp. 1129 (W.D.N.C. 1973).

Safety Stop Resulting in OWI Arrest Not Unconstitutional. — A stop by a Wildlife Resources Commission officer, pursuant to this section, for the purpose of conducting a safety inspection of a motor vessel on the waters of North Carolina without any reasonable, articulable suspicion of criminal activity was not a violation of U.S. Const., Amendment IV, and the evidence obtained therefrom could not be suppressed in defendant's trial for operating a motor vessel while impaired (OWI), a violation of G.S.113-136, where the intrusion on the defendant's rights was reasonable given the state's interest in recreational water safety, the reduced expectation of privacy in a boat, the brevity of the encounter, and the lack of alternative means, and where the defendant's conduct was in "plain view." State v. Pike, 139 N.C. App. 96, 532 S.E.2d 543, 2000 N.C. App. LEXIS 805 (2000).

OPINIONS OF ATTORNEY GENERAL

Dumping Waste Within Three Miles of Seashore Prohibited. — North Carolina General Statutes specifically prohibit the dumping of waste materials such as bags of medical refuse, and other forms of ocean dumping or the introduction of other pollutants in coastal waters if the waste materials were dumped within three miles of the Atlantic seashore. See opinion of the Attorney General to Lieutenant Governor Robert B. Jordan, III, 58 N.C.A.G. 57 (1988).

§ 75A-18. Penalties.

(a) Except as otherwise provided, a person who violates a provision of this Article or who violates a rule adopted under authority of this Chapter is guilty of a Class 3 misdemeanor and shall only be subject to a fine not to exceed two hundred and fifty dollars ($250.00) for each violation. This limitation shall not apply in a case where a more severe penalty is prescribed in this Chapter.

(b) through (e) Repealed by Session Laws 2006-185, s. 1. (1959, c. 1064, s. 18; 1965, c. 634, s. 3; c. 793; 1969, c. 97, s. 2; 1979, c. 761, s. 8; 1985, c. 615, ss. 6, 7; 1989, c. 742, s. 2; 1993, c. 539, ss. 566, 1285; 1994, Ex. Sess., c. 24, s. 14(c); 1997-129, s. 3; 1999-447, s. 2; 2006-185, s. 1.)

§ 75A-19. Operation of vessels by manufacturers, dealers, etc.

Notwithstanding any other provisions of this Chapter, the Commission may adopt rules regarding the operation of vessels by manufacturers, distributors, dealers, and demonstrators as the Commission may deem necessary and proper. (1959, c. 1064, s. 181/2; 2006-185, s. 1.)

ARTICLE 2.

Local Water Safety Committees.

§§ 75A-20 through 75A-25: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1082, s. 3.

§ 75A-26. Local water safety committees.

(a) In order that responsible State and local officials may consult with an advisory body as to the needs and desires of the public in matters of water recreation and safety in various local waters, local authorities may sponsor local water safety committees. When a local government or two or more local governments acting jointly determine that the interests of the public would be served by sponsorship of a local water safety committee, such local government or governments may sponsor a committee. As used in this section, the noun "sponsor" shall include a sponsoring local government or a sponsoring group of local governments acting jointly.

(b) Members of a local committee shall be selected by the sponsor to represent various viewpoints and interests respecting water recreation and safety in the locality concerned. The membership of the committee shall be not less than 15 nor more than 35, and members shall serve at the pleasure of the sponsor. Except where the charter granted by the sponsor may make specific provision, the members of a local committee shall select their officers, determine the need for subcommittees (if any), provide for times and places of regular meetings, and otherwise order the internal organization and administration of the committee. Special meetings may be held:

(1) Upon the call of such officers or members of the local committee as may be specified in the charter from the sponsor or the bylaws enacted by the committee.

(2) Upon the call of three members of the governing body or bodies of the sponsor.

(3) Upon the call of the chairman of the North Carolina Water Safety Committee.

(c) Where the sponsor finds that an existing organization or committee is sufficiently broadly based to represent the various community interests, it may sponsor (and at any time withdraw sponsorship of) the activities of such organization or committee relating to water recreation and safety in lieu of creating a separate local committee. In the event an existing organization or committee is sponsored, the membership restrictions of subsection (b) do not apply. The phrase "local committee" as used in this section shall include such sponsored existing organizations and committees as well as separate committees.

(d) Except as indicated below, members of a local committee shall serve without compensation from the sponsor. Public officers and employees who are acting within the scope and course of their employment, however, may receive such travel and subsistence allowance as authorized by law when attending meetings, whether as members or observers, or otherwise assisting or participating in the affairs of a local committee. Within the bounds set by governing provisions of the law generally, a sponsor may also provide administrative and staff services to a local committee and may underwrite or finance its projects which are carried out to the benefit of water recreation and safety in the area concerned.

(e) At the time of sponsorship, or withdrawal of sponsorship, of a local committee, the sponsor shall notify the following persons of the action taken:

(1) The chairman of the North Carolina Water Safety Committee.
(2) The Executive Director of the North Carolina Wildlife Resources Commission.

(f) All meetings of separately created local committees shall be open to the public. Where an existing organization or committee has received sponsorship, all its meetings devoted to carrying out the advisory functions of a local committee shall be open to the public.

(g) Members of a local committee are under an obligation:

(1) To keep themselves informed as to problems of water recreation and safety in their area.
(2) To study such problems concerning water recreation and safety as may be referred to them by their sponsor or by the chairman of the North Carolina Water Safety Committee.
(3) To make reports from time to time, either on their own motion or in response to a request for a study, on problems of water recreation and safety, and with suggestions for remedies where such are indicated and feasible. Such reports may be made to the sponsor, the chairman of the North Carolina Water Safety Committee, the Executive Director of the North Carolina Wildlife Resources Commission, or any other public or private person, agency, firm, corporation, or organization with the power to effect improvements in the level of water recreation and safety available to the public.
(4) To take part in and, where necessary, to help coordinate programs of public education in the field of water safety. (1969, c. 1093, s. 3.)

Editor's Note. — G.S. 75A-20 through 75A-25, creating the North Carolina Water Safety Committee referred to in this section, were repealed by Session Laws 1983 (Regular Session, 1984), c. 1082, s. 3.

ARTICLE 3.

Boat Hull Anti-Copying Act.

§§ 75A-27 through 75A-31: Repealed by Session Laws 1991, c. 191, s. 1.

ARTICLE 4.

Vessel Titling Act.

§ 75A-32. Short title.

This Article shall be known as the Vessel Titling Act. (1989, c. 739, s. 1; 2006-185, s. 2.)

Editor's Note. — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after that date, rewrote the Article 4 heading, which formerly read: "Watercraft Titling Act".

§ 75A-33. Definitions.

The definitions set forth in G.S. 75A-2 shall apply to this Article, unless the context clearly requires a different meaning. (1989, c. 739, s. 1; 2006-185, s. 2.)

§ 75A-34. Who may apply for certificate of title; authority of employees of Commission.

(a) Any owner of a motorized vessel or sailboat 14 feet or longer or any personal watercraft, as defined in G.S. 75A-13.3(a), that is applying for a certificate of number for the first time in this State pursuant to G.S. 75A-5(a), and any new owner of a motorized vessel or sailboat 14 feet or longer or any personal watercraft to whom ownership is being transferred under G.S. 75A-5(c) shall apply to the Commission for a certificate of title for that vessel. Any other vessel may be titled in this State at the owner's option. A vessel may not be titled in this State if it is titled in another state, unless the current title is surrendered along with the application for a certificate of title in this State. The Commission shall issue a certificate of title upon reasonable evidence of ownership, which may be established by affidavit, bill of sale, manufacturer's statement of origin, certificate of title in this State, certificate of number or title from another state, or other document satisfactory to the Commission. Only one certificate of title may be issued for any vessel in this State. A vessel may not be titled in this State if it is documented with the United States Coast Guard. The Commission shall issue a certificate of title upon receipt of a completed application, along with the appropriate fee and reasonable evidence of ownership. The Commission shall require a manufacturer's statement of origin for all new vessels being issued a certificate of number and a certificate of title for the first time. The Commission may request a pencil tracing of the hull identification number (serial number) for vessels being transferred, in order to positively identify the vessel before issuance of a certificate of title for that vessel.

(b) Employees of the Commission are vested with the power to administer oaths and to take acknowledgements and affidavits incidental to the administration and enforcement of this section. They shall receive no compensation for these services. (1989, c. 739, s. 1; 2006-185, s. 2.)

§ 75A-35. Form and contents of application.

(a) The owner or the owner's attorney shall apply for a certificate of title for a vessel. The application shall contain the name, residence, and mailing address of the owner, the county where the vessel is taxed, proof of ownership, and a statement of all liens or encumbrances upon the vessel in the order of their priority. The application shall also contain the names and addresses of all persons having any interest in the vessel.

(b) Every application for a certificate of title for a vessel shall contain a brief description of the vessel to be titled, including the name of the manufacturer, certificate of number, hull identification number, length, type, and principal material of construction, model year, and purchase information. It shall also include the name and address of the previous owner or owners from whom the vessel was obtained. If the vessel has an outboard motor of greater than 25 horsepower, the application shall also contain identification of the motor, including the serial number and manufacturer. The application shall be made on forms prescribed and furnished by the Commission and shall contain other information as may be required by the Commission. (1989, c. 739, s. 1; 2006-185, s. 2.)

§ 75A-36. Notice by owner of change of address.

Whenever any person, after applying for or obtaining the certificate of title of a vessel, moves from the address shown on the application or certificate of title, that person shall, within 30 days of moving, notify the Commission of the change of address on a form acceptable to the Commission. (1989, c. 739, s. 1; 2006-185, s. 2.)

§ 75A-37. Certificate of title as evidence; duration; transfer of title.

(a) A certificate of title is prima facie evidence of the ownership of a vessel. A certificate of title shall remain in force for the life of the vessel.

(b) Upon the sale, assignment, or transfer of a vessel for which a certificate of title has been issued under this Article, the legal holder of the certificate of title shall deliver it to the purchaser or transferee. The assignment on the certificate must be completed showing transfer of ownership to the purchaser or transferee and settlement of all outstanding liens and encumbrances. The new owner shall submit the assigned certificate of title to the Commission, accompanied by evidence satisfactory to the Commission that all outstanding liens have been released, with the application for transfer of title. The application shall contain all the information required by the Commission for the transfer in order to identify the vessel and the new owner. The application shall show any and all new liens and encumbrances on the vessel, in order of priority, incurred by the owner. The nature of the new liens and encumbrances shall also be given, along with the name and address of all secured parties. (1989, c. 739, s. 1; 2006-185, s. 2.)

§ 75A-38. Commission's records; fees.

(a) The Commission shall maintain a record of any title it issues.

(b) The Commission shall charge a fee of twenty dollars ($20.00) to issue a new or transfer certificate of title. The Commission shall charge a fee of ten dollars ($10.00) for each duplicate title it issues and for the recording of a supplemental lien. (1989, c. 739, s. 1; 2006-185, s. 2.)

§ 75A-39. Duplicate certificate of title.

The Commission may issue a duplicate certificate of title plainly marked "duplicate" across its face upon application by the person entitled to hold the certificate if the Commission is satisfied that the original certificate has been lost, stolen, mutilated, destroyed, or has become illegible. Mutilated or illegible certificates shall be returned to the Commission with the application for a duplicate. If a duplicate certificate of title has been issued and the lost or stolen original is recovered, the original shall be promptly surrendered to the Commission. A duplicate certificate of title, not bearing the word "duplicate" across its face, shall be issued for anyone having an address change or name change so long as the original title is surrendered and the appropriate fees paid as provided in G.S. 75A-38(b). If the original certificate of title is not surrendered to the Commission, the duplicate certificate of title shall be plainly marked "duplicate" across its face. (1989, c. 739, s. 1; 2006-185, s. 2.)

§ 75A-40. Certificate to show security interests.

The Commission, after receiving an application for a certificate of title for a vessel, shall, upon issuing the certificate of title to the owner, show upon the face of the certificate of title all security interests in the order of their priority as shown in the application. (1989, c. 739, s. 1; 2006-185, s. 2.)

§ 75A-41. Security interests subsequently created.

Except for security interests in vessels that are inventory held for sale, security interests created in vessels by the voluntary act of the owner after the original issue of title to the owner must be shown on the certificate of title. In such cases, the owner shall file an application with the Commission on a form furnished for that purpose, setting forth all security interests and other information as the Commission requires. The Commission, if satisfied that it is proper that the security interests be recorded, shall upon surrender of the certificate of title covering the vessel, issue a new certificate of title showing any security interests in the order of the priority according to the date of the filing of the application. For the purpose of recording the subsequent security interest, the Commission may require any secured party to deliver the certificate of title to the Commission. The newly issued certificate shall be sent or delivered to the secured party of first priority listed on the certificate of title. (1989, c. 739, s. 1; 2000-169, s. 38; 2006-185, s. 2.)

§ 75A-42. Certificate as notice of security interest.

A certificate of title, when issued by the Commission showing a security interest, shall be deemed adequate notice to the State, creditors, and purchasers that a security interest in the vessel exists. No other recording or filing of the creation or reservation of a security interest in the county or city wherein the purchaser or debtor resides or elsewhere is necessary and shall not be required. Vessels, other than those that are inventory held for sale, for which a certificate of title is currently in effect, shall be exempt from the provisions of G.S. 25-9-309, 25-9-310, 25-9-312, 25-9-320, 25-9-322, 25-9-323, 25-9-324, 25-9-331, 25-9-404, 25-9-405, 25-9-406, and 25-9-501 to 25-9-526 for so long as the certificate of title remains in effect. (1989, c. 739, s.1; 2000-169, s. 39; 2006-185, s. 2.)

§ 75A-43. Security interest may be filed within 30 days after purchase.

If application for the recordation of a security interest to be placed upon a vessel is filed in the principal office of the Commission within 30 days from the date of the applicant's purchase of the vessel, it shall be valid to all persons, including the State, as if the recordation had been done on the day the security interest was acquired. (1989, c. 739, s. 1; 2006-185, s. 2.)

§ 75A-44. Priority of security interests shown on certificates.

Except for security interests in vessels that are inventory held for sale, security interests shown upon the certificates of title issued by the Commission pursuant to applications for certificates shall have priority over any other liens or security interests against the vessel however created and recorded, except for a mechanics lien for repairs, provided that the mechanic furnishes the holder of any recorded lien who may request it with an itemized sworn statement of the work done and materials supplied for which the lien is claimed. (1989, c. 739, s.1; 2000-169, s. 40; 2006-185, s. 2.)

§ 75A-45. Legal holder of certificate of title subject to security interest.

The certificate of title of a vessel shall be delivered to the person holding the security interest having first priority upon the vessel and retained by that person until the entire amount of the security interest is fully paid by the owner of the vessel. The certificate of title shall then be delivered to the secured party next in order of priority and so on, or, if none, then to the owner of the vessel. (1989, c. 739, s. 1; 2006-185, s. 2.)

§ 75A-46. Release of security interest shown on certificate of title.

An owner, upon securing the release of any security interest upon a vessel shown upon the certificate of title issued for the vessel, may exhibit the documents evidencing the release, signed by the person or persons making the release, and the certificate of title to the Commission. When it is impossible to secure the release from the secured party, the owner may exhibit to the Commission any available evidence showing that the debt secured has been satisfied, together with a statement by the owner under oath that the debt has been paid. If the Commission determines that the secured debt has been satisfied in full, the Commission shall issue to the owner either a new certificate of title in proper form or an endorsement or rider showing the release of the security interest which the Commission shall attach to the outstanding certificate of title. (1989, c. 739, s. 1; 2006-185, s. 2.)

§ 75A-47. Surrender of certificate required when security interest paid.

It is unlawful and constitutes a Class 1 misdemeanor for a secured party who holds a certificate of title as provided in this Article to refuse or fail to surrender the certificate of title to the person legally entitled to it within 10 days after the security interest has been paid and satisfied. (1989, c. 739, s. 1; 1993, c. 539, s. 567; 1994, Ex. Sess., c. 24, s. 14(c); 2006-185, s. 2.)

§ 75A-48. Levy of execution, etc.

A levy made by virtue of an execution or other proper court order, upon a vessel for which a certificate of title has been issued by the Commission, shall constitute a lien, subsequent to security interests previously recorded by the Commission and subsequent to security interests in inventory held for sale and perfected as otherwise permitted by law, if and when the officer making the levy reports to the Commission at its principal office, on forms provided by the Commission, that the levy has been made and that the vessel levied upon has been seized by and is in the custody of the officer. Should the lien thereafter be satisfied or should the vessel levied upon and seized thereafter be released by the officer, the officer shall immediately report that fact to the Commission at its principal office. After a levy and seizure by an officer and before the officer reports the levy and seizure to the Commission, any person who fraudulently assigns, transfers, causes the certificate of title to be assigned or transferred, or causes a security interest to be shown upon the certificate of title, is guilty of a Class 1 misdemeanor. (1989, c. 739, s. 1; 1993, c. 539, s. 568; 1994, Ex. Sess., c. 24, s. 14(c); 2006-185, s. 2.)

§ 75A-49. Registration prima facie evidence of ownership; rebuttal.

A valid certificate of number issued under the provisions of this Chapter, or any similar document issued under the jurisdiction of any other state or country, shall be prima facie evidence of ownership of a vessel and entitlement to a certificate of title under the provisions of this Article, but ownership established by such documents shall be subject to rebuttal. (1989, c. 739, s. 1; 2006-185, s. 2.)

been seized by and is in the custody of the officer. Should the lien thereafter be satisfied or should the vessel levied upon and seized thereafter be released by the officer, the officer shall immediately report that fact to the Commission at its principal office. After a levy and seizure by an officer and before the officer reports the levy and seizure to the Commission, any person who fraudulently assigns, transfers, causes the certificate of title to be assigned or transferred, or causes a security interest to be shown upon the certificate of title, is guilty of a Class 1 misdemeanor. (1989, c. 739, s. 1; 1993, c. 539, s. 568; 1994, Ex. Sess., c. 24, s. 14(c); 2006-185, s. 2.)

§ 75A-49. Registration prima facie evidence of ownership; rebuttal.

A valid certificate of number issued under the provisions of this Chapter, or any similar document issued under the jurisdiction of any other state or country, shall be prima facie evidence of ownership of a vessel and entitlement to a certificate of title under the provisions of this Article, but ownership established by such documents shall be subject to rebuttal. (1989, c. 739, s. 1; 2006-185, s. 2.)

Chapter 75B.

Discrimination in Business.

Sec.
75B-1. Definitions.
75B-2. Discrimination in business prohibited.
75B-3. Actions not prohibited.
75B-4. Enforcement.

Sec.
75B-5. Remedies cumulative.
75B-6. Contracts void.
75B-7. Chapter not exclusive.

§ 75B-1. Definitions.

The following words and phrases as used in this Chapter shall have the following meaning unless the context clearly requires otherwise:

(1) "Business," the manufacture, processing, sale, purchase, licensing, distribution, provision, or advertising of goods or services, or extension of credit, or issuance of letters of credit, or any other aspect of business;

(2) "Foreign government," all governments and political subdivisions and the instrumentalities thereof, excepting the government, political subdivisions, and instrumentalities of the United States and the states, commonwealths, territories and possessions of the United States, and the District of Columbia;

(3) "Foreign person," any person whose principal place of residence, business or domicile is outside the United States, or any person controlled directly or indirectly by such person or persons; provided, however, that no person shall be deemed a foreign person if after reasonable inquiry and due diligence it cannot be determined that any such person has a principal place of residence, business, or domicile outside the United States or is controlled by such person;

(4) "Foreign trade relationships," the dealing with or in any foreign country of any person, or being listed on a boycott list or compilation of unacceptable persons maintained by a foreign government, foreign person, or international organization;

(5) "International organization," any association or organization, with the exception of labor associations, or organizations of which more than a majority of the membership consists of foreign persons or foreign governments; and

(6) "Persons," one or more of the following or their agents, employees, servants, representatives, directors, officers, partners, members, managers, superintendents, and legal representatives: individuals, corporations, partnerships, joint ventures, associations, labor organizations, educational institutions, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, fiduciaries, and all other entities recognized at law by this State. (1977, c. 916, s. 1.)

Cross References. — For statute of limitation for an action under this Chapter, see G.S. 1-52(14).

Legal Periodicals. — For survey of 1977 law on trade regulation, see 56 N.C.L. Rev. 934 (1978).

§ 75B-2. Discrimination in business prohibited.

It shall be unlawful for any person doing business in the State or for the State of North Carolina:

(1) To enter into any agreement, contract, arrangement, combination, or understanding with any foreign government, foreign person, or international organization, which requires such person or the State to refuse, fail, or cease to do business in the State with any other person who is domiciled or has a usual place of business in the State, based upon such other person's race, color, creed, religion, sex, national origin or foreign trade relationships;

(2) To execute in the State any contract with any foreign government, foreign person, or international organization which requires such person or the State to refuse, fail or cease to do business with another person who is domiciled or has a usual place of business in the State, based upon such other person's race, color, creed, religion, sex, national origin, or foreign trade relationships;

(3) To refuse, fail or cease to do business in the State with any other person who is domiciled or has a usual place of business in the State or with the State when such refusal, failure, or cessation results directly or indirectly from an agreement, contract, arrangement, combination, or understanding between the person who refuses, fails or ceases to do business and any foreign government, foreign person, or international organization, and is based upon such other person's race, color, creed, religion, sex, national origin or foreign trade relationships;

(4) To discharge or to fail, refuse or cease to hire, promote or appoint in the State any other person who is domiciled in the State to any position of employment or employment responsibility when such refusal, failure or cessation results from an agreement, contract, arrangement, combination, or understanding with any foreign government, foreign person, or international organization and is based upon such other person's race, color, creed, religion, sex, national origin, or foreign trade relationships;

(5) To willfully and knowingly aid or abet any other person to engage in conduct which is prohibited by this Chapter. (1977, c. 916, s. 1.)

§ 75B-3. Actions not prohibited.

It shall not be unlawful under this Chapter:

(1) To engage in conduct required by or expressly authorized by acts of the United States Congress, a United States treaty, a United States regulation, or a United States executive order;

(2) To enter into any agreement with an international organization entirely composed of member governments or their contracting representatives which requires that a preference or priority be given to the citizens or products of one or more of such member governments;

(3) To enter into any agreement with respect to the insuring, handling, or shipping of goods, or choice of carrier while in international transit. (1977, c. 916, s. 1.)

§ 75B-4. Enforcement.

The Attorney General may institute a civil action to prevent or restrain violations of G.S. 75B-2.

A person injured by a violation of G.S. 75B-2 may maintain an action for damages or for an injunction or both against any person who has committed the violation.

In a proceeding under this section, the court shall determine whether a violation has been committed and enter any judgment or decree necessary to remove the effects of any violation it finds and to prevent continuation or renewal of the violation in the future.

If an application for an injunction is granted, after due notice to all parties, a hearing thereon, and as a disposition on the merits of such application, the complainant may be awarded costs and reasonable attorney's fees.

In an action for damages, if there is a willful violation of G.S. 75B-2 the person injured may be awarded up to three times the amount of actual damages which results from the violation, with costs and reasonable attorney's fees. (1977, c. 916, s. 1.)

§ 75B-5. Remedies cumulative.

The remedies provided in this Chapter are cumulative. (1977, c. 916, s. 1.)

§ 75B-6. Contracts void.

Any provision of any contract or other document or other agreement which violates G.S. 75B-2 or which, if complied with by the person intended to be bound by the provision, would cause a violation of G.S. 75B-2 shall be null and void as being against the public policy of the State. (1977, c. 916, s. 1.)

§ 75B-7. Chapter not exclusive.

This Chapter shall not be deemed to supersede, restrict or otherwise limit the continuing applicability of the antitrust or anti-discrimination laws of the State. (1977, c. 916, s. 1.)

remove the effects of any violation it finds and to prevent continuation or renewal of the violation in the future.

If an application for an injunction is granted, after due notice to all parties, a hearing thereon, and as a disposition on the merits of such application, the complainant may be awarded costs and reasonable attorney's fees.

In an action for damages, if there is a willful violation of G.S. 75B-2 the person injured may be awarded up to three times the amount of actual damages which results from the violation, with costs and reasonable attorney's fees. (1977, c. 916, s. 1.)

§ 75B-5. Remedies cumulative.

The remedies provided by this Chapter are cumulative. (1977, c. 916, s. 1.)

§ 75B-6. Contracts void.

Any provision of any contract or other document or other agreement which violates G.S. 75B-2, or which, if complied with, by the person intended to be bound by the provision, would cause a violation of G.S. 75B-2 shall be null and void as being against the public policy of the State. (1977, c. 916, s. 1.)

§ 75B-7. Chapter not exclusive.

This Chapter shall not be deemed to supersede, restrict or otherwise limit the continuing applicability of all antitrust or anti-discrimination laws of the State. (1977, c. 916, s. 1.)

Chapter 75C.

Motion Picture Fair Competition Act.

Sec.
75C-1. Declaration of policy.
75C-2. Definitions.
75C-3. Blind bidding prohibited.
Sec.
75C-4. Bidding procedures.
75C-5. Enforcement.

§ 75C-1. Declaration of policy.

It is the policy of this State to establish fair and open procedures for the bidding and negotiation of motion pictures within the State in order to prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of motion picture distribution within the State; promote fair and effective competition in that business; and benefit the movie-going public by holding down admission prices to motion picture theatres, expanding the choice of motion pictures available to the public, and preventing exposure of the public to objectionable or unsuitable motion pictures by insuring that exhibitors have the opportunity to view a picture before committing themselves to exhibiting it. (1979, c. 463, s. 1.)

§ 75C-2. Definitions.

When used in this Chapter, and for the purposes of this Chapter:

(1) The term "bid" means a written or oral offer or proposal by an exhibitor to a distributor, in response to an invitation to bid for the right to exhibit a motion picture, stating the terms under which the exhibitor will agree to exhibit a motion picture.

(2) The term "blind bidding" means the bidding for, negotiating for, or offering or agreeing to terms for the licensing or exhibition of, a motion picture if such first run motion picture has not been trade screened within the State before any such event has occurred.

(3) The term "distributor" means any person engaged in the business of distributing or supplying motion pictures to exhibitors by rental or licensing.

(4) The term "exhibit" or "exhibition" means showing a motion picture to the public for a charge.

(5) The term "exhibitor" means any person engaged in the business of operating one or more theatres.

(6) The term "invitation to bid" means a written or oral solicitation or invitation by a distributor to one or more exhibitors to bid or negotiate for the right to exhibit a first run motion picture.

(7) The term "license agreement" means any contract, agreement, understanding or condition between a distributor and an exhibitor relating to the licensing or exhibition of a motion picture by the exhibitor.

(8) The term "person" includes one or more individuals, partnerships, associations, societies, trusts, or corporations.

(9) The term "run" means the continuous exhibition of a motion picture in a defined geographic area for a specified period of time. A "first run" is the first exhibition of a picture in the designated area, a "second run" is the second exhibition and "subsequent runs" are subsequent exhibitions after the second run.

(10) The term "theatre" means any establishment in which motion pictures are exhibited to the public regularly for a charge.

(11) The term "trade screening" means the showing of a motion picture by a distributor within the State which is open to any exhibitor interested in exhibiting the motion picture. (1979, c. 463, s. 1.)

§ 75C-3. Blind bidding prohibited.

(a) Blind bidding for a first run motion picture is hereby prohibited within the State. No bids shall be returnable, no negotiations for the exhibition or licensing of a first run motion picture shall take place, and no license agreement or any of its terms shall be agreed to for the first run exhibition of any motion picture within the State before the motion picture has been trade screened within the State.

(b) A distributor shall include in each invitation to bid for the first run exhibition of any motion picture within the State the date, time and place of the trade screening of the motion picture within the State.

(c) A distributor shall provide reasonable and uniform notice to exhibitors within the State of all trade screenings within the State of motion pictures he is distributing. Such notice may be provided by mail or by publication in a trade magazine or other publication having general circulation among exhibitors within the State.

(d) No exhibitor may bid, negotiate, or offer terms for the licensing or exhibition of a motion picture that has been trade screened in accordance with the provisions of G.S. 75C-3 herein, unless said exhibitor or his agent has attended the trade screening.

The provisions of this subdivision (d) are subject to waiver by the distributor of a motion picture upon notice of such waiver to an exhibitor prior to the trade screening.

(e) Any purported waiver of the requirements of subdivisions (a) through (c) of this section shall be void and unenforceable. (1979, c. 463, s. 1.)

§ 75C-4. Bidding procedures.

When bids are solicited from exhibitors for the licensing of a first run motion picture within the State, then:

(a) The invitation to bid shall specify (i) the number and length of runs for which the bid is being solicited, whether it is a first, second or subsequent run, and the geographic area for each run; (ii) the names of all exhibitors who are being individually solicited; (iii) the date and hour the invitation to bid expires; and (iv) the time and location, including the address, where the bids will be opened, which shall be within the State. The invitation to bid may contain additional terms or conditions not inconsistent with the provisions of this Chapter.

(b) All bids shall be submitted in writing and shall be opened at the same time and in the presence of exhibitors, or their agents, who submitted bids and who are present at such time. Bids may be opened at the scheduled time notwithstanding the absence of exhibitors entitled to appear at such time.

(c) After being opened, bids shall be subject to examination by exhibitors, or their agents, who submitted bids. Within seven business days after a bid is accepted, the distributor shall notify in writing each exhibitor who submitted a bid of the terms of the accepted bid and the name of the winning bidder.

(d) Once bids are solicited and no bids are received or all bids are withdrawn, the distributor shall license the picture by re-bids or negotiation; provided that nothing in this Chapter shall be interpreted to require any distributor to accept any bid. (1979, c. 463, s. 1.)

§ 75C-5. Enforcement.

Any person who suffers loss or pecuniary damages resulting from a violation of the provisions of this Chapter shall be entitled to bring an individual action to recover damages and reasonable attorney fees. The provisions of this Chapter may be enforced by injunction or any other available equitable or legal remedy. Class actions are not available under this Chapter. (1979, c. 463, s. 1.)

to recover damages and reasonable attorney fees. The provisions of this Chapter may be enforced by injunction or any other available equitable or legal remedy. Class actions are not available under this Chapter. (1979, c. 468, s. 1.)

Chapter 75D.

Racketeer Influenced and Corrupt Organizations.

Sec.
75D-1. Short title.
75D-2. Findings and intent of General Assembly.
75D-3. Definitions.
75D-4. Prohibited activities.
75D-5. RICO civil forfeiture proceedings.
75D-6. Power to compel examination.
75D-7. False testimony.
75D-8. Available RICO civil remedies.
75D-9. Period of limitations as to civil proceedings under this Chapter.

Sec.
75D-10. Civil remedies are supplemental and not mutually exclusive.
75D-11. Reciprocal agreements with other states.
75D-12. Venue.
75D-13. Filing and attachment of RICO lien notice.
75D-14. Release of lien notice.

§ 75D-1. Short title.

This Chapter shall be known and may be cited as the North Carolina Racketeer Influenced and Corrupt Organizations Act (RICO). (1985 (Reg. Sess., 1986), c. 999, s. 1; 1989, c. 489, s. 1.)

Legal Periodicals. — For note, "North Carolina RICO: A Critical Analysis and User's Guide," see 66 N.C.L. Rev. 445 (1988).

For article, "Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement," see 1989 Duke L.J. 903 (1989).

For article, "Asset Forfeiture and Third Party Rights: The Need for Further Law Reform," see 1989 Duke L.J. 1254 (1989).

For article, "Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers," see 12 Campbell L. Rev. 145 (1990).

For note, "Civil RICO — In Search of a 'Pattern' — H.J. Inc. v. Northwestern Bell Tel. Co.," see 25 Wake Forest L. Rev. 315 (1990).

CASE NOTES

Cited in Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994).

Weight-loss Center. — In an action brought against a weight loss center and other defendants, the trial court did not err in concluding that plaintiff failed to establish a cause of action under the Racketeer Influenced and Corrupt Organizations Act. Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

§ 75D-2. Findings and intent of General Assembly.

(a) The General Assembly finds that a severe problem is posed in this State by the increasing organization among certain unlawful elements and the increasing extent to which organized unlawful activities and funds acquired as a result of organized unlawful activity are being directed to and against the legitimate economy of the State.

(b) The General Assembly declares that the purpose and intent of this Chapter is: to deter organized unlawful activity by imposing civil equitable sanctions against this subversion of the economy by organized unlawful elements; to prevent the unjust enrichment of those engaged in organized unlawful activity; to restore the general economy of the State all of the proceeds, money, profits, and property, both real and personal of every kind and description which is owned, used or acquired through organized unlawful activity by any person or association of persons whether natural, incorporated or unincorporated in this State; and to provide compensation to private persons injured by organized unlawful activity. It is not the intent of the

General Assembly to in any way interfere with the attorney-client relationship.

(c) It is not the intent of the General Assembly that this Chapter apply to isolated and unrelated incidents of unlawful conduct but only to an interrelated pattern of organized unlawful activity, the purpose or effect of which is to derive pecuniary gain. Further, it is not the intent of the General Assembly that legitimate business organizations doing business in this State, having no connection to, or any relationship or involvement with organized unlawful elements, groups or activities be subject to suit under the provisions of this Chapter. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1989, c. 489, s. 1.)

Legal Periodicals. — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

Legislative Intent. — the aggrieved party to establish a causal connection between the alleged pecuniary gain and defendant's activities which allegedly violate G.S. 75D-4.

Causal Nexus Not Established. — Plaintiffs failed to establish a causal nexus between defendant's pecuniary gain, as required by subsection (c), and defendant's alleged organized unlawful activity, as prohibited by G.S. 75D-4. Kaplan v. Prolife Action League, 347 N.C. 342, 493 S.E.2d 416 (1997).

Cited in State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989); State ex rel. Thornburg v. Currency in Amount of $52,029.00, 324 N.C. 276, 378 S.E.2d 1 (1989); Delk v. ArvinMeritor, Inc., 179 F. Supp. 2d 615, 2002 U.S. Dist. LEXIS 98 (W.D.N.C. 2001).

§ 75D-3. Definitions.

As used in this Chapter, the term:

(a) "Enterprise" means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this State, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.

(b) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents, provided at least one of such incidents occurred after October 1, 1986, and that at least one other of such incidents occurred within a four-year period of time of the other, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity.

(c)(1) "Racketeering activity" means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts which would be chargeable by indictment if such act or acts were accompanied by the necessary mens rea or criminal intent under the following laws of this State:

a. Article 5 of Chapter 90 of the General Statutes of North Carolina relating to controlled substances and counterfeit controlled substances;

b. Chapter 14 of the General Statutes of North Carolina except Articles 9, 22A, 38, 40, 43, 46, 47, 59 thereof; and further excepting G.S. Sections 14-78.1, 14-82, 14-86, 14-145, 14-146, 14-147, 14-177, 14-178, 14-179, 14-183, 14-184, 14-186, 14-

190.9, 14-195, 14-197, 14-201, 14-202, 14-247, 14-248, 14-313 thereof.

c. Any conduct involved in a "money laundering" activity; and

(2) "Racketeering activity" also includes the description in Title 18, United States Code, Section 1961(1).

(d) "Documentary material" means any book, paper, document, writing, drawing, graph, chart, photograph, phonocord, magnetic tape, computer printout, other data compilation from which information can be obtained or from which information can be translated into useable form, or other tangible item.

(e) "RICO lien notice" means the notice described in G.S. 75D-13.

(f) "Attorney General" means the Attorney General of North Carolina or any employee of the Department of Justice designated by him in writing. Any district attorney of this State, with his consent, may be designated in writing by the Attorney General to enforce the provisions of this Chapter.

(g)(1) "Beneficial interest" means either of the following:

a. The interest of a person as a beneficiary under any other trust arrangement pursuant to which a trustee holds legal or record title to real property for the benefit of such person; or

b. The interest of a person under any other form of express fiduciary arrangement pursuant to which any other person holds legal or record title to real property for the benefit of such person.

(2) "Beneficial interest" does not include the interest of a stockholder in a corporation or the interest of a partner in either a general partnership or limited partnership. A beneficial interest shall be deemed to be located where the real property owned by the trustee is located.

(h) "Real property" means any real property situated in this State or any interest in such real property, including, but not limited to, any lease of or mortgage upon such real property.

(i)(1) "Trustee" means either of the following:

a. Any person who holds legal or record title to real property for which any other person has a beneficial interest; or

b. Any successor trustee or trustees to any of the foregoing persons.

(2) "Trustee" does not include the following:

a. Any person appointed or acting as a personal representative under Chapter 35A of the General Statutes relating to guardian and ward, or under Chapter 28A of the General Statutes relating to the administration of estates; or

b. Any person appointed or acting as a trustee of any testamentary trust or as trustee of any indenture of trust under which any bonds are to be issued.

(j) "Criminal proceeding" means any criminal action commenced by the State for a violation of any provision of those criminal laws referred to in G.S. 75D-3(c).

(k) "Civil proceeding" means any civil proceeding commenced by the Attorney General or an injured person under any provision of this Chapter. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1987, ch. 550, s. 22; 1989, c. 489, s. 1.)

Editor's Note. — Article 43 of Chapter 14, referred to in subdivision (c)(1)b, has been repealed.

G.S. 14-179 and G.S 14-195, referred to above, has been repealed.

G.S. 14-78.1, 14-86, and 14-201 referred to above have been repealed by Session Laws 1994 Extra Session, c. 14, ss. 72(1), 72(3), and 72(10), effective October 1, 1994.

CASE NOTES

Defendants' motion to dismiss plaintiff's claims under this section would be granted, since the North Carolina Racketeer Influenced and Corrupt Organization Act became effective on October 1, 1986, and the insurance company was involved in the rehabilitation process as early as February, 1984. Allegations that defendants engaged in an incident of racketeering activity after October 1, 1986, as required by subsection (b) of this section, were insufficient. North Carolina ex rel. Long v. Alexander & Alexander Servs., Inc., 680 F. Supp. 746 (E.D.N.C. 1988).

Racketeering Activity. — Where defendant was convicted of gambling in houses of public entertainment in violation of G.S. 14-293, operating or possessing gambling devices in violation of G.S. 14-302, and selling or possessing numbers tickets in violation of G.S. 14-291.1, his actions constituted "racketeering activity" under the alternate definition established in this section. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

In an action arising from unwanted sexual advances toward the plaintiff at her workplace, the court dismissed a state RICO claim on the basis that none of the conduct alleged by the plaintiff, even viewed in a light most favorable to her, constituted organized unlawful conduct. Delk v. ArvinMeritor, Inc., 179 F. Supp. 2d 615, 2002 U.S. Dist. LEXIS 98 (W.D.N.C. 2001).

Gambling is "racketeering activity" under the North Carolina RICO Act. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Cited in State ex rel. Thornburg v. Currency in Amount of $52,029.00, 324 N.C. 276, 378 S.E.2d 1 (1989); R.J. Reynolds Tobacco Co. v. S K Everhart, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 13440 (M.D.N.C. July 31, 2003); Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

§ 75D-4. Prohibited activities.

(a) No person shall:

(1) Engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or

(2) Conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or

(3) Conspire with another or attempt to violate any of the provisions of subdivision (1) or (2) of this subsection.

(b) Violation of this section is inequitable and constitutes a civil offense only and is not a crime, therefore a mens rea or criminal intent is not an essential element of any of the civil offenses set forth in this section. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1989, c. 489, s. 1.)

Legal Periodicals. — For survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

Causal Nexus Not Established. — Plaintiffs failed to establish a causal nexus between defendant's pecuniary gain, as required by G.S. 75D-2(c), and defendant's alleged organized unlawful activity, as prohibited by this section. Kaplan v. Prolife Action League, 347 N.C. 342, 493 S.E.2d 416 (1997).

Pattern of Racketeering Activity. — Cigarette manufacturer was not entitled to judgment on the pleadings on its claims under G.S.

75D-3 of the North Carolina Racketeer Influenced and Corrupt Organizations (RICO) statute, which arose from an alleged fraudulent scheme by retailers and wholesalers to obtain discount payments from the manufacturer without passing the discount on to retail customers, based on individual defendants' guilty pleas to state false pretenses charges; the facts alleged were insufficient to state as a matter of law that defendants' conduct constituted a "pattern" for state RICO purposes. R.J. Reynolds Tobacco Co. v. S K Everhart, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 13440 (M.D.N.C. July 31, 2003).

To state a claim for RICO violations under 18 U.S.C.S. § 1962(c), the plaintiff had to allege that the defendant's enterprise functioned with some type of ascertainable structure separate and apart from the predicate acts of mail fraud and trademark counterfeiting that constituted the pattern of racketeering activity. However, the North Carolina racketeering statute, G.S. 75D-4, did not require proof of an enterprise. AARP v. Am. Family Prepaid Legal Corp., Inc., 604 F. Supp. 2d 785, 2009 U.S. Dist. LEXIS 16238 (M.D.N.C. 2009).

Cited in Kaplan v. Prolife Action League, 123 N.C. App. 720, 475 S.E.2d 247 (1996); Delk v. ArvinMeritor, Inc., 179 F. Supp. 2d 615, 2002 U.S. Dist. LEXIS 98 (W.D.N.C. 2001); Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

§ 75D-5. RICO civil forfeiture proceedings.

(a) All property of every kind used or intended for use in the course of, derived from, or realized through a racketeering activity or pattern of racketeering activity is subject to forfeiture to the State. Forfeiture shall be had by a civil procedure known as a RICO forfeiture proceeding.

(b) A RICO forfeiture proceeding shall be governed by Chapter 1A of the General Statutes of North Carolina except to the extent that special rules of procedure are stated in this Chapter.

(c) A RICO forfeiture proceeding shall be an in rem proceeding against the property.

(d) A RICO forfeiture proceeding shall be instituted by complaint and prosecuted only by the Attorney General of North Carolina or his designated representative. The proceeding may be commenced and a final judgment rendered thereon before or after seizure of the property and before or after any criminal conviction of any person for violation of those laws set forth in G.S. 75D-3(c).

(e) If the complaint is filed before seizure, it shall state what property is sought to be forfeited, that the property is within the jurisdiction of the court, the grounds for forfeiture, and the names of all persons known to have or claim an interest in the property. The court shall determine ex parte whether there is reasonable ground to believe that the property is subject to forfeiture and, if the State so alleges, whether notice to those persons having or claiming an interest in the property prior to seizure would cause the loss or destruction of the property. If the court finds:

(1) That reasonable ground does not exist to believe that the property is subject to forfeiture, it shall dismiss the complaint; or

(2) That reasonable ground does exist to believe the property is subject to forfeiture but there is not reasonable ground to believe that prior notice would result in loss or destruction, it shall order service on all persons known to have or claim an interest in the property prior to a further hearing on whether a writ of seizure should issue; or

(3) That there is reasonable ground to believe that the property is subject to forfeiture and to believe that prior notice would cause loss or destruction, it shall without any further hearing or notice, issue a writ of seizure directing the sheriff of or any other law enforcement officer in the county where the property is found to seize it.

(f) Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this State prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within 24 hours of the time of seizure, the seizure shall be reported by the officer to the district attorney of the prosecutorial district as defined in G.S. 7A-60 in which the seizure is effected who shall immediately report such seizure to the Attorney General. The Attorney General shall, within 30 days after receiving notice of seizure, examine the evidence surrounding such seizure, and if he believes reasonable ground exists for forfeiture under this Chapter, shall file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this section, the date and place of seizure.

(g) After the complaint is filed or the seizure effected, whichever is later, every person known to have or claim an interest in the property, or in the property or enterprise of which the subject property is a part or represents any interest, shall be served, if not previously served, with a copy of the complaint and a notice of seizure in the manner provided by Chapter 1A of the General Statutes of North Carolina. Service by publication may be ordered upon any party whose whereabouts cannot be determined with reasonable diligence within 30 days of filing of the complaint.

(h)(1) Any person claiming an interest in the property, may become a party to the action at any time prior to judgment whether named in the complaint or not. Any party claiming a substantial interest in the property, upon motion may be allowed by the court to take possession of the property upon posting bond with good and sufficient security in double the amount of the property's value conditioned to pay the value of any interest in the property found to be subject to forfeiture or the value of any interest of another not subject to forfeiture.

(2) The court, upon such terms and conditions as it may prescribe, may order that the property be sold by an innocent party who holds a lien on or security interest in the property at anytime during the proceedings. Any proceeds from such sale over and above the amount necessary to satisfy the lien or security interest shall be paid into court pending final judgment in the forfeiture proceeding. No such sale shall be ordered, however, unless the obligation upon which the lien or security interest is based is in default.

(3) Pending final judgment in the forfeiture proceeding, the court may make any other disposition of the property necessary to protect it or in the interest of substantial justice, and which adequately protects the interests of innocent parties.

(i) The interest of an innocent party in the property shall not be subject to forfeiture. An innocent party is one who did not have actual or constructive knowledge that the property was subject to forfeiture. An attorney who is paid a fee for representing any person subject to this act, shall be rebuttably presumed to be an innocent party as to that fee transaction.

(j) Subject to the requirement of protecting the interest of all innocent parties, the court may, after judgment of forfeiture, make any of the following orders for disposition of the property:

(1) Destruction of the property or contraband, the possession of, or use of, which is illegal;

(2) Retention for official use by a law enforcement agency, the State or any political subdivision thereof. When such agency or political subdivision no longer has use for such property, it shall be disposed of by judicial sale as provided in Article 29A of Chapter 1 of the General Statutes of North Carolina, and the proceeds shall be paid to the State Treasurer;

(3) Transfer to the Department of Cultural Resources of property useful for historical or instructional purposes;

(4) Retention of the property by any innocent party having an interest therein, including the right to restrict sale of an interest to outsiders, such as a right of first refusal, upon payment or approval of a plan for payment into court of the value of any forfeited interest in the property. The plan may include, in the case of an innocent party who holds an interest in the property through an estate by the entirety, or an undivided interest in the property, or a lien on or security interest in the property, the sale of the property by the innocent party under such terms and conditions as may be prescribed by the court and the payment into court of any proceeds from such sale over and above the amount necessary to satisfy the divided ownership value of the innocent party's interest or the lien or security interest. Proceeds paid into the court must then be paid to the State Treasurer;

(5) Judicial sale of the property as provided in Article 29A of Chapter 1 of the General Statutes of North Carolina, with the proceeds being paid to the State Treasurer;

(6) Transfer of the property to any innocent party having an interest therein equal to or greater than the value of the property; or

(7) Any other disposition of the property which is in the interest of substantial justice and adequately protects innocent parties, with any proceeds being paid to the State Treasurer.

(k) In addition to the provisions of subsections (c) through (g) relating to in rem actions, the State may bring an in personam action for the forfeiture of any property subject to forfeiture under subsection (a) of this section.

(*l*) Upon the entry of a final civil judgment of forfeiture in favor of the State:

(1) The title of the State to the forfeited property shall:

a. In the case of real property or beneficial interest, relate back to the date of filing of the RICO lien notice in the official record of the county where the real property or beneficial interest is located and, if no RICO lien notice is filed, then to the date of the filing of any notice of lis pendens in the official records of the county where the real property or beneficial interest is located and, if no RICO lien notice or notice of lis pendens is so filed, then to the date of recording of the final judgment of forfeiture in the official records of the county where the real property or beneficial interest is located; and

b. In the case of personal property, relate back to the date the personal property was seized pursuant to the provisions of this Chapter.

(2) If property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a RICO lien notice or after the filing of a RICO civil proceeding whichever is earlier, the Attorney General may, on behalf of the State, institute in action in an appropriate court against the person named in the RICO lien notice or the defendant in the civil proceeding and the court shall enter final judgment against the person named in the RICO lien notice or the defendant in the civil proceeding in an amount equal to the fair market value of the property, together with investigative costs and attorney's fees incurred by the Attorney General in the action. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1987 (Reg. Sess., 1988), c. 1037, ss. 98, 99; 1989, c. 489, s. 1.)

Legal Periodicals. — For survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

This section is a civil in rem proceeding. State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989).

Payment of Proceeds from Sale of Forfeited Property. — Since the Racketeer Influenced and Corrupt Organizations Act (RICO) provides that the proceeds from the sale of RICO forfeited property accrue to the State, such proceeds must therefore be paid to the public school fund as required by N.C. Const., Art. IX, § 7. State ex rel. Thornburg v. 532 "B" Street, 334 N.C. 290, 432 S.E.2d 684 (1993).

Priority of Controlled Substances Act Provisions. — The criminal forfeiture provisions of the Controlled Substances Act take precedence over the civil forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) where the possessor of the items seized and subject to forfeiture has been validly indicted and awaits criminal trial under the Controlled Substances Act. State ex rel. Thornburg v. Currency in Amount of $52,029.00, 324 N.C. 276, 378 S.E.2d 1 (1989).

State's Title Superior Where Intervenor's Interest Derived from Deed Recorded After Filing of Lis Pendens. — Since State's title to property, derived from a Racketeer Influenced and Corrupt Organizations (RICO) Act forfeiture proceeding, related back to the date of the institution of the action when the notice of lis pendens was filed pursuant to subdivision (*l*)(1)(a) of this section, the State's title was superior to the interest of an intervenor which derived from a deed from her husband recorded after the institution of the RICO action, and after the filing of the notice of lis pendens. State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989).

"Innocent Party" Issue Raised by Intervenor. — Nothing in this chapter requires State to make any person a party defendant or to allege or prove that any person claiming an interest in the property is "innocent" to effect forfeiture; the only way, therefore, that an "innocent party" issue will be raised is by the voluntary intervention of some claimant to the property. State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989).

Intervenors Claiming to Be Innocent Parties Have Burden of Proof on That Issue. — The burden of proof of any exemption or exception is normally upon the person claiming it, and the General Assembly has clearly indicated by the provisions of this section that intervenors claiming to be innocent parties have the burden of proof on that issue. State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989).

Evidence. — There was ample evidence to show that defendant's property was used in the course of a racketeering activity where the State's forecast of evidence revealed that each incident of criminal conduct took place on the real property for which forfeiture was sought, where also included in the State's evidence were affidavits of law enforcement officers showing without question that such property was used to further defendant's criminal activity, and where at the hearing before the trial court, the defendant made no effort to rebut or contest the State's evidence. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Pattern of Racketeering Activity. — Where the defendant engaged in at least two incidents of racketeering activity that had the same or similar purposes and methods of commission and at least one incident occurred within a four-year period of the other, two of defendant's gambling convictions alone would constitute a "pattern of racketeering activity" under this Act. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Property Used in Furtherance of Unlawful Activity. — Where the evidence adduced at trial clearly showed that defendant engaged in a pattern of racketeering activity and that certain of his property was used in furtherance of such unlawful activity, the defendant's property was subject to forfeiture. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Cited in Shavitz v. City of High Point, 270 F. Supp. 2d 702, 2003 U.S. Dist. LEXIS 11839 (M.D.N.C. 2003).

§ 75D-6. Power to compel examination.

Whenever the Attorney General has reason to believe that any person or enterprise may have information or may be in possession, custody or control of any documentary materials relevant to an activity prohibited under G.S. 75D-4, he may issue in writing, and cause to be served upon such person or upon the appropriate officers, agents, and employees of any such enterprise (other than one employed as an attorney by such person or enterprise), a notice requiring such person or enterprise to submit themselves to examination by him, and produce for his inspection any documentary material relevant to an investigation of activities prohibited by G.S. 75D-4.

The notice shall be served either personally or by registered or certified mail return receipt requested. The notice shall specify the general purpose of the examination, a general description of the documentary material to be produced, and the time and place where such examination will take place. The witness shall be placed under oath or affirmation to testify truthfully. The examination shall be recorded and the witness has the right to a copy upon payment of its cost. The witness has the right to have legal counsel present during the examination.

The Attorney General shall also have the right to apply to any judge of the superior court division, after five days' prior notice of such application served in the same manner as the notice of examination described in this section, for an order requiring such person or enterprise to appear and subject himself or itself to examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such court.

No such demand or order of a court shall contain any requirement which would be held to be unreasonable if contained in a civil discovery request or court order issued pursuant to G.S. 1A-1, Rules of Civil Procedure 26-36. Any person or enterprise upon whom a demand is served and who objects to complying with such demand in whole or in part, shall, within five days of service of the demand, serve a written reply upon the Attorney General specifying the nature of the objection.

Such examination shall be held in camera and no one, except the person or enterprise being examined, may release information obtained from the examination prior to a proceeding being instituted under this Chapter by the Attorney General. Such information may be used in any proceeding instituted under this Chapter by the Attorney General. Any person violating the provisions of this paragraph shall be guilty of a Class 1 misdemeanor. If such offending person is a public officer or employee, he shall also be dismissed from such office or employment and shall not hold any public office or employment in this State for a period of five years after conviction. This paragraph does not prohibit disclosure of this information to other employees of the Department of Justice, or to district attorneys designated in writing by the Attorney General as authorized to receive this information. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1989, c. 489, s. 1; 1993, c. 539, s. 569; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 75D-7. False testimony.

False testimony as to any material fact by any person examined under the provisions of this Chapter shall constitute perjury and a conviction shall be punishable as in other cases of perjury as a Class F felony. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1993, c. 539, s. 1286; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Legal contentions made by defendants in the motion stage of the lawsuit were not statements of material fact made under oath or affirmation, and thus were not actionable under the perjury or the Racketeer Influenced and Corrupt Organizations Act statutes. Jenkins v. Trs. of Sandhills Cmty. College, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 25252 (M.D.N.C. Dec. 3, 2002).

§ 75D-8. Available RICO civil remedies.

(a) As part of a final judgment of forfeiture, any judge of the superior court may, after giving reasonable notice to potential innocent claimants, enjoin violations of G.S. 75D-4, by issuing appropriate orders and judgments:

(1) Ordering any defendant to divest himself of any interest in any enterprise, real property, or personal property including property held by the entirety. Where property is held by the entirety and one of the spouses is an innocent person as defined in G.S. 75D-5(i), upon entry of a final judgment of forfeiture of entirety property, the judgment operates, to convert the entirety to a tenancy in common, and only the one-half undivided interest of the offending spouse shall be forfeited according to the provisions of this Chapter;

(2) Imposing reasonable restrictions upon the future activities or investments of any defendant in the same or similar type of endeavor as the enterprise in which he was engaged in violation of G.S. 75D-4;

(3) Ordering the dissolution or reorganization of any enterprise;

(4) Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any agency of the State;

(5) Ordering the forfeiture of the charter of a corporation organized under the laws of this State or the revocation of a certificate authorizing a foreign corporation to conduct business within this State upon a finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting affairs of the corporation, has authorized or engaged in conduct in violation of G.S. 75D-4, and that, for the prevention of future unlawful activity, the public interest requires that the charter of the corporation be dissolved or the certificate be revoked;

(6) Appointment of a receiver pursuant to the provisions of Article 38 of Chapter 1 of the General Statutes of North Carolina, to collect, conserve and dispose of all the proceeds, money, profits and property, both real and personal, subject to the provisions of this Chapter in accordance with the provisions hereof as directed by the final judgment of the superior court having jurisdiction over the parties or subject matter of the action; or

(7) Any other equitable remedy appropriate to effect complete forfeiture of property subject to forfeiture, or to prevent future violations of this Chapter.

(b) The State through the Attorney General may institute a proceeding under G.S. 75D-5. In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, provided that no showing of special or irreparable damage to the person shall have to be made and provided further that the State shall not be required to execute any bond before or after obtaining temporary restraining orders or preliminary injunctions.

(c) Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees. For purposes of this subsection, "pattern of racketeering activity" shall require that at least one act of racketeering activity be an act of racketeering activity other than (i) an act indictable under 18 U.S.C. § 1341 or U.S.C. § 1343, or (ii) an act which is an offense involving fraud in the sale of securities. Any person filing a private action under this subsection must concurrently notify the Attorney General in writing of the commencement of the action. Thereafter, the Attorney General may file a motion for a protective order in the court where the private action is pending and shall be granted a stay of the private action for a reasonable time if the court finds either:

(1) The bringing of a private action is likely to materially interfere with or impair a public forfeiture action; or

(2) The public interest is so great as to require the Attorney General to investigate and bring a forfeiture action.

(d) Any injured innocent person shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the State has in the same property or proceeds. To enforce such a claim the injured innocent person must intervene in the forfeiture proceeding prior to its final disposition.

(e) A final conviction in any criminal proceeding for a violation of those laws set forth in G.S. 75D-3(c), shall estop the defendant in any subsequent civil action or proceeding under this Chapter as to all matters proved in the criminal proceeding.

(f) A defendant in an action commenced by the State pursuant to this Chapter whose convictions of two or more criminal offenses of those criminal statutes as set forth in G.S. 75D-3(c) have become final, which offenses have occurred within a four-year period of each other as set forth in G.S. 75D-3(b) shall be deemed to have, per se violated the provisions of G.S. 75D-4(a)(1) or (2) as of the date of the second conviction.

(g) Any party is entitled to a jury trial in any action brought under this Chapter. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1989, c. 489, s. 1.)

CASE NOTES

Class Actions. — Where plaintiff consumers in a proposed class action admitted that the named consumers did not have grounds for any relief against defendant law firm under the North Carolina Racketeer Influenced and Corrupt Organizations Act (NCRICO), G.S. 75D-8(c), because they suffered no injury to their business or property, and instead argued the absent class members would be able to do so, the named consumers, who pleaded mail and wire fraud as predicate acts to show violation of NCRICO, could not provide the required facts to plead fraud as against the class members with particularity, as was required by Fed. R. Civ.P. 9(b) and G.S. 1A-1, Rule 9(b), and thus, is was appropriate to dismiss the NCRICO claim for failure to state a claim. Godfredson v. JBC Legal Group, P.C., 387 F. Supp. 2d 543, 2005 U.S. Dist. LEXIS 17878 (E.D.N.C. 2005).

Applied in R.J. Reynolds Tobacco Co. v. S K Everhart, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 13440 (M.D.N.C. July 31, 2003).

Cited in Kaplan v. Prolife Action League, 123 N.C. App. 720, 475 S.E.2d 247 (1996); Delk v. ArvinMeritor, Inc., 179 F. Supp. 2d 615, 2002 U.S. Dist. LEXIS 98 (W.D.N.C. 2001).

§ 75D-9. Period of limitations as to civil proceedings under this Chapter.

Notwithstanding any other provision of law, a civil action or proceeding under this Chapter may be commenced within five years after the conduct in violation of a provision of this Chapter terminates or the claim for relief accrues, whichever is later. If a civil action is brought by the State for forfeiture or to prevent any violation of the Chapter, then the running of this period of limitations with respect to any innocent person's claim for relief which is based upon any matter complained of in such action by the State, shall be suspended during the pendency of the action by the State and for two years thereafter. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1989, c. 489, s. 1.)

§ 75D-10. Civil remedies are supplemental and not mutually exclusive.

The application of one civil remedy under this Chapter shall not preclude the application of any other remedy under this Chapter or any other provision of law. Civil remedies under this Chapter are cumulative, supplemental and not exclusive, and are in addition to the fines, penalties and forfeitures set forth in a final judgment of conviction of a violation of the criminal laws of this State as punishment for violation of the penal laws of this State. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1989, c. 489, s. 1.)

Legal Periodicals. — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

Applied in R.J. Reynolds Tobacco Co. v. S K Everhart, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 13440 (M.D.N.C. July 31, 2003).

Cited in State ex rel. Thornburg v. Currency in Amount of $52,029.00, 324 N.C. 276, 378 S.E.2d 1 (1989).

§ 75D-11. Reciprocal agreements with other states.

The Attorney General is authorized to enter into reciprocal agreements with any United States attorney or the attorney general or chief prosecuting attorney of any other state having a civil forfeiture law substantially similar to this Chapter so as to further the purpose of this Chapter. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1989, c. 489, s. 1.)

§ 75D-12. Venue.

In any forfeiture action brought pursuant to this Chapter, the claim for relief shall be considered to have arisen in any county in which an incident of racketeering occurred or in which an interest or control of an enterprise or real or personal property is acquired or maintained. Venue in any private action shall be as provided in Article 7, Chapter 1, of the General Statutes of North Carolina. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1989, c. 489, s. 1.)

§ 75D-13. Filing and attachment of RICO lien notice.

(a) Upon the institution of any proceeding under this Chapter, the Attorney General then or at any time during the pendency of the proceeding may file in the official records of any one or more counties a RICO lien notice. No filing fee or other charge shall be required as a condition for filing the RICO lien notice. The clerk of the superior court shall, upon the presentation of a RICO lien notice, immediately record it in the official records.

(b) The RICO lien shall be signed by the Attorney General or his designee or by a designated district attorney. The notice shall be in such form as the Attorney General prescribes and, in addition to a description of the particular property sought to be forfeited, shall set forth the following information:

(1) If brought in the name of a person, the name of the person against whom the civil proceeding has been brought. In his discretion, the Attorney General may also name in the RICO lien notice any other aliases, names or fictitious names under which the person may be known;

(2) If known to the Attorney General the present residence and business addresses of the person named in the RICO lien notice and of the other names set forth in the RICO lien notice;

(3) A reference to the civil proceeding stating that a proceeding under this Chapter has been brought against the person named in the RICO lien

notice, the name of the county or counties where the proceeding has been brought, and, if known to the Attorney General at the time of filing the RICO lien notice, the case number of the proceeding;

(4) A statement that the notice is being filed pursuant to this Chapter; and

(5) The name and address of the person in the Attorney General's office filing the RICO lien notice and the name of the individual signing the RICO lien notice.

(c) A RICO lien notice shall apply only to one person and, to the extent applicable, any aliases, fictitious names, or other names, including names of corporations, partnerships, or other entities, to the extent permitted in paragraph (1) of subsection (b) of this section. A separate RICO lien notice shall be filed for any other person against whom the Attorney General desires to file a RICO lien notice under this section.

(d) The Attorney General shall, as soon as practicable after the filing of each RICO lien notice, serve, by any method provided for by G.S. 1A-1, Rule 4, upon the person named in the notice and any other person who holds an interest of record, either a copy of the recorded notice or a copy of the notice with a notation thereon of the county or counties in which the notice has been recorded.

(e) The filing of a RICO lien notice creates, from the time of its filing, a lien in favor of the State on the following property of the person named in the notice and against any other names sets forth in the notice:

(1) Any real property situated in the county where the notice is filed then or thereafter owned by the person or under any of the names; and

(2) Any beneficial interest situated in the county where the notice is filed then or thereafter owned by the person or under any of the names.

(f) The lien shall commence and attach as of the time of filing of the RICO lien notice and shall continue thereafter until expiration, termination, or release pursuant to G.S. 75D-14. The lien created in favor of the State shall be superior and prior to the interest of any other person in the real property or beneficial interests if the interest is acquired subsequent to the filing of the notice.

(g) In conjunction with any proceedings pursuant to this Chapter:

(1) The Attorney General may file without prior court order in any county a lis pendens and, in such case, any person acquiring an interest in the subject real property or beneficial interest subsequent to the filing of lis pendens, shall take the interest subject to the civil proceeding and any subsequent judgment of forfeiture; and

(2) If a RICO lien notice has been filed, the Attorney General may name as defendants, in addition to the person named in the notice, any persons acquiring an interest in the real property or beneficial interest subsequent to the filing of the notice. If a judgment of forfeiture is entered in the proceeding in favor of the State, the interest of any person in the property that was acquired subsequent to the filing of the notice shall be subject to the notice and judgment of forfeiture.

(h)(1) A trustee upon whom a RICO lien notice or a RICO civil proceeding has been served shall immediately furnish to the Attorney General the following:

a. The name and addresses, as known to the trustee, of all persons for whose benefit the trustee holds title to the real property; and

b. If requested by the Attorney General's office, a copy of the trust agreement or other instrument pursuant to which the trustee holds legal or record title to the real property.

(2) Any trustee who fails to comply with the provisions of this subsection shall be removed by court order and a substitute trustee shall be named in lieu of the trustee so removed.

(i) The filing of a RICO lien notice shall not affect the use to which real property or a beneficial interest owned by the person named in the RICO lien notice may be put or in the right of the person to receive any avails, rents, or other proceeds resulting from the use and ownership, but not the sale, of the property until a judgment of forfeiture is entered.

(j) All forfeitures or dispositions under this section shall be made with due provision for the rights of innocent persons. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1989, c. 489, s. 1.)

§ 75D-14. Release of lien notice.

The Attorney General filing the RICO lien notice, or the court for good cause shown at anytime, may release in whole or in part any RICO lien notice or may release any specific property or beneficial interest from the RICO lien notice upon such terms and conditions as he may determine. Any release of a RICO lien notice executed by the Attorney General or ordered by the court may be filed in the official records of any county. No charge or fee shall be imposed for the filing of any release of a RICO lien notice. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1989, c. 489, s. 1.)

CASE NOTES

Cited in Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994).

Chapter 75E.

Unlawful Activities in Connection With Certain Corporate Transactions.

Sec.
75E-1. Definitions.
75E-2. Unlawful activities in connection with business combinations and control share acquisitions.
75E-3. Investigative and regulatory powers of the Attorney General.
75E-4. Enforcement.

Sec.
75E-5. Civil penalties.
75E-6. Remedies cumulative.
75E-7. Chapter not exclusive.
75E-8. Designation of Secretary of State for service.
75E-9. Validity; saving clause.

§ 75E-1. Definitions.

The following words and phrases as used in this Chapter shall have the following meanings unless the context clearly requires otherwise:

(1) "Acquiring person statement" has the same meaning as G.S. 55-9A-02.
(2) "Business combination" has the same meaning as G.S. 55-9-01(b)(1).
(3) "Control share acquisition" has the same meaning as G.S. 55-9A-01(b)(3).
(4) "Person" includes "entity" (as that term is defined in G.S. 55-1-40(9)), "individual" (as that term is defined in G.S. 55- 1-40(13)) and, without limiting the generality of the foregoing, "other entity" (as that term is defined in G.S. 55-9-01(b)(6)). (1991, c. 440, s. 1; 1993, c. 553, s. 25.)

§ 75E-2. Unlawful activities in connection with business combinations and control share acquisitions.

It shall be unlawful for any person:

(1) To consummate any business combination in violation of Article 9 of Chapter 55 of the General Statutes.
(2) To make a control share acquisition without complying with the provisions of Article 9A of Chapter 55 of the General Statutes.
(3) To make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with: (i) the application of Article 9 of Chapter 55 of the General Statutes to any business combination or to the acquisition of beneficial ownership, directly or indirectly, of more than twenty percent (20%) of the voting shares of a corporation within the meaning of Article 9; or (ii) the application of Article 9A of Chapter 55 of the General Statutes to any control share acquisition.
(4) To willfully and knowingly aid or abet any other person to engage in conduct which is prohibited by this Chapter. (1991, c. 440, s. 1.)

§ 75E-3. Investigative and regulatory powers of the Attorney General.

The Attorney General may conduct such investigations as the Attorney General deems necessary to determine compliance by all persons or entities with the provisions of Articles 9 and 9A of Chapter 55 of the General Statutes; and the Attorney General may exempt from the provisions of Article 9 of Chapter 55 of the General Statutes any business combination that is solely an internal corporate restructuring which does not effect any material change in the ultimate ownership of the corporation and does not affect the ongoing applicability of that Article to the corporation or any other entity. In performing any such investigations, the Attorney General shall have all the powers given him by G.S. 75-10. The provisions of G.S. 75-11 and G.S. 75-12 shall apply to this Chapter. (1991, c. 440, s. 1; 1998-217, s. 24.)

§ 75E-4. Enforcement.

The Attorney General may institute a civil action to prevent or restrain violations of G.S. 75E-2.

A person injured by a violation of G.S. 75E-2 may maintain an action for damages or for an injunction or both against any person who has committed the violation. The holders of the voting shares of a corporation that is the subject of a proposed business combination that is to be consummated in violation of G.S. 75E-2 shall, for purposes of the previous sentence, be deemed to be injured by such violation, notwithstanding the fact that such business combination has not been consummated.

In a proceeding under this section, the court shall determine whether a violation has been committed and enter any judgment or decree necessary to remove the effects of any violation it finds and to prevent continuation or renewal of the violation in the future.

If an application for an injunction is granted, after due notice to all parties, and a hearing thereon, the complainant (including, without limiting the generality hereof, the Attorney General) may be awarded costs and reasonable attorneys' fees.

In an action for damages, if the defendant is found to have willfully violated G.S. 75E-2, the person injured may be awarded up to three times the amount of actual damages which result from the violation, with costs and reasonable attorneys' fees. (1991, c. 440, s. 1.)

§ 75E-5. Civil penalties.

In any suit instituted by the Attorney General in which the defendant is found to have violated G.S. 75E-2, the court may, in its discretion, impose a civil penalty against the defendant of not more than one hundred thousand dollars ($100,000) for each violation; provided that, if the court shall determine that such violation was willful, it may in its discretion treble such penalty; provided, further, that in either of the foregoing circumstances, the court may in its discretion award to the Attorney General costs and reasonable attorneys' fees. The clear proceeds of any penalty assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1991, c. 440, s. 1; 1998-215, s. 105.)

§ 75E-6. Remedies cumulative.

The remedies provided in this Chapter are cumulative. (1991, c. 440, s. 1.)

§ 75E-7. Chapter not exclusive.

This Chapter shall not be deemed to supersede, restrict, or otherwise limit any other applicable laws of this State. (1991, c. 440, s. 1.)

§ 75E-8. Designation of Secretary of State for service.

Every nonresident person who is or is about to become the beneficial owner, directly or indirectly, of more than twenty percent (20%) of the voting shares of a corporation within the meaning of Article 9 of Chapter 55 or to make a control share acquisition, except a foreign corporation which has appointed and keeps a resident agent in this State, shall be deemed to have appointed the Secretary of State as its agent upon whom may be served any lawful process, authorized by this Chapter with the same effect as though served upon the person personally.

Service of process pursuant to this section shall be accomplished by leaving a copy of the process in the office of the Secretary of State, but it shall not be effective unless notice of the service and a copy of the process is sent by certified or registered mail to the nonresident person served, at such person's last known address. (1991, c. 440, s. 1.)

§ 75E-9. Validity; saving clause.

In the event any provision or application of this Chapter shall be held illegal or invalid for any reason, such holding shall not affect the legality or validity of any other provision or application thereof. (1991, c. 440, s. 1.)

Chapter 76.

Navigation.

Article 1.

Cape Fear River.

Sec.
76-1 through 76-24. [Repealed.]

Article 2.

Beaufort Harbor.

76-25 through 76-34. [Repealed.]

Article 3.

Bogue Inlet.

76-35, 76-36. [Repealed.]

Article 4.

Hatteras and Ocracoke.

76-37 through 76-39. [Repealed.]

Article 5.

General Provisions.

76-40. Navigable waters; certain practices regulated.
76-41. Obstructing waters of Currituck Sound.
76-42. Lumbermen to remove obstructions in Albemarle Sound.
76-43. Anchorage in range of lighthouses.
76-44. Vessels on inland waterways exempt from pilot laws; proviso as to steam vessels.
76-45. Bond of pilot.
76-46. Pilots to have spyglasses.
76-47. Acting as pilot without license.
76-48. Penalty on pilot neglecting to go to vessel having signal set.
76-49. Pilots may be removed.
76-50. Pilots refused, entitled to pay.
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76-53. Harbor masters; how appointed.
76-54. Commissioners of navigation may hold another office.
76-55. Commissioners of navigation to designate place for trash.
76-56. Harbor master; how appointed where no board of navigation.
76-57. Rafts to exercise care in passing buoys, etc., penalty.
76-58. Interfering with buoys, beacons, and day marks.

Article 6.

Morehead City Navigation and Pilotage Commission.

76-59 through 76-73. [Repealed.]

State Government Reorganization. — All navigation and pilotage commissions established by this Chapter were transferred to the Department of Commerce by a Type I transfer by Session Laws 1977, c. 198, s. 6, as amended by Session Laws 1977, c. 802, s. 50.46, effective July 1, 1977.

ARTICLE 1.

Cape Fear River.

§§ 76-1 through 76-17: Repealed by Session Laws 1981, c. 910, s. 2.

Cross References. — For present provisions as to the Cape Fear Navigation and Pilotage Commission, see Chapter 76A.

§ 76-18: Repealed by Session Laws 1975, c. 23, s. 3.

Editor's Note. — Session Laws 1975, c. 23, s. 1, effective May 5, 1975, provided: "The position and office of harbor master for the port of Wilmington is hereby abolished."

§§ 76-19 through 76-24: Repealed by Session Laws 1981, c. 910, s. 2.

ARTICLE 2.

Beaufort Harbor.

§§ 76-25 through 76-34: Repealed by Session Laws 1975, c. 716, s. 4.

ARTICLE 3.

Bogue Inlet.

§§ 76-35, 76-36: Repealed by Session Laws 1975, c. 716, s. 4.

ARTICLE 4.

Hatteras and Ocracoke.

§§ 76-37 through 76-39: Repealed by Session Laws 1975, c. 716, s. 4.

ARTICLE 5.

General Provisions.

§ 76-40. Navigable waters; certain practices regulated.

(a) It shall be unlawful for any person, firm or corporation to place, deposit, leave or cause to be placed, deposited or left, either temporarily or permanently, any trash, refuse, rubbish, garbage, debris, rubble, scrapped vehicle or equipment or other similar waste material in or upon any body of navigable water in this State; "waste material" shall not include spoil materials lawfully dug or dredged from navigable waters and deposited in spoil areas designated by the Department of Environment and Natural Resources; violation of this section shall constitute a Class 2 misdemeanor.

(a1) It shall be unlawful for any person, firm or corporation to place, deposit, leave or cause to be placed, deposited, or left, either temporarily or permanently, any medical waste as defined in G.S. 130A-290 in the open waters of the Atlantic Ocean over which the State has jurisdiction or the navigable waters of this State.

(1) A person who willfully violates this subsection is guilty of a Class 1 misdemeanor.

(2) A person who willfully violates this subsection and in so doing releases medical waste that creates a substantial risk of physical injury to any person who is not a participant in the offense is guilty of a Class F felony which may include a fine not to exceed fifty thousand dollars ($50,000) per day of violation.

(b) No person, firm or corporation shall erect upon the floor of, or in or upon, any body of navigable water in this State, any sign or other structure, without having first secured a permit to do so from the appropriate federal agencies (which would include a permit from the State of North Carolina) or from the Department of Administration, or from the agency designated by the Department to issue such permit. Provided, however, this subsection shall not apply to commercial fishing nets, fish offal, ramps, boathouses, piers or duck blinds placed in navigable waters. Any person, firm or corporation erecting such sign or other structure without a proper permit or not in accordance with the specification of such permit shall be guilty of a Class 2 misdemeanor. The State may immediately proceed to remove or cause to be removed such unlawful sign or structure after five days' notice to the owner or erector thereof and the cost of such removal by the State shall be payable by the person, firm or corporation who erected or owns the unlawful sign or other structure and the State may bring suit to recover the costs of the removal thereof.

(c) Whenever any structure lawfully erected upon the floor of, or in or upon, any body of navigable water in this State, is abandoned, such structure shall be removed by the owner thereof and the area cleaned up within 30 days of such abandonment; failure to comply with this section shall constitute a Class 2 misdemeanor. The State may, after 10 days' notice to the owner or erector thereof, remove the abandoned structure and have the area cleaned up and the cost of such removal and cleaning up by the State shall be payable by the owner or erector of the abandoned structure and the State may bring suit to recover the costs thereof.

(d) For purposes of this section, the term "navigable waters" shall not include any waters within the boundaries of any reservoir, pond or impoundment used in connection with the generation of electricity, or of any reservoir project owned or operated by the United States.

(e) The provisions of this section, in the coastal waters of this State, shall be enforced by the Department of Environment and Natural Resources. In the inland waters of the State, the provisions of this section shall be enforced by the Wildlife Resources Commission. The Department of Environment and Natural Resources and the Wildlife Resources Commission shall cooperate in the enforcement of this section. (1784, c. 206, s. 11; 1811, c. 839; 1833, c. 146; R.S., c. 88, ss. 23, 24, 45; 1842, c. 65, s. 4; 1846, c. 60, s. 3; R.C., c. 85, ss. 40, 41; Code, ss. 3537, 3538; Rev., s. 3560; C.S., s. 6891; 1969, c. 792; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, ss. 13, 218(18); c. 742, s. 3; 1993, c. 539, ss. 570, 1287; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.119(a).)

Editor's Note. — Session Laws 1989, c. 742, which amended this section, in s. 9 provided: "Neither the definition of 'medical waste' nor any other provision of this act shall be construed to require that rules or standards adopted by the Commission of Health Services [now the Commission for Public Health] for the management of infectious and noninfectious medical waste be identical or similar. Neither the definition of 'medical waste' nor any other provision of this act shall be construed to prohibit any discharge of waste into a sanitary sewer or sewer system which is otherwise allowed under any provision of the General Statutes or under any rule adopted by the Commission for Health Services [now the Commission for Public Health] or the Environmental Management Commission."

Session Laws 2000-74, s. 3, states that the act does not obligate the General Assembly to appropriate funds to implement the act, and that the act is to be implemented with funds otherwise appropriated or available to the Department.

Legal Periodicals. — For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

CASE NOTES

Cited in State v. Eason, 114 N.C. 787, 19 S.E. 88 (1894); In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

OPINIONS OF ATTORNEY GENERAL

Dumping Waste Within Three Miles of Seashore Prohibited. — North Carolina General Statutes specifically prohibit the dumping of waste materials such as bags of medical refuse, and other forms of ocean dumping or the introduction of other pollutants in coastal waters if the waste materials were dumped within three miles of the Atlantic seashore. See opinion of the Attorney General to Lieutenant Governor Robert B. Jordan, III, 58 N.C.A.G. 57 (1988).

§ 76-41. Obstructing waters of Currituck Sound.

It shall be unlawful for any person to obstruct navigation in the waters of Currituck Sound and tributaries, and all persons, corporations, companies, or clubs, who have heretofore placed or caused to be placed any hedging across the mouth of a bay, creek, strait, or lead of water in Currituck Sound or tributaries, made of iron, wire, or wood or other material, for the purpose of preventing the free passage of boats or vessels of any size or class, or to stop the public use of such bay, creek, strait, or lead of water, are required to forthwith remove the same. Any person, corporation, or club violating any of the provisions of this section shall be guilty of a Class 3 misdemeanor. (1897, c. 277; Rev., s. 3553; C.S., s. 6982; 1993, c. 539, s. 571; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 76-42. Lumbermen to remove obstructions in Albemarle Sound.

If any lumberman shall fail to remove all obstructions placed by him in the waters of Albemarle Sound and its tributaries, as soon as practicable, after they have ceased to use them for the purpose for which they were placed in said waters, from all places where the water is not less than two feet deep, and also from all landing places on both sides, for the space of 60 feet from the shore outward, he shall be guilty of a Class 3 misdemeanor, and only fined not less than one dollar ($1.00) nor more than fifty dollars ($50.00), at the discretion of the court. (1880, c. 37, ss. 1, 2; Code, s. 3303; Rev., s. 3551; C.S., s. 6983; 1993, c. 539, s. 572; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 76-43. Anchorage in range of lighthouses.

If the master of any vessel shall anchor on the range line of any range of lights established by the United States Lighthouse Board, unless such anchorage is unavoidable, he shall be guilty of a Class 3 misdemeanor, and punished only by a fine not to exceed fifty dollars ($50.00). (1883, c. 165, s. 2; Code, s. 3086; Rev., s. 3550; C.S., s. 6984; 1993, c. 539, s. 573; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 76-44. Vessels on inland waterways exempt from pilot laws; proviso as to steam vessels.

All vessels, barges, schooners, or other craft passing through the inland waterway of this State, when bound to a port or ports in this or any other state, be and the same are hereby exempt from the operations of the pilot laws of North Carolina and are not compelled to take a state-licensed pilot: Provided, that steam vessels not having a United States licensed pilot for the waters navigated on board shall be subject to the State pilot laws. (1917, c. 33, s. 2; C.S., s. 6985.)

CASE NOTES

Under Federal Law. — Vessels passing through the inland waterways of the State are exempt from the pilot laws by the State statutes, subject to the proviso of this section, and under the federal statutes, whether a vessel has a gross tonnage of more than 15 tons should be determined by the method prescribed by the federal statutes requiring a pilot; in an action for damages alleged to have been caused by defendant's negligence in a collision, it was reversible error for the trial judge to direct an affirmative answer to the issue of contributory negligence in navigating without a pilot upon plaintiff's assertion that his vessel would carry 30 tons. Harris v. Slater, 187 N.C. 163, 121 S.E. 437 (1924).

§ 76-45. Bond of pilot.

Every person, before he obtains a commission or a branch to be a pilot, shall give bond with two sufficient sureties payable to the State of North Carolina, in the sum of five hundred dollars ($500.00), with condition for the due and faithful discharge of his duties, and the duties of his apprentices; and the body appointing such pilot may, from time to time, and as often as they may deem it necessary, enlarge the penalty of the bond, or require new and additional bonds to be given; and every bond taken of a pilot shall be filed with, and preserved by, the said body appointing such pilot in trust for every person that shall be injured by the neglect or misconduct of such pilot, or his apprentices; who may severally bring suit thereon for the damage by each one sustained. (1784, c. 207, s. 3; R.C., c. 85, s. 6; Code, s. 3487; Rev., s. 307; C.S., s. 6986.)

§ 76-46. Pilots to have spyglasses.

Every pilot, within such convenient time as the commissioners may direct, who has control over the waters within which he acts, shall furnish himself with a good telescope or spyglass, under the penalty of fifty dollars ($50.00), to be paid to the commissioners. (1790, c. 320, s. 3; R.C., c. 85, s. 27; Code, s. 3517; Rev., s. 4973; C.S., s. 6987.)

§ 76-47. Acting as pilot without license.

If any person shall act as a pilot, who is not qualified and licensed in the manner prescribed in this Chapter, he shall be guilty of a Class 3 misdemeanor: Provided, that should there be no licensed pilot in attendance, any person may conduct into port any vessel in danger from stress of weather or in a leaky condition. (1783, c. 194, s. 3; 1784, c. 208, s. 4; R.C., c. 85, s. 29; Code, s. 3519; Rev., s. 4974; C.S., s. 6988; 1933, c. 325; 1993, c. 539, s. 574; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 76-48. Penalty on pilot neglecting to go to vessel having signal set.

When any pilot shall see any vessel on the coast, having a signal for a pilot, or shall hear a gun of distress fired off the coast, and shall neglect or refuse to go to the assistance of such vessel, such pilot shall forfeit and pay one hundred dollars ($100.00), to be recovered in the name of the State, one half to the use of the informer and the other half to the master of the vessel, unless such pilot is then actually in charge of another vessel. (1783, c. 194, s. 6; 1784, c. 207, s. 10; 1790, c. 320, s. 2; R.C., c. 85, s. 31; Code, s. 3521; Rev., s. 4975; C.S., s. 6989.)

§ 76-49. Pilots may be removed.

Unless otherwise provided in the first Article of this Chapter for the Cape Fear River, whenever any pilot appointed, as authorized in this Chapter, shall, on trial, be found incompetent, or shall be guilty of improper conduct by intoxication or otherwise, or of any misbehavior in his office, or shall absent himself from the State for a period of six months, the pilot so offending may be removed from his office by the board of commissioners under whose authority he is acting, by a notice to him in writing; and if after such removal he shall attempt to take charge of any vessel, he shall forfeit and pay two hundred dollars ($200.00) for the use of said board. And it shall be the duty of the board to put up a written notice of the removal, in the public places within the port, or publish it in some convenient newspaper. But no pilot for the navigation of Hatteras Inlet shall be required to surrender or forfeit his branch by reason of absence from the State for a period of less than six months. (1784, c. 207, s. 4; 1800, c. 565; 1819, c. 1025, s. 4; R. S., c. 88, ss. 7, 31, 35; R.C., c. 85, s. 28; 1869-70, c. 235, s. 7; 1876-7, c. 22; 1881, c. 261, ss. 1, 2; Code, ss. 3490, 3518; Rev., s. 4976; C.S., s. 6990.)

CASE NOTES

Entitled to Fees Until Removed. — A duly licensed pilot may recover charges for his services, and while his failure to have his boat registered and numbered will cause a forfeiture of his license, the lawful pilotage charges for the service of such boat are recoverable by him until the commissioners of navigation and pilotage have acted thereon and revoked his license. Davis v. Heide & Co., 161 N.C. 476, 77 S.E. 691 (1913).

§ 76-50. Pilots refused, entitled to pay.

If a branch pilot shall go off to any vessel bound in, and offer to pilot her over the bar, the master or commander of such vessel, if he refuses to take such pilot, shall pay to such pilot, if not previously furnished with one, the same sum as is allowed by law for conducting such vessel in, to be recovered in the district court: Provided, that the first pilot, and no other, who shall speak such vessel so bound in shall be entitled to the pay provided for in this section. (R.C., c. 85, s. 32; 1871-2, c. 117; Code, s. 3522; Rev., s. 4978; C.S., s. 6991; 1973, c. 108, s. 30.)

§ 76-51. Pay of pilots when detained by vessel.

Every master of a vessel who shall detain a pilot at the time appointed, so that he cannot proceed to sea, though wind and weather should permit, shall pay to such pilot three dollars ($3.00) per day during the time of his actual detention. (1858-9, c. 23, s. 7; Code, s. 3495; Rev., s. 4979; C.S., s. 6992.)

§ 76-52. Rates of pilotage annexed to commission.

The commissioners of navigation for the several ports of this State shall annex to the branch or commission, by them given to each pilot, a copy of the fees to which such pilot is entitled. (1784, c. 208, s. 4; 1796, c. 470, s. 5; R.C., c. 85, ss. 9, 38; Code, ss. 3497, 3536; Rev., s. 4980; C.S., s. 6993.)

§ 76-53. Harbor masters; how appointed.

The several boards of commissioners of navigation may appoint a harbor master for their respective ports. They shall appoint a clerk to keep books, in which shall be recorded all their proceedings. (R.C., c. 85, s. 35; Code, s. 3525; Rev., s. 4981; C.S., s. 6994.)

§ 76-54. Commissioners of navigation may hold another office.

A commissioner of navigation and pilotage shall be deemed a commissioner for a special purpose within the meaning of Sec. 7 of Article XIV of the

Constitution of North Carolina, so as not to be prohibited from holding at the same time with his commissionership another office under the national or State governments. (Ex. Sess., 1913, c. 76; C.S., s. 6995.)

Editor's Note. — The reference to N.C. Const., Art. XIV, § 7 above is to Art. XIV, § 7, Const. 1868, which existed prior to the revision of the Constitution by Session Laws 1969, c. 1258. For present provisions as to dual office holding, see N.C. Const., Art. VI, § 9.

§ 76-55. Commissioners of navigation to designate place for trash.

The several boards of commissioners established by this Chapter may, subject to such regulations as the United States may make, designate the places whereat, within the waters under their several and respective control, may be cast and thrown ballast, trash, stone, and like matter. (1833, c. 146, ss. 1, 2, 3; R.S., c. 88, ss. 23, 24, 45; 1846, c. 60, s. 3; R.C., c. 85, s. 40; Code, s. 3537; Rev., s. 4982; C.S., s. 6996.)

CASE NOTES

Cited in State v. Eason, 114 N.C. 787, 19 S.E. 88 (1894).

§ 76-56. Harbor master; how appointed where no board of navigation.

Where no board of navigation exists the governing body of any incorporated town, situated on any navigable watercourse, shall have power to appoint a harbor master for the port, who shall have the same power and authority in their respective ports as the harbor master of Wilmington is by this Chapter given for that port, and shall receive like fees and no others.

The board of county commissioners of any county is authorized to appoint a harbor master for any unincorporated community situated on any navigable watercourses in their respective counties. Harbor masters appointed hereunder shall have the same power and authority and shall receive the same fees as set forth in G.S. 76-18. (Rev., s. 4983; C.S., s. 6997; 1953, c. 445.)

Editor's Note. — The position and office of harbor master for the port of Wilmington, referred to in this section, was abolished by Session Laws 1975, c. 23, s. 1.

G.S. 76-18, referred to in the second paragraph, was repealed by Session Laws 1975, c. 23, s. 3.

§ 76-57. Rafts to exercise care in passing buoys, etc., penalty.

If any person having charge of any raft passing any buoy, beacon, or day mark, shall not exercise due diligence in keeping clear of it, or, if unavoidably fouling it, shall not exercise due diligence in clearing it, without dragging from its position such buoy, beacon, or day mark, he shall be guilty of a Class 3 misdemeanor, and punished only by a fine not to exceed fifty dollars ($50.00). (1883, c. 165, s. 3; Code, s. 3087; Rev., s. 3545; C.S., s. 6998; 1993, c. 539, s. 575; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 76-58. Interfering with buoys, beacons, and day marks.

If any person shall moor any kind of vessel, or any raft or any part of a raft, to any buoy, beacon, or day mark placed in the waters of North Carolina by the authority of the United States Lighthouse Board, or shall in any manner hang on with any vessel or raft, or part of a raft, to any such buoy, beacon, or day mark, or shall willfully remove, damage, or destroy any such buoy, beacon, or day mark, or shall cut down, remove, damage, or destroy any beacon erected on land in this State by the authority of the said United States Lighthouse Board, or through unavoidable accident run down, drag from its position, or in any way injure any buoy, beacon, or day mark, as aforesaid, and shall fail to give notice as soon as practicable of having done so, to the lighthouse inspector of the district in which said buoy, beacon, or day mark may be located, or to the collector of the port, or, if in charge of a pilot, to the collector of the port from which he comes, he shall for every such offense be guilty of a Class 2 misdemeanor. (1858-9, c. 58, ss. 2, 3; 1883, c. 165, s. 1; Code, s. 3085; Rev., s. 3546; C.S., s. 6999; 1993, c. 539, s. 576; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 6.

Morehead City Navigation and Pilotage Commission.

§§ 76-59 through 76-73: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1176, s. 2.

Cross References. — For present provisions as to the Morehead City Navigation and Pilotage Commission, see Chapter 76A.

Chapter 76A.

Navigation and Pilotage Commissions.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

Article 1.

General Provisions.

Sec.
76A-1. Commission established; powers generally.
76A-2. Membership.
76A-3. Term.
76A-4. Quorum.
76A-5. Duties and authority.
76A-6. Classes of licenses.
76A-7 through 76A-11. [Reserved.]

Article 2.

Pilots.

76A-12. Apprentices.
76A-13. Pilotage association.
76A-14. Number of pilots.
76A-15. Pilot retirement.
76A-16. Compulsory use of pilots.
76A-17. Pilotage rates.
76A-18. Vessels not liable for pilotage.
76A-19 through 76A-23. [Reserved.]

Article 3.

Commission Funds.

76A-24. Expenses of the Commission.
76A-25. Widows and Orphans Fund.

Sec.
76A-26 through 76A-30. [Reserved.]

SUBCHAPTER II. MOREHEAD CITY NAVIGATION AND PILOTAGE COMMISSION.

Article 4.

General Provisions.

76A-31. Morehead City Navigation and Pilotage Commission.
76A-32. Membership.
76A-33. Term.
76A-34. Quorum.
76A-35. Duties and authority.
76A-36. Classes of licenses.
76A-37 through 76A-41. [Reserved.]

Article 5.

Pilots.

76A-42. Apprentices.
76A-43. Pilotage association.
76A-44. Number of pilots.
76A-45. Pilot retirement.
76A-46. Compulsory use of pilots.
76A-47. Pilotage rates.
76A-48. Vessels not liable for pilotage.
76A-49 through 76A-53. [Reserved.]

Article 6.

Commission Funds.

76A-54. Expenses of the Commission.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

ARTICLE 1.

General Provisions.

§ 76A-1. Commission established; powers generally.

In consideration of the requirement for the safe and expeditious movement of waterborne commerce on the navigable waters of the State, it is deemed necessary to establish the Cape Fear Navigation and Pilotage Commission, hereinafter referred to as the Commission. The Commission shall have the exclusive power to license and regulate a group of river pilots familiar with the waters of the Cape Fear River and Bar to best guide vessels within those waters and to exercise authority over navigation in the Cape Fear and Bar and to and from the sea buoy of the port. (1981, c. 910, s. 1; 1983 (Reg. Sess., 1984), c. 1081, s. 1.)

Cross References. — As to transfer of the board of commissioners of navigation and pilotage for the Cape Fear River to the Department of Commerce, see G.S. 143B-451.

§ 76A-2. Membership.

The Commission shall consist of five voting members, four appointed by the Governor, and the president of the Wilmington-Cape Fear Pilots Association who shall serve as an ex officio voting member. Of the four members appointed by the Governor three shall be from New Hanover County, one shall be from Brunswick County. One member shall represent maritime interests. The Governor shall designate a member to serve at his pleasure as Chairman. With the exception of the ex officio member, licensed pilots and members of their immediate families shall not be allowed to serve on the Commission. (1981, c. 910, s. 1.)

§ 76A-3. Term.

It shall be the duty of the Governor to make initial appointments to the Commission on July 1, 1981. Two of the initial appointees shall serve two-year terms; the other two appointees shall serve four-year terms. All appointees after the initial appointments shall serve four-year terms. Any vacancy in the membership appointed by the Governor shall be filled by the Governor. (1981, c. 910, s. 1.)

§ 76A-4. Quorum.

A simple majority of the Commission shall constitute a quorum and may act in all cases. (1981, c. 910, s. 1.)

§ 76A-5. Duties and authority.

(a) Rules and Regulations, Pilotage. — The Commission shall make and establish such rules and regulations as necessary and desirable respecting the qualifications, arrangements and station of pilots and for the control of navigation within the Cape Fear River and from and to the Cape Fear Bar and the sea buoys. In the development of such rules and regulations, the Commission should request the advice of the U.S. Coast Guard, the U.S. Corps of Engineers, the Pilots Association, other maritime interests and any other party that the Commission might deem beneficial.

(b) Examination and Licensing. — The Commission may examine such persons who hold a federal pilot's license as may offer themselves to be a pilot on the Cape Fear River and Bar. The examination shall consist of, but not be limited to: a personal interview before the Commission; contact by the Commission with personal references; and a physical examination by a licensed physician based on a standard established by the Commission. Licenses shall be granted for a one-year period.

(c) License Renewal. — Each license shall be renewed annually provided during the preceding year the holder thereof shall have complied with the provisions of this act and the reasonable rules and regulations as prescribed by the Commission under authority hereof. The Commission may for special considerations validate a license for less than a one-year period. Each license renewal submittal shall be accompanied with a physical examination comparable to the standards set in G.S. 76A-5(b).

(d) Fine, License Suspension and Cancellation. — The Commission shall have the power to fine or call in and suspend or cancel the license of any pilot found to be derelict of duty, in violation of the reasonable rules and regulations as set out by the Commission or for other just cause. Grounds for suspension or cancellation shall include but not be limited to: citation by the Coast Guard and/or Commission for careless or neglectful duty resulting in damage to property or personal harm; absence, neglect of duty, absence from duty for a period longer than four weeks without written submission to and written approval from the Commission chairman; other violations of regulations or in actions found by the Commission to be unduly disruptive of the pilotage and service and/or harmful to person or property.

The clear proceeds of fines levied pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(e) Pilots to Give Bond. — The Commission shall require of each pilot prior to granting his commission a bond with surety acceptable to the Commission in an amount not to exceed ten thousand dollars ($10,000). Every bond taken of a pilot shall be filed with and preserved by the Commission in trust for every person, firm or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm or corporation, so injured may severally bring suit for the damage by each one sustained.

(f) Jurisdiction over Disputes as to Pilotage. — Disputes between pilots may be voluntarily appealed by one of the pilots to the Commission for resolution. If a resolution is not reached or the Commission decision is unacceptable to either party, normal legal recourse is available to resolve the dispute. (1981, c. 910, s. 1; 1983 (Reg. Sess., 1984), c. 1081, s. 2; 1998-215, s. 137(a).)

§ 76A-6. Classes of licenses.

The Commission shall have general authority to issue the following classes of licenses:

(1) Limited. — Limited licenses may be issued to those who pass requirements established by the Commission to entitle such person to a limited license.

(2) Full. — A license to pilot any vessel. Provided there is a vacancy in the number of pilot positions established pursuant to G.S. 76A-14, a full license shall be issued to the holder of a limited license who has in the opinion of the Commission satisfactorily served at least one year under a limited license. Additionally the Commission may issue a full license to any one who in the Commission's judgment has sufficient credentials as established under G.S. 76A-5(b) to perform the pilotage task associated with a full license.

(3) Apprentice. — A license to engage in a program, approved by the Commission, as apprentice pilot under the terms of G.S. 76A-12. (1981, c. 910, s. 1; 1983 (Reg. Sess., 1984), c. 1081, s. 3; 1985, c. 631, ss. 1, 2; c. 689, s. 26.)

§§ 76A-7 through 76A-11: Reserved for future codification purposes.

ARTICLE 2.

Pilots.

§ 76A-12. Apprentices.

The Commission when it deems necessary for the best interest of the State is hereby authorized to appoint in its discretion apprentices, none of whom shall be less than 21 years of age, and to make and enforce reasonable rules and regulations relating thereto. Apprentices shall serve for a minimum of one year but no longer than three years in order to be eligible for a limited license. The Commission shall adopt rules and regulations to monitor the progress of apprentices on a regular basis to assure the progressive development of knowledge and skill necessary to obtain a limited license. (1981, c. 910, s. 1; 1987, c. 475.)

§ 76A-13. Pilotage association.

In consideration that a mutual association for pilots has been formed, is operational and is expedient for effective management, the Commission shall recognize such a proper pilot association formed for the smooth business transactions in the provision of services. However, the Commission may prescribe such reasonable rules and regulations for the governance of such associations in its direct relationship with the Commission as it deems necessary. Any licensed pilot refusing to become a member of such association shall be subject to suspension or have his license revoked, at the discretion of the Commission. (1981, c. 910, s. 1.)

§ 76A-14. Number of pilots.

The Commission shall govern the number of pilots necessary to maintain an efficient pilotage service. Present active pilots shall continue to serve with the Commission's power of reduction to be effective only in the case of natural attrition except as provided in G.S. 76A-15. At no time shall the number of active licensed pilots exceed 15. Docking masters shall not be deemed pilots for this section or any other section in this Chapter. (1981, c. 910, s. 1.)

§ 76A-15. Pilot retirement.

The Commission shall have and is hereby given authority in its discretion and under such reasonable rules and regulations as it may prescribe to retire from active service any pilot who shall become physically or mentally unfit to perform a pilot's duties. Provided, however, that no pilot shall be retired, except with his consent for physical or mental disability unless and until such pilots shall have first been examined by the public health officer or county physician of his respective county of residence and such public health officer or physician shall have certified to the board the fact of such physical or mental disability. (1981, c. 910, s. 1.)

§ 76A-16. Compulsory use of pilots.

Every foreign vessel and every U.S. vessel sailing under register, including such vessels towing or being towed when underway in the Cape Fear River and Bar and over 60 gross tons, shall employ and take a State-licensed pilot, except when maneuvering during berthing or unberthing operations, shifting within the confine of ports or terminals, passing through bridges, with tug assistance and with a docking master aboard the vessel. Any master of a vessel violating this section shall be guilty of a Class 1 misdemeanor except as provided for in G.S. 76A-18. (1981, c. 910, s. 1; 1993, c. 539, s. 577; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 76A-17. Pilotage rates.

The Commission shall set charges for pilotage services on a published tariff basis to be reviewed and revised annually as necessary. The initial publication of rates and subsequent revisions shall be preceded by public notice at least 30 days prior to publication. The rates may be based on the method chosen by the Commission and may be varied on a geographic or other basis which the Commission deems appropriate. In establishing pilotage rates the Commission shall consider but not be limited to factors such as vessels' lengths, vessels' drafts, general design of vessels, distances for which pilotage services are to be provided, nature of waters to be traversed and the rates for comparable pilotage services in other ports. (1981, c. 910, s. 1.)

§ 76A-18. Vessels not liable for pilotage.

Any vessel coming in from sea for harborage without the assistance of a pilot the wind and weather being such that such assistance or service could not have been reasonably given, shall not be liable for pilotage inward from sea. (1981, c. 910, s. 1.)

§§ 76A-19 through 76A-23: Reserved for future codification purposes.

Article 3.

Commission Funds.

§ 76A-24. Expenses of the Commission.

The pilots association shall pay to the Commission according to rules prescribed by the Commission a percentage of pilotage fees not to exceed two percent (2%) per annum for the purpose of providing funds to defray the necessary expense of the Commission. The appropriate percentage shall be set on an annual basis by the Commission. The fees paid shall be deposited to a special account with the State Treasurer in the name of the Commission and shall be administered by the Secretary of Commerce. Surpluses in the account in excess of three thousand dollars ($3,000) at the end of the fiscal year shall be returned to the pilot association on a prorated basis determined and distributed by the Commission. The Commission, in carrying out its duties, may incur necessary legal and auditing expenses and expenses for its travel and investigation which in addition to the one hundred dollars ($100.00) per meeting fee and other allowances provided by law shall be paid from the foregoing funds. (1981, c. 910, s. 1; 1983 (Reg. Sess., 1984), c. 1081, s. 4.)

§ 76A-25. Widows and Orphans Fund.

The Widows and Orphans Fund established by Chapter 76, Section 7 of the General Statutes shall be dissolved at the earliest possible date under a method to be determined by the Commission. The method of dissolution should be equitable to all current recipients of benefits from the fund and should attempt to make reasonable provision for their future needs in lieu of on-going payments from the fund. Should the Commission determine that the assets of the fund are in excess of those needed to provide for the recipients, it may determine that a portion of the fund may be retained by the Commission and deposited in its operating fund. In such an event the requirement for payment referred to in G.S. 76A-24 shall be suspended until the balance of the operating fund is reduced to three thousand dollars ($3,000) as prescribed in G.S. 76A-24. (1981, c. 910, s. 1.)

Editor's Note. — Chapter 76, Section 7, referred to near the beginning of this section, was repealed by Session Laws 1981, c. 910, s. 2.

§§ 76A-26 through 76A-30: Reserved for future codification purposes.

SUBCHAPTER II. MOREHEAD CITY NAVIGATION AND PILOTAGE COMMISSION.

ARTICLE 4.

General Provisions.

§ 76A-31. Morehead City Navigation and Pilotage Commission.

In consideration of the requirement for the safe and expeditious movement of waterborne commerce on the navigable waters of the State, it is deemed necessary to establish the Morehead City Navigation and Pilotage Commission, herein called Commission. The Commission shall have the exclusive power to license and regulate pilots familiar with the waters of Morehead City Harbor and Beaufort Bar and the water route from Morehead City to Aurora, North Carolina (to include from Morehead City through the Inland or Intracoastal Waterway North, through Adams Creek, the Neuse River, the Bay River, the Hobuken Canal, the Pamlico River, and South Creek to Aurora or from the Neuse River around Brant Island Shoal through the Pamlico River and South Creek to Aurora), referred to herein as the regulated area, to best guide vessels within those waters and to exercise authority over navigation in Morehead City Harbor and Beaufort Bar and to and from the sea buoy of the port. (1981 (Reg. Sess., 1982), c. 1176, s. 1; 1985, c. 517, s. 1.)

Cross References. — As to transfer of the board of commissioners of navigation and pilotage for Beaufort Bar to the Department of Commerce, see G.S. 143B-451.

§ 76A-32. Membership.

The Commission shall consist of three voting members, all appointed by the Governor. The president of the Morehead City Pilots' Association shall serve as an ex officio nonvoting member. All of the three members appointed by the Governor, shall be from Carteret County. One additional nonvoting ex officio member shall represent the maritime interests and shall be designated by the Governor. The Governor shall designate a voting member to serve at his pleasure as chairman. With the exception of the ex officio members, licensed pilots and members of their immediate families shall not be allowed to serve on the Commission. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-33. Term.

It shall be the duty of the Governor to make initial appointments to the Commission on July 1, 1982. One of the initial appointees shall serve an initial three-year term. One shall serve an initial two-year term and one for an initial one-year term. Thereafter, all appointments shall be for a three-year term. The representatives of the maritime interest shall be appointed for a one-year initial term and three-year terms thereafter. Any vacancy in the membership appointed by the Governor shall be filled by the Governor. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-34. Quorum.

A simple majority of voting members of the Commission shall constitute a quorum and may act in all cases. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-35. Duties and authority.

(a) Rules and Regulations, Pilotage. — The Commission shall make and establish such rules and regulations as necessary and desirable respecting the qualifications, arrangements and station of pilots and for the control of navigation within the regulated area. In the development of such rules and regulations, the Commission should request the advice of the U.S. Coast Guard, the U.S. Corps of Engineers, the Pilots' Association, other maritime interests and any other party that the Commission might deem beneficial. However, the Commission may not establish rules and regulations concerning the Morehead City to Aurora water route except as they may apply to foreign vessels displacing over 60 gross tons.

(b) Examination and Licensing. — The Commission may examine such persons who hold a federal pilot's license and who have complied with an apprentice course approved by the Commission as may offer themselves to be a pilot on the regulated area. The examination shall consist of, but not be limited to: a personal interview before the Commission; contact by the Commission with personal references; and a physical examination by a licensed physician based on a standard established by the Commission. Licenses shall be granted for a one-year period.

(c) License Renewal. — Each license shall be renewed annually provided during the preceding year the holder thereof shall have complied with the provisions of this Subchapter and the reasonable rules and regulations as prescribed by the Commission under authority hereof. The Commission may for special considerations validate a license for less than a one-year period. Each license renewal submittal shall be accompanied with a physical examination comparable to the standards set in G.S. 76A-35(b).

(d) Fine, License Suspension and Cancellation. — The Commission shall have the power to fine or call in and suspend or cancel the license of any pilot found to be derelict of duty, in violation of the reasonable rules and regulations as set out by the Commission or for other just cause. Grounds for suspension or cancellation shall include but not be limited to: citation by the Coast Guard and/or Commission for careless or neglectful duty resulting in damage to property or personal harm; absence, neglect of duty, absence from duty for a period longer than four weeks without written submission to and written approval from the Commission Chairman; other violations of regulations or in actions found by the Commission to be unduly disruptive of the pilotage and service and/or harmful to person or property.

The clear proceeds of fines levied pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(e) Pilots to Give Bond. — The Commission shall require of each pilot prior to granting his commission a bond with surety acceptable to the Commission in an amount not to exceed ten thousand dollars ($10,000). Every bond taken of a pilot shall be filed with and preserved by the Commission in trust for every person, firm or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm or corporation so injured may severally bring suit for the damage by each one sustained.

(f) Jurisdiction over Disputes as to Pilotage or Navigation. — Disputes between pilots or over matters related to navigation in the regulated area may be voluntarily appealed by one of the pilots to the Commission for resolution or so presented to the Commission by any interested party for resolution. If a resolution is not reached or the Commission decision is unacceptable to either party, normal legal recourse is available to resolve the dispute. (1981 (Reg. Sess., 1982), c. 1176, s. 1; 1985, c. 517, s. 2; 1998-215, s. 137(b).)

§ 76A-36. Classes of licenses.

The Commission shall have general authority to issue three classes of licenses:

(1) Limited. — A license to pilot vessels whose draft does not exceed 25 feet combined with a maximum length to be fixed by Commission rules. Limited licenses may be issued to those who pass requirements established by statute and by the Commission to entitle such person to a limited license.

(2) Full. — A license to pilot any vessel. Full license shall be issued to all holders of a limited license who have in the opinion of the Commission satisfactorily served at least one year under a limited license. Additionally, the Commission may issue a full license to anyone who in the Commission's judgments has sufficient credentials as established under G.S. 76A-35(b) to perform the pilotage task associated with a full license.

(3) Apprentice. — A license to engage in a program, approved by the Commission, as apprentice pilot under the terms of G.S. 76A-42. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§§ 76A-37 through 76A-41: Reserved for future codification purposes.

Article 5.

Pilots.

§ 76A-42. Apprentices.

The Commission when it deems necessary for the best interest of the State is hereby authorized to appoint in its discretion apprentices, none of whom shall be less than 21 nor more than 35 years of age, and to make and enforce reasonable rules and regulations relating thereto. Apprentices shall serve for a minimum of one year but no longer than three years in order to be eligible for a limited license. The Commission shall adopt rules and regulations to monitor the progress of apprentices on a regular basis to assure the progressive development of knowledge and skill necessary to obtain a limited license. That upon application of any person already partially qualified by prior experience, the Commission may waive the 35 maximum age limit and may vary the time requirements for the time period of such apprenticeship. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-43. Pilotage association.

In consideration that a mutual association for pilots has been formed, is operational and is expedient for effective management, the Commission shall recognize such a proper pilot association formed for the smooth business transactions in the provision of services. However, the Commission may prescribe such reasonable rules and regulations for the governance of such associations in its direct relationship with the Commission as it deems necessary. Any licensed pilot refusing to become a member of such association shall be subject to suspension or have his license revoked, at the discretion of the Commission. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-44. Number of pilots.

The Commission shall govern the number of pilots necessary to maintain an efficient pilotage service. Present active pilots shall continue to serve with the Commission's power of reduction to be effective only in the case of natural attrition except as provided in G.S. 76A-45. Docking masters shall not be deemed pilots for this section or any other section in this Subchapter. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-45. Pilot retirement.

The Commission shall have and is hereby given authority in its discretion and under such reasonable rules and regulations as it may prescribe to retire from active service any pilot who shall become physically or mentally unfit to perform a pilot's duties. Provided, however, that no pilot shall be retired, except with his consent for physical or mental disability unless and until such pilots shall have first been examined by the public health officer or county physician of his respective county of residence and such public health officer or physician shall have certified to the board the fact of such physical or mental disability. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-46. Compulsory use of pilots.

Every foreign vessel and every United States vessel sailing under register, including such vessels towing or being towed when underway or docking in the waters of the Morehead City Harbor and Beaufort Bar, either incoming or outgoing, and over 60 gross tons, shall employ and utilize a State licensed pilot. Every foreign vessel sailing including such vessels towing or being towed when underway or docking in the Morehead City to Aurora water route, and over 60 gross tons, shall employ and utilize a State licensed pilot. Any master of a vessel violating this section by failing to use a State licensed pilot shall be guilty of a Class 1 misdemeanor except as provided for in G.S. 76A-54. (1981 (Reg. Sess., 1982), c. 1176, s. 1; 1985, c. 517, s. 3; 1993, c. 539, s. 578; 1994, Ex. Sess., c. 14, s. 45; c. 24, s. 14(c).)

§ 76A-47. Pilotage rates.

The Commission shall set charges for pilotage services on a published tariff basis to be reviewed and revised annually as necessary. The initial publication of rates shall be those now in effect and subsequent revisions shall be preceded by public notice at least 30 days prior to publication. The rates may be based on the method chosen by the Commission and may be varied on a geographic or other basis which the Commission deems appropriate. In establishing pilotages' rates, the Commission shall consider, but not be limited to, factors such as vessels' lengths, tonnage, vessels' drafts, general design of vessels, distances for which pilotage services are to be provided, nature of waters to be traversed and the rates for comparable pilotage services in other ports. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-48. Vessels not liable for pilotage.

Any vessel, for reasons of safety, coming in from sea for harborage without assistance of a pilot, the wind and weather being such that such pilot assistance or service could not have been reasonably and safely given, shall not be liable for pilotage inward from sea. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§§ 76A-49 through 76A-53: Reserved for future codification purposes.

ARTICLE 6.

Commission Funds.

§ 76A-54. Expenses of the Commission.

The pilots' association shall pay to the Commission, according to rules prescribed by the Commission, a percentage of all pilotage fees not to exceed two percent (2%) per annum for the purpose of providing funds to defray the necessary expense of the Commission. The appropriate percentage shall be set on an annual basis by the Commission. The fees paid shall be deposited to a special account with the State Treasurer in the name of the Commission and shall be administered by the Secretary of Commerce. Surpluses in the account in excess of three thousand dollars ($3,000) at the end of the fiscal year shall be returned to the pilots' association on a prorated basis determined and distributed by the Commission. That the Commission in carrying out its duties may incur necessary legal and auditing expenses and expenses for its travel and investigations which in addition to the one hundred dollar ($100.00) per meeting fee and other allowances allowed by law shall be paid from the foregoing funds. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

Chapter 77.

Rivers, Creeks, and Coastal Waters.

Article 1.

Commissioners for Opening and Clearing Streams.

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77-5. Owner to maintain gate and slope.
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77-72. Membership; terms.
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Article 6A.

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77-89. [Reserved.]

Article 7.

Roanoke River Basin Bi-State Commission; Roanoke River Basin Advisory Committee.

Part 1. Roanoke River Basin Bi-State Commission.

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77-91. Commission established; purposes.
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77-110. Definitions.
77-111. Commissions established; purposes.
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77-119 through 77-124. [Reserved].

Article 9.

Clean Coastal Water and Vessel Act (Effective July 1, 2010).

77-125. (Effective July 1, 2010) Definitions.
77-126. (Effective July 1, 2010) Marina pumpout facilities and services required in certain areas; marinas and local government may apply for grant funds.
77-127. (Effective July 1, 2010) Department of Environment and Natural Resources establish pumpout facility criteria; inspection of pumpout facilities and vessels docked or moored at a marina.
77-128. (Effective July 1, 2010) Vessel owner and operator required to keep log of pumpout dates.
77-129. (Effective July 1, 2010) No discharge of treated or untreated sewage in coastal waters; duty of marina owner or operator to report unlawful discharge.
77-130. (Effective July 1, 2010) Enforcement.
77-131. (Effective July 1, 2010) Application of Article.
77-132. (Effective July 1, 2010) Rule-making authority.

ARTICLE 1.

Commissioners for Opening and Clearing Streams.

§ 77-1. County commissioners to appoint commissioners.

Where any inland river or stream runs through the county, or is a line of their county, the boards of commissioners of the several counties may appoint commissioners to view such river or stream, and make out a scale of the expense of labor with which the opening and clearing thereof will be attended; and if the same is deemed within the ability of the county, and to be expedient, they may appoint and authorize the commissioners to proceed in the most expeditious manner in opening and clearing the same. (Code, s. 3706; 1887, c. 370; Rev., s. 5297; C.S., s. 7363.)

Cross References. — As to building bridges, see G.S. 136-72 et seq.

§ 77-2. Flats and appurtenances procured.

The board of county commissioners appointing the commissioners may direct them to purchase or hire a flat with a windlass and the appurtenances necessary to remove loose rock and other things, which may by such means be more easily removed, and allow the same to be paid for out of the county funds. (1785, c. 242, s. 2; R.C., c. 100, s. 3; Code, s. 3708; Rev., s. 5299; C. S., s. 7365.)

§ 77-3. Laid off in districts; passage for fish.

The board of county commissioners may appoint commissioners to examine and lay off the rivers and creeks in their county; and where the stream is a boundary between two counties, may lay off the same on their side; in doing so they shall allow three fourths for the owners of the streams for erecting slopes, dams and stands; and one-fourth part, including the deepest part, they shall leave open for the passage of fish, marking and designating the same in the best manner they can; and if mills are built across such stream, and slopes may be necessary, the commissioners shall lay off such slopes, and determine the length of time they shall be kept open; and such commissioners shall return to their respective boards of county commissioners a plan of such slopes, dams, and other parts of streams viewed and surveyed. (1787, c. 272, s. 1; R.C., c. 100, s. 5; Code, s. 3710; Rev., s. 5301; C.S., s. 7367.)

Cross References. — As to injuries to dams and water channels of mills and factories, see G.S. 14-142. As to obstructing passage of fish in streams, see G.S. 113-251 and 113-252.

CASE NOTES

Cited in Gwaltney v. Scottish Carolina Timber & Land Co., 111 N.C. 547, 16 S.E. 692 (1892); Hutton v. Webb, 124 N.C. 749, 33 S.E. 169 (1899).

§ 77-4. Gates and slopes on milldams.

The commissioners appointed by the board of county commissioners to examine and lay off the rivers and creeks within the county, or where the stream is a boundary between counties, shall have power to lay off gates, with slopes attached thereto, upon any milldam built across such stream, of such dimensions and construction as shall be sufficient for the convenient passage of floating logs and other timber, in cases where it may be deemed necessary by the said board of county commissioners; and they shall return to the board of county commissioners appointing them a plan of such gates, slopes, and dams in writing. (1858-9, c. 26, s. 1; Code, s. 3712; Rev., s. 5302; C.S., s. 7368.)

CASE NOTES

Applicability to Floatable Streams. — It would seem that the statute was passed entirely with reference to floatable streams because without condemnation the commissioners would have no right to enter upon and clean out beds of streams which were not natural highways. Commissioners of Burke County v. Catawba Lumber Co., 116 N.C. 731, 21 S.E. 941 (1895).

Dams Built Under Permit. — Authority over streams, conferred upon county commissioners while it stands and is unimpeached by allegations of fraud or other illegal conduct, is a bar to the remedy by injunction. Therefore, a defendant will not be restrained from erecting a dam across a stream when he is proceeding under the permit and direction of the commissioners. McLaughlin v. Hope Mfg. Co., 103 N.C. 100, 9 S.E. 307 (1889).

Cited in Gwaltney v. Scottish Carolina Timber & Land Co., 111 N.C. 547, 16 S.E. 692 (1892).

§ 77-5. Owner to maintain gate and slope.

Upon the confirmation of the report made by the commissioners, and notice thereof given to the owner or keeper of said mill, it shall be his duty forthwith to construct, and thereafter to keep and maintain, at his expense, such gate and slope, for the use of persons floating logs and other timber as aforesaid, so long as said dam shall be kept up, or until otherwise ordered by the board of county commissioners. (1858-9, c. 26, s. 2; Code, s. 3713; Rev., s. 5303; C.S., s. 7369.)

§ 77-6. Gates and slopes discontinued.

The commissioners appointed as aforesaid, at any time that they may deem such gate and slope no longer necessary, may report the fact to their respective boards of county commissioners, and said boards of county commissioners may order the same to be discontinued. (1858-9, c. 26, s. 3; Code, s. 3714; Rev., s. 5304; C.S., s. 7370.)

§ 77-7. Failure of owner of dam to keep gates, etc.

If any owner or keeper of a mill, whose dam is across any stream, shall fail to build a gate and slope therein, or thereafter to keep and maintain the same as required by commissioners to lay off rivers and creeks, he shall be guilty of a Class 1 misdemeanor. (1858-9, c. 26, s. 4; Code, s. 3715; Rev., s. 3383; C.S., s. 7371; 1993, c. 539, s. 579; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Letterman v. English Mica Co., 249 N.C. 769, 107 S.E.2d 753 (1959).

§ 77-8. Repairing breaks.

Wherever any stream of water which is used to propel machinery shall be by freshet or otherwise diverted from its usual channel so as to impair its power as used by any person, such person shall have power to repair the banks of such stream at the place where the break occurs, so as to cause the stream to return to its former channel. (1879, c. 53, s. 1; Code, s. 3716; Rev., s. 5305; C.S., s. 7372.)

§ 77-9. Entry upon lands of another to make repairs.

In case the break occurs on the lands of a different person from the one utilizing the stream, the person utilizing the stream shall have power to enter upon the lands of such other person to repair the same, and in case such person objects, the clerk of the superior court of the county in which the break occurs shall, upon application of the party utilizing the stream, appoint three disinterested freeholders, neither of whom shall be related to either party, who after being duly sworn shall lay off a road, if necessary, by which said person may pass over the lands of such other person to the break and repair said break from time to time as often as may be necessary, so as to cause the stream to return to its original channel, and assess any damage which may thereby be occasioned: Provided, the party upon whose land the work is proposed to be done shall have five days' notice in writing served on him or left at his place of residence: Provided further, that it shall be the duty of said commissioners to assess the damage of anyone on whose land the road shall be laid off to be paid by the applicant for said road: Provided, also, that either party shall have the right of appeal to the superior court. (1879, c. 53, s. 2; Code, s. 3717; Rev., s. 5306; C.S., s. 7373.)

§ 77-10. Draws in bridges.

Whenever the navigation of any river or creek which, in the strict construction of law, might not be considered a navigable stream, shall be obstructed by any bridge across said stream, except those under the supervision and control of the Board of Transportation, it shall be lawful for any person owning any boat plying on said stream to make a draw in such bridge sufficient for the passage of such boat; and the party owning such boat shall construct and maintain such draw at his own expense, and shall use the same in such manner as to delay travel as little as possible. (1879, c. 279, ss. 1, 2; Code, s. 3719; Rev., s. 5307; C.S., s. 7374; 1965, c. 493; 1973, c. 507, s. 5.)

CASE NOTES

Cited in Staton v. Wimberly, 122 N.C. 107, 29 S.E. 63 (1898).

§ 77-11. Public landings.

The board of county commissioners may establish public landings on any navigable stream or watercourse in the county upon petition in writing. Unless it shall appear to the board that the person owning the lands sought to be used for a public landing shall have had 20 days' notice of the intention to file such petition, the same shall be filed in the office of the clerk of the board until the succeeding meeting of the board, and notice thereof shall be posted during the same period at the courthouse door. At said meeting of the board, the allegations of the petition shall be heard, and if sufficient reason be shown, the board shall order the establishment of the public landing. The board shall at that time initiate proceedings under the Chapter entitled Eminent Domain. (1784, c. 206, s. 4; 1789, c. 303; 1790, c. 331, s. 3; 1793, c. 386; 1813, c. 862, s. 1; 1822, c. 1139, s. 2; R.C., c. 60, s. 1; c. 101, ss. 2, 4; 1869, c. 20, s. 8, subsec. 29; 1872-3, c. 189, s. 3; 1879, c. 82, s. 9; Code, ss. 2038, 2040, 2982; Rev., ss. 2684, 2685, 5308; 1917, c. 284, s. 33; 1919, c. 68; C.S., ss. 3667, 3762, 3763, 7375; 1981, c. 919, s. 10.)

Cross References. — As to eminent domain, see Chapter 40A.

Article 2.

Obstructions in Streams.

§ 77-12. Obstructing passage of boats.

If any person shall obstruct the free passage of boats along any river or creek, by felling trees, or by any other means whatever, he shall be guilty of a Class 1 misdemeanor. (1796, c. 460, s. 2; R.C., c. 100, s. 6; Code, s. 3711; Rev., s. 3561; C.S., s. 7376; 1993, c. 539, s. 580; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Hutton v. Webb, 124 N.C. 749, 33 S.E. 169 (1899).

§ 77-13. Obstructing streams a misdemeanor.

If any person, firm, or corporation shall fell any tree, or put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek, stream, or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, or whereby the navigation of such stream may be impeded, delayed, or prevented, the person, firm, or corporation so offending shall be guilty of a Class 2 misdemeanor. In addition to any fine or imprisonment imposed, the court may, in its discretion, order the person, firm, or corporation so offending to remove the obstruction and restore the affected waterway to an undisturbed condition, or allow authorized employees of the enforcing agency to enter upon the property and accomplish the removal of the obstruction and the restoration of the waterway to an undisturbed condition, in which case the costs of the removal and restoration shall be paid to the enforcing agency by the offending party. Nothing in this section shall prevent the erection of fish dams or hedges across any stream which do not extend across more than two thirds of its width at the point of obstruction. If the fish dams or hedges extend more than two thirds of the width of any stream, the said penalties shall attach. This section may be enforced by marine fisheries inspectors and wildlife protectors. Within the bounds of any county or municipality, this section may also be enforced by any law enforcement officer having territorial jurisdiction, or by the county engineer. This section may also be enforced by specially commissioned forest law-enforcement officers of the Department of Environment and Natural Resources for offenses occurring in woodlands. For purposes of this section, the term "woodlands" means all forested areas, including swamp and timber lands, cutover lands, and second-growth stands in previously cultivated sites. (1872-3, c. 107, ss. 1, 2; Code, s. 1123; Rev., s. 3559; C.S., s. 7377; 1975, c. 509; 1977, c. 771, s. 4; 1979, c. 493, s. 1; 1987, c. 641, s. 12; 1989, c. 727, s. 218(19); 1991, c. 152, s. 1; 1993, c. 539, s. 581; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.119(a).)

CASE NOTES

Compared with Common-Law Offense. — At common law it was an offense to obstruct any navigable stream, but by this section, as it read prior to amendment in 1991, unless the act was willful and not for the purpose of utilizing the water as a motive power the offense was not indictable. State v. Narrows Island Club, 100 N.C. 477, 5 S.E. 411 (1888); State v. Baum, 128 N.C. 600, 38 S.E. 900 (1901).

"Or" Construed to Read "And". — The word "and" between the words "retarded" and "whereby" formerly read "or." It was held that the word "or" should read "and." State v. Pool, 74 N.C. 402 (1876).

Section Applicable to Navigable Streams. — If a creek is not navigable, an obstruction cannot "impede, delay, or prevent" navigation, and so there is no violation of the statute by cutting trees so as to obstruct a nonnavigable stream. State v. Pool, 74 N.C. 402 (1876).

Section Applicable Though Stream Is Private Property. — The bed of a lake or watercourse may be private property, but if the waters are navigable in their natural state the public has an easement of navigation in them, which easement the owner of the soil cannot obstruct. State v. Narrows Island Club, 100 N.C. 477, 5 S.E. 411 (1888).

"Motive Power" Defined. — Water used in "sluicing" is not used as a "motive power" within the meaning of this section. The section has obvious reference to the use of the energies of water dammed, as a moving force, and not to the operation of the current in motion. State v. Duplin Canal Co., 91 N.C. 637 (1884).

Indictment. — The indictment under this section must charge that the obstruction was not "for the purpose of utilizing." Such a charge is not necessary in an indictment for obstructing waters, at common law. State v. Narrows Island Club, 100 N.C. 477, 5 S.E. 411 (1888).

Railroad Bridges. — A railroad bridge built over a navigable stream if obstructing passage of vessels is a nuisance, and tearing a portion of it down so that vessels may pass is not indictable. State v. Parrott, 71 N.C. 311 (1874).

Action for Damages. — In an action wherein actual damages were claimed, with punitive damages, for damming a navigable stream, made a misdemeanor by this section, it was held that to recover punitive damages it was insufficient to show merely that the stream was obstructed to plaintiff's damage, it being necessary to prove, in such cases, malice, fraud, wanton or willful disregard of the plaintiff's rights, or other circumstances of recklessness or aggravation. Warren v. Coharie Lumber Co., 154 N.C. 34, 69 S.E. 685 (1910).

Cited in Gwaltney v. Scottish Carolina Timber & Land Co., 111 N.C. 547, 16 S.E. 692 (1892).

§ 77-14. Obstructions in streams and drainage ditches.

If any person, firm or corporation shall fell any tree or put any slabs, stumpage, sawdust, shavings, lime, refuse or any other substances in any creek, stream, river or natural or artificial drainage ravine or ditch, or in any other outlet which serves to remove water from any land whatsoever whereby the drainage of said land is impeded, delayed or prevented, the person, firm or corporation so offending shall be guilty of a Class 2 misdemeanor: Provided, however, nothing herein shall prevent the construction of any dam or weir not otherwise prohibited by any valid local or State statute or regulation. In addition to any fine or imprisonment imposed, the court may, in its discretion, order the person, firm, or corporation so offending to remove the obstruction and restore the affected waterway to an undisturbed condition, or allow authorized employees of the enforcing agency to enter upon the property and accomplish the removal of the obstruction and the restoration of the waterway to an undisturbed condition, in which case the costs of the removal and restoration shall be paid to the enforcing agency by the offending party. This section may be enforced by marine fisheries inspectors and wildlife protectors. Within the boundaries of any county or municipality this section may also be enforced by any law enforcement officer having territorial jurisdiction, or by the county engineer. This section may also be enforced by specially commissioned forest law-enforcement officers of the Department of Environment and Natural Resources for offenses occurring in woodlands. For purposes of this section, the term "woodlands" means all forested areas, including swamp and timber lands, cutover lands and second-growth stands on previously cultivated sites. (1953, c. 1242; 1957, c. 524; 1959, cc. 160, 1125; 1961, c. 507; 1969, c. 790, s. 1; 1975, c. 509; 1977, c. 771, s. 4; 1979, c. 493, s. 1; 1987, c. 641, s. 13; 1989, c. 727, s. 218(20); 1991, c. 152, s. 2; 1993, c. 539, s. 582; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.119(a).)

CASE NOTES

Insurance company could not deny coverage to defendants where they did not intentionally harm their land, and they did not intentionally violate state or county law regarding streams or landfills. Nationwide Mut. Fire Ins. Co. v. Banks, 114 N.C. App. 760, 443 S.E.2d 93, cert. denied, 337 N.C. 695, 448 S.E.2d 530 (1994).

§§ 77-15 through 77-19: Reserved for future codification purposes.

ARTICLE 3.

Lands Adjoining Coastal Waters.

§ 77-20. Seaward boundary of coastal lands.

(a) The seaward boundary of all property within the State of North Carolina, not owned by the State, which adjoins the ocean, is the mean high water mark. Provided, that this section shall not apply where title below the mean high water mark is or has been specifically granted by the State.

(b) Notwithstanding any other provision of law, no agency shall issue any rule or regulation which adopts as the seaward boundary of privately owned property any line other than the mean high water mark. The mean high water mark also shall be used as the seaward boundary for determining the area of any property when such determination is necessary to the application of any rule or regulation issued by any agency.

(c) For purposes of this Article, "agency" means any part, branch, division, or instrumentality of the State; any county, municipality, or special district; or any commission, committee, council, or board established by the State, or by any county or municipality.

(d) The public having made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial, this section shall not be construed to impair the right of the people to the customary free use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the common law and are a part of the common heritage of the State recognized by Article XIV, Section 5 of the Constitution of North Carolina. These public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State.

(e) As used in this section, "ocean beaches" means the area adjacent to the ocean and ocean inlets that is subject to public trust rights. This area is in constant flux due to the action of wind, waves, tides, and storms and includes the wet sand area of the beach that is subject to regular flooding by tides and the dry sand area of the beach that is subject to occasional flooding by tides, including wind tides other than those resulting from a hurricane or tropical storm. The landward extent of the ocean beaches is established by the common law as interpreted and applied by the courts of this State. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line. (1979, c. 618, s. 2; 1998-225, s. 5.1.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Legal Periodicals. — For article, "The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina," see 78 N.C.L. Rev. 1869 (2000).

CASE NOTES

Dismissal of Suit Upheld. — Dismissal of a suit brought by a group of beachfront landowners against the State of North Carolina, the State of North Carolina Department of Environment and Natural Resources, the Coastal Resources Commission, the Division of Coastal Management, and its director, was upheld on appeal because the landowners failed to allege in their complaint sufficient allegations to establish that the State of North Carolina asserted any claim of title to their land under G.S. 41-10.1 to have constituted a waiver of the state's sovereign immunity with regard to the landowners' suit to prevent the general public from interfering with their use of certain beach property, which the landowners claimed was deeded to them. Fabrikant v. Currituck County, 174 N.C. App. 30, 621 S.E.2d 19, 2005 N.C. App. LEXIS 2219 (2005).

§§ **77-21 through 77-29:** Reserved for future codification purposes.

Article 4.

Lake Wylie Marine Commission.

§ 77-30. Definitions.

For purposes of this article:

(1) "Board" means the board of commissioners of Mecklenburg and Gaston Counties, North Carolina and the county council of York County, South Carolina.

(2) "Commission" means the Lake Wylie Marine Commission or its governing board as the case may be.

(3) "Commissioner" means a member of the governing board of the Lake Wylie Marine Commission.

(4) "Three counties" means Mecklenburg and Gaston Counties, North Carolina, and York County, South Carolina.

(5) "Joint ordinance" means an ordinance substantially identical in content adopted separately by the board in each of the three counties.

(6) "Lake Wylie" means the impounded body of water along the Catawba River in the three counties extending from the base of Mountain Island Dam downstream to the Catawba Dam.

(7) "Shoreline area" means, except as restricted by a joint ordinance, the area within the three counties lying within 1000 feet of the mean high-water line (570 feet) on Lake Wylie. In addition, the shoreline area includes all islands within Lake Wylie and all peninsulas extending into the waters of Lake Wylie.

(8) "Wildlife Commission" means the North Carolina Wildlife Resources Commission and the South Carolina Department of Wildlife and Marine Resources. (1987, c. 683, s. 1; 1987 (Reg. Sess., 1988), c. 897, s. 1.)

Editor's Note. — This Article is Session Laws 1987, c. 683, as amended by Session Laws 1987 (Reg. Sess., 1988), c. 897. It has been codified as Article 4 of Chapter 77 at the direction of the Revisor of Statutes.

Section 10 of Session Laws 1987, c. 683, as rewritten by Session Laws 1987 (Reg. Sess., 1988), c. 897, s. 10, provides: "This act shall become effective upon enactment by the State of South Carolina and upon approval by the Congress of the United States.

"Either North Carolina or South Carolina may withdraw from this Compact by enacting a statute repealing the same, but no withdrawal is effective until the Governor of the withdrawing state has sent formal notice in writing to the Governor of each other party state informing the Governors of the action of the legislature in repealing the Compact and declaring an intention to withdraw. This withdrawal is effective on a date set by the withdrawing state, but not less than 90 days after enactment of the withdrawal statute. In case of the withdrawal, the property of the commission must be divided in an equitable manner by the Commission as if dissolution had occurred under Section 2 [G.S. 77-22] of this act."

The state of South Carolina has also enacted the compact. See 1987 Act No. 176, as amended by 1988 Act No. 679, G.S. 49-27-10 to 49-27-90, effective March 1, 1988.

House Joint Resolution 644 granted the consent of the United States Congress to the compact entered into between the State of North Carolina and the State of South Carolina establishing the Lake Wylie Marine Commission on October 28, 1988.

§ 77-31. Authority to create and dissolve commission.

The three counties may by joint ordinance create the Lake Wylie Marine Commission. Upon its creation, the Commission has the powers, duties and responsibilities conferred upon it by joint ordinance subject to the laws of each applicable state. The provisions of any joint ordinance may be modified, amended, or rescinded by a subsequent joint ordinance. A county may unilaterally withdraw from participation as required by any joint ordinance or the provisions of this article, once the commission has been created. Any county may, by ordinance, unilaterally withdraw from the commission at the end of any budget period upon ninety days prior written notice. Upon the effectuation of the withdrawal, the Commission is dissolved and all property of the Commission must be distributed to or divided among the three counties and any other public agency or agencies serving the Lake Wylie area in a manner considered equitable by the Commission by resolution adopted prior to dissolution. (1987, c. 683, s. 2; 1987 (Reg. Sess., 1988), c. 897, s. 2.)

§ 77-32. Governing body.

Upon its creation, the commission shall have a governing board of seven. Except as otherwise provided for the first four-year period, each commissioner shall serve either a three or a four-year term, with commissioners to serve overlapping terms so that two commissioner appointments are made each year. Upon creation of the Commission, the Board of Commissioners of Gaston County shall appoint three commissioners and the boards of the other two counties shall appoint two each. These initial appointees shall serve until September thirtieth following their appointment. Thereafter, appointments must be made for terms beginning each October first by the respective boards of the three counties as follows:

(1) First Year: Three commissioners from Gaston, one appointed for a one-year term, one appointed for a three-year term and one appointed for a four-year term; two commissioners from Mecklenburg, one appointed for a one-year term and one appointed for a two-year term; two commissioners from York, one appointed for a two-year term and one appointed for a three-year term.
(2) Second Year: Two commissioners from Mecklenburg, one appointed for a three-year term and one appointed for a four-year term.
(3) Third Year: Two commissioners from York, one appointed for a three-year term and one appointed for a four-year term.
(4) Fourth Year: Two commissioners from Gaston, one appointed for a three-year term and one appointed for a four-year term.
(5) Fifth and Succeeding Years: Appointments for one three-year and one four-year term in rotation by county in the order set out above.

On the death of a commissioner, resignation, incapacity or inability to serve, as determined by the board appointing the commissioner, or removal of the commissioner for cause, as determined by the board appointing the commissioner, the board affected may appoint another commissioner to fill the unexpired term. (1987, c. 683, s. 3; 1987 (Reg. Sess., 1988), c. 897, s. 3.)

§ 77-33. Compensation and expenses of commissioners, consultants and staff.

The joint ordinance shall state the terms relating to compensation to commissioners, if any, compensation of consultants and staff members employed by the Commission, and reimbursement of expenses incurred by commissioners, consultants, and employees. The Commission is governed by these budgetary and accounting procedures as may be specified by joint ordinance. (1987, c. 683, s. 4; 1987 (Reg. Sess., 1988), c. 897, s. 4.)

§ 77-34. Meetings and election of officers; rules and regulations.

Upon creation of the Commission, its governing board shall meet at a time and place agreed upon by the boards of the three counties concerned. The commissioners shall elect a chairman and such officers as they may choose. All officers shall serve one-year terms. The governing board shall adopt such rules and regulations as it may consider necessary, not inconsistent with the provisions of this act or of any joint ordinance or the laws of the appropriate state, for the proper discharge of its duties and for the governance of the commission. In order to conduct business, a quorum must be present. The chairman may adopt those committees as may be authorized by such rules and regulations. The commission shall meet regularly at those times and places as may be specified in its rules and regulations or in any joint ordinance. However, meetings of the commission must he held in all three counties on a rotating basis so that an equal number of meetings is held in each county. Special meetings may be called as specified in the rules and regulations. As to meetings held within South Carolina, the provisions of Chapter 4 of Title 30, Code of Laws of South Carolina, 1976, (Freedom of Information Act) apply. As to meetings held within North Carolina, the provisions of that State's Open Meetings Law, Article 33C of Chapter 143 of the North Carolina General Statutes apply. (1987, c. 683, s. 5; 1987 (Reg. Sess., 1988), c. 897, s. 5.)

§ 77-35. Powers and duties.

(a) Within the limits of funds available to it and subject to the provisions of this act and of any joint ordinance the Commission may:

(1) Hire and fix the compensation of permanent and temporary employees and staff as it may consider necessary in carrying out its duties;

(2) Contract with consultants for such services as it may require;

(3) Contract with the States of North Carolina, South Carolina, or the federal government, or any agency, department, or subdivision of them for property or services as may be provided to or by these agencies and carry out the provisions of these contracts;

(4) Contract with persons, firms, and corporations generally as to all matters over which it has a proper concern and carry out the provisions of contracts;

(5) Lease, rent, purchase, or otherwise obtain suitable quarters and office space for its employees and staff, and lease, rent, purchase, or otherwise obtain furniture, fixtures, vessels, vehicles, firearms, uniforms, and other supplies and equipment necessary or desirable for carrying out the duties imposed in or under the authority of this article;

(6) Lease, rent, purchase, construct, otherwise obtain, maintain, operate, repair, and replace, either on its own or in cooperation with other public or private agencies or individuals, any of the following: boat docks, navigation aids, waterway markers, public information signs and notices, and other items of real and personal property designed to enhance public safety in Lake Wylie and its shoreline area, or protection of property in the shoreline area subject however to the provisions of Title 50 Code of Laws of South Carolina, 1976, or regulations promulgated under that title as to property within South Carolina, and Chapter 113 of the General Statutes of North Carolina and rules promulgated under that Chapter as to property within North Carolina.

(b) The Commission may accept, receive, and disburse in furtherance of its functions any funds, grants, services, or property made available by the federal government or its agencies or subdivisions, by the States of North Carolina or South Carolina or their agencies or subdivisions, or by private and civic sources.

(c) The governing bodies of the three counties may appropriate funds to the Commission out of surplus funds or funds derived from nontax sources. They may appropriate funds out of tax revenues and may also levy annually taxes for the payments of such appropriation as a special purpose, in addition to any allowed by the Constitution or in North Carolina as provided by G.S. 153A-149.

(d) The Commission is subject to those audit requirements as may be specified in any joint ordinance.

(e) In carrying out its duties and either in addition to or in lieu of exercising various provisions of the above authorization, the Commission may, with the agreement of the governing board of the county concerned, utilize personnel and property of or assign responsibilities to any officer or employee of any of the three counties. Such contribution in kind, if substantial, may with the agreement of the other two counties be considered to substitute in whole or in part for the financial contribution required of that county in support of the Commission.

(f) Unless otherwise specified by joint ordinance, each of the three counties shall annually contribute an equal financial contribution to the Commission in an amount appropriate to support the activities of the Commission in carrying out its duties. (1987, c. 683, s. 6; 1987 (Reg. Sess., 1988), c. 897, s. 6.)

§ 77-36. Filing and distribution of certified single ordinance text; effective date of ordinance and admissibility as evidence.

(a) A copy of the joint ordinance creating the Commission and of any joint ordinance amending or repealing the joint ordinance creating the Commission must be filed with the Executive Director of the North Carolina Wildlife Resources Commission and the Executive Director of the South Carolina Department of Wildlife and Marine Resources. When the Executive Directors receive ordinances that are in substance identical from all three counties concerned, they, in accordance with procedures agreed upon, shall, within 10 days, certify this fact and distribute a certified single ordinance text to the following:

(1) The Secretary of State of North Carolina and the Secretary of State of South Carolina;
(2) The clerk to the governing board of each of the three counties;
(3) The clerk of superior court of Mecklenburg and Gaston Counties and the clerk of court of York County. Upon request, the Executive Directors also shall send a certified single copy of any and all applicable joint ordinances to the chairman of the Commission;
(4) A newspaper of general circulation in the three counties.

(b) Unless a joint ordinance specifies a later date, it shall take effect when the Executive Directors' certified text has been submitted to the Secretaries of State for filing. Certifications of the Executive Directors under the seal of the Commission as to the text or amended text of any joint ordinance and of the date or dates of submission to the Secretaries of State is admissible in evidence in any court. Certifications by any clerk of superior court or county clerk of court of the text of any certified ordinance filed with him by the Executive Directors is admissible in evidence and the Executive Directors' submission of the ordinance for filing to the clerk shall constitute prima facie evidence that the ordinance was on the date of submission also submitted for filing with the Secretary of State. Except for the certificate of a clerk as to receipt and date of submission, no evidence may be admitted in court concerning the submission of the certified text of any ordinance by the Executive Directors to any person other than the Secretary of State. (1987, c. 683, s. 7; 1987 (Reg. Sess., 1988), c. 897, s. 7.)

§ 77-37. Regulations for Lake Wylie and shoreline area.

(a) Except as limited in subsection (b) of this section, by restrictions in any joint ordinance and by other supervening provisions of law, the Commission may make regulations applicable to Lake Wylie and its shoreline area concerning all matters relating to or affecting the use of Lake Wylie. These regulations may not conflict with or supersede provisions of general or special acts or of regulations of state agencies promulgated under the authority of general law. No regulations adopted under the provisions of this section may be adopted by the Commission except after public hearing, with publication of notice of the hearing in a newspaper of general circulation in the three counties at least 10 days before the hearing. In lieu of or in addition to passing regulations supplementary to state law and regulations concerning the operation of vessels on Lake Wylie, the Commission may, after public notice, request that the North Carolina Wildlife Resources Commission and the South Carolina Department of Wildlife and Marine Resources pass local regulations on this subject in accordance with the procedure established by appropriate state law.

(b) Violation of any regulation of the Commission commanding or prohibiting an act is a Class 3 misdemeanor.

(c) The regulations promulgated under this section take effect upon passage or upon such dates as may be stipulated in the regulations except that no regulation may be enforced unless adequate notice of the regulation has been posted in or on Lake Wylie or its shoreline area. Adequate notice as to a regulation affecting only a particular location may be by a sign, uniform waterway marker, posted notice, or other effective method of communicating the essential provisions of the regulation in the immediate vicinity of the location in question. Where a regulation applies generally as to Lake Wylie or its shoreline area, or both, there must be a posting of notices, signs, or markers communicating the essential provisions in at least three different places throughout the area and it must be printed in a newspaper of general circulation in the three counties.

(d) A copy of each regulation promulgated under this section must be filed by the Commission with the following persons:

(1) The Secretaries of State of North and South Carolina;
(2) The clerk of superior court of Mecklenburg and Gaston Counties and the clerk of court of York County;
(3) The Executive Directors of the Wildlife Resources Commission of North Carolina and South Carolina Wildlife and Marine Resources Department.

(e) Any official designated in subsection (d) above may issue certified copies of regulations filed with him under the seal of his office. These certified copies may be received in evidence in any proceeding.

(f) Publication and filing of regulations promulgated under this section as required above is for informational purposes and is not a prerequisite to their validity if they in fact have been duly promulgated, the public has been notified as to the substance of regulations, a copy of the text of all regulations is in fact available to any person who may be affected and no party to any proceeding has been prejudiced by any defect that may exist with respect to publication and filing. Rules and regulations promulgated by the Commission under the provisions of other sections of this article relating to internal governance of the Commission need not be filed or published. Where posting of any sign, notice, or marker or the making of other communication is essential to the validity of a regulation duly promulgated, it is presumed in any proceeding that prior notice was given and maintained and the burden lies upon the party asserting to the contrary to prove lack of adequate notice of any regulation. (1987, c. 683,

s. 8; 1987 (Reg. Sess., 1988), c. 897, s. 8; 1993, c. 539, s. 583; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 77-38. Authority of law enforcement officers and special officers.

(a) Where a joint ordinance so provides, all law enforcement officers, or those officers as may be designated in the joint ordinance, with territorial jurisdiction as to any part of Lake Wylie or its shoreline area, within the limitations of their subject matter jurisdiction, have the authority of peace officers in enforcing the laws over all of Lake Wylie and its shoreline area.

(b) Where a joint ordinance provides it, the Commission may hire special officers to patrol and enforce the laws on Lake Wylie and its shoreline area. These special officers have and may exercise all the powers of peace officers generally within the area in question and shall take the oaths and are subject to all provisions of law relating to law enforcement officers.

(c) Every criminal violation must be tried in the county where it occurred. However, a certificate of training by the South Carolina Criminal Justice Academy, or a similar certificate issued by the North Carolina Criminal Justice Education and Training Standards Commission or the North Carolina Sheriffs' Education and Training Standards Commission will suffice for certification in both states for the purposes of this article.

(d) Where a law enforcement officer with jurisdiction over any part of Lake Wylie or its shoreline area is performing duties relating to the enforcement of the laws on Lake Wylie or in its shoreline area, he has such extraterritorial jurisdiction as may be necessary to perform his duties. These duties include investigation of crimes an officer reasonably believes have been, or are about to be, committed within the area in question. This includes traversing by reasonable routes from one portion of this area to another although across territory not within the boundaries of Lake Wylie and its shoreline area; conducting prisoners in custody to a court or detention facilities as may be authorized by law, although this may involve going outside the area in question; execution of process connected with any criminal offense alleged to have been committed within the boundaries in question, except that this process may not be executed by virtue of this provision beyond the boundaries of the three counties. This also includes continuing pursuit of and arresting any violator or suspected violator as to which grounds for arrest arose within the area in question.

(e) Where law enforcement officers are given additional territorial jurisdiction under the provisions of this section, this is considered an extension of the duties of the office held and no officer shall take any additional oath or title of office. (1987, c. 683, s. 9; 1987 (Reg. Sess., 1988), c. 897, s. 9.)

§§ 77-39 through 77-49: Reserved for future codification purposes.

ARTICLE 5.

High Rock Lake Marine Commission.

§ 77-50. Definitions.

For purposes of this Article:

(1) "Boards" means the Boards of Commissioners of Davidson and Rowan Counties.

(2) "Commission" means the High Rock Lake Marine Commission or its governing board, as the case may be.
(3) "Commissioner" means a member of the governing board of the High Rock Lake Marine Commission.
(4) High Rock Reservoir, known for purposes of this Article as "High Rock Lake", means the impounded body of water along the Yadkin River in the two counties extending from High Rock Dam, located at mile 253 on the Yadkin River, upstream approximately 19 miles.
(5) "Joint ordinance" means an ordinance substantially identical in content adopted separately by the board in each of the two counties.
(6) "Shoreline area" means, except as restricted by a joint ordinance, the area within the two counties lying within 500 feet of the normal full pool elevation of 655 (Yadkin, Inc. datum) on High Rock Lake. In addition, the shoreline area shall include all islands within High Rock Lake and all peninsulas extending into the waters of High Rock Lake.
(7) "Two counties" means Davidson and Rowan Counties.
(8) "Wildlife Commission" means the North Carolina Wildlife Resources Commission. (1993, c. 355, s. 1.)

Editor's Note. — This Article is Session Laws 1993, c. 355. It has been codified at the direction of the Revisor of Statutes.

The definitions in this section were placed in alphabetical order at the direction of the Revisor of Statutes.

§ 77-51. Creation of Commission authorized.

The two counties may by joint ordinance create the High Rock Lake Marine Commission. The Boards shall hold a public hearing on the joint ordinance to create the Commission. The location of the public hearing shall be determined by the Boards and established by resolution. The Boards shall cause notice of the hearing to be published once a week for two successive calendar weeks in a newspaper of general circulation in each county. The notice shall be published the first time not less than 10 days nor more than 25 days before the date fixed for the hearing. Upon its creation the Commission shall enjoy the powers and have the duties and responsibilities conferred upon it by joint ordinance, subject to the provisions of this Article and the laws of the State of North Carolina. The provisions of any joint ordinance may be modified, amended, or rescinded by a subsequent joint ordinance. A county may unilaterally withdraw from participation as required by any joint ordinance or the provisions of this Article, once the Commission has been created. Any county may unilaterally withdraw from the Commission at the end of its fiscal year, by written notification to the other county and the Commission of its intent to withdraw, with notification 90 days prior to the end of the fiscal year. Upon the effectuation of the withdrawal, the Commission is dissolved, and all property of the Commission shall be distributed to or divided among the two counties and any other public agency or agencies serving the High Rock Lake area in a manner considered equitable by the Commission by resolution adopted prior to dissolution. (1993, c. 355, s. 2.)

§ 77-52. Terms of members.

Upon its creation, the Commission shall have a governing board of nine commissioners. Except as otherwise provided for the first three-year period, each commissioner shall serve a three-year term, with commissioners to serve overlapping terms. Upon creation of the Commission, the Boards shall appoint four commissioners each. Another alternating commissioner shall serve two-year terms. This alternating commissioner shall initially be appointed by the

Davidson County Board of Commissioners, then by the Rowan County Board of Commissioners, and thereafter shall alternate between the two Boards.

These appointees shall serve until December 31 following their appointment. Thereafter, appointments shall be made for terms beginning each January 1 by the respective Boards of the two counties as follows:

Initial appointments: Four commissioners from Davidson County, one appointed for a one-year term, one appointed for a two-year term, and two appointed for three-year terms; four commissioners from Rowan County, one appointed for a one-year term, two appointed for two-year terms, and one appointed for a three-year term. Subsequent appointees shall serve three-year terms. The alternating commissioner, to be initially appointed by Davidson County, shall initially serve a one-year term and thereafter serve a two-year term. (1993, c. 355, s. 3.)

§ 77-53. Compensation; budgetary and accounting procedures.

The joint ordinance shall state the terms relating to compensation to commissioners, if any, compensation of consultants and staff members employed by the Commission, and reimbursement of expenses incurred by commissioners, consultants, and employees. The Commission shall be governed by these budgetary and accounting procedures as may be specified by joint ordinance and the applicable laws of North Carolina. (1993, c. 355, s. 4.)

§ 77-54. Organization and meetings.

Upon creation of the Commission, its governing board shall meet at a time and place agreed upon by the Boards. The commissioners shall elect a chairman and such other officers as they may choose. All officers shall serve one-year terms. The governing board shall adopt such rules and regulations as it may consider necessary, not inconsistent with the provisions of this Article or of any joint ordinance or the laws of the State of North Carolina, for the proper discharge of its duties and for the governance of the Commission. In order to conduct business, a quorum must be present. The chairman may appoint those committees as may be authorized by such rules and regulations. The Commission shall meet regularly at those times and places as may be specified in its rules and regulations or in any joint ordinance. However, meetings of the Commission shall be held in the two counties on a rotating basis so that an equal number of meetings is held in each county. Special meetings may be called as specified in the rules and regulations. The provisions of the Open Meetings Law, Article 33C of Chapter 143 of the General Statutes apply. (1993, c. 355, s. 5.)

Editor's Note. — Chapter 143 of Article 33C, referred to in this section, is codified as G.S. 143-318.9 et seq.

§ 77-55. Powers of Commission; administrative provision.

(a) Within the limits of funds available to it and subject to the provisions of this Article and of any joint ordinance the Commission may:

(1) Hire and fix the compensation of permanent and temporary employees and staff as it may consider necessary in carrying out its duties;

(2) Contract with consultants for such services as it may require;

(3) Contract with the State of North Carolina or the federal government, or any agency or department or subdivision of them, for property or

services as may be provided to or by these agencies, and carry out the provisions of such contracts;

(4) Contract with persons, firms, and corporations generally as to all matters over which it has a proper concern, and carry out the provisions of such contracts;

(5) Lease, rent, purchase, or otherwise obtain suitable quarters and office space for its employees and staff, and lease, rent, purchase, or otherwise obtain furniture, fixtures, vehicles, uniforms, and other supplies and equipment necessary or desirable for carrying out the duties imposed in or under the authority of this Article; and

(6) Lease, rent, purchase, construct, otherwise obtain, maintain, operate, repair, and replace, either on its own or in cooperation with other public or private agencies or individuals, any of the following: boat docks, navigation aids, waterway markers, public information signs and notices, and other items of real and personal property designed to enhance public recreation, public safety in High Rock Lake and its shoreline area, or protection of property in the shoreline area, subject, however, to the provisions of Chapter 113 of the General Statutes and rules promulgated under that Chapter as to property within North Carolina.

(b) The Commission may accept, receive, and disburse in furtherance of its functions any funds, grants, services, or property made available by the federal government or its agencies or subdivisions, or by private and civic sources.

(c) The Boards may appropriate funds to the Commission out of surplus funds or funds derived from nontax sources. They may appropriate funds out of tax revenues and may also levy annually taxes for the payment of such appropriation as a special purpose, in addition to any allowed by the North Carolina Constitution or as provided by G.S. 153A-149.

(d) The Commission shall be subject to such audit requirements as may be specified in any joint ordinance.

(e) In carrying out its duties, and either in addition to or in lieu of exercising various provisions of the above authorizations, the Commission may, with the agreement of the Board of Commissioners of the county concerned, utilize personnel and property of or assign responsibilities to any officer or employee of any of the two counties. Such contribution in kind, if substantial, may with the agreement of the other county be considered to substitute in whole or in part for the financial contribution required of such county in support of the Commission.

(f) Unless otherwise specified by joint ordinance, each of the two counties shall annually contribute an equal financial contribution to the Commission in an amount appropriate to support the activities of the Commission in carrying out its duties. (1993, c. 355, s. 6.)

§ 77-56. Filing and publication of joint ordinances.

(a) A copy of the joint ordinance creating the Commission and of any joint ordinance amending or repealing the joint resolution creating the Commission shall be filed with the Executive Director of the Wildlife Commission. When the Executive Director receives ordinances that are in substance identical from the two counties concerned, the Executive Director shall, within 10 days, certify this fact and distribute a certified single ordinance text to the following:

(1) The Secretary of State.

(2) The clerk to the governing board of each of the two counties.

(3) The clerk of superior court of Davidson and Rowan Counties. Upon request, the Executive Director shall also send a certified single copy of any and all applicable joint ordinances to the chairman of the Commission.

(4) A newspaper of general circulation in the two counties.

(b) Unless a joint ordinance specifies a later date, it shall take effect when the Executive Director's certified text has been submitted to the Secretary of State for filing. Certifications of the Executive Director under the seal of the Commission as to the text or amended text of any joint ordinance and of the date or dates of submission to the Secretary of State shall be admissible in evidence in any court. Certifications by any clerk of superior court of the text of any certified ordinance filed with him by the Executive Director is admissible in evidence and the Executive Director's submission of the resolution for filing to the clerk shall constitute prima facie evidence that such resolution was on the date of submission also submitted for filing with the Secretary of State. Except for the certificate of a clerk as to receipt and date of submission, no evidence may be admitted in court concerning the submission of the certified text of any ordinance by the Executive Director to any person other than the Secretary of State. (1993, c. 355, s. 7.)

§ 77-57. Regulatory authority.

(a) Except as limited in subsection (b) below, by restrictions in any joint ordinance, and by other supervening provisions of law, the Commission may make regulations applicable to High Rock Lake and its shoreline area concerning all matters relating to or affecting the use of High Rock Lake. These regulations may not conflict with or supersede provisions of general or special acts or of regulations of State agencies promulgated under the authority of general law. No regulations adopted under the provisions of this section may be adopted by the Commission except after public hearing, with publication of notice of the hearing in a newspaper of general circulation in the two counties at least 10 days before the hearing. In lieu of or in addition to passing regulations supplementary to State law and regulations concerning the operation of vessels on High Rock Lake, the Commission may, after public notice, request that the Wildlife Resources Commission pass local regulations on this subject in accordance with the procedure established by appropriate State law.

(b) Violation of any regulation of the Commission commanding or prohibiting an act shall be a Class 3 misdemeanor.

(c) The regulations promulgated under this section take effect upon passage or upon such dates as may be stipulated in the regulations except that no regulation may be enforced unless adequate notice of the regulation has been posted in or on High Rock Lake or its shoreline area. Ordinances providing regulations for specific areas shall clearly establish the boundaries of the affected area by including a map of the regulated area, with the boundaries clearly drawn, or by setting out the boundaries in a written description, or by a combination of these techniques. Adequate notice as to a regulation affecting only a particular location shall be given in the following manner. When an ordinance providing regulations for a specific area is proposed, owners of the parcel of land involved as shown on the county tax listing, and the owners of land within 500 feet of the proposed area to be regulated, as shown on the county tax listing, shall be mailed a notice of the proposed classification by first-class mail at the last addresses listed for such owners on the county tax abstracts. This mailing requirement does not apply in regulations affecting the entire lake. Notice shall also be given by a sign, uniform waterway marker, posted notice, or other effective method of communicating the essential provisions of the regulation in the immediate vicinity of the location in question. Where a regulation applies generally as to High Rock Lake or its shoreline area, or both, there must be a posting of notices, signs, or markers communicating the essential provisions in at least three different places throughout the area, and it shall be printed in a newspaper of general circulation in the two counties.

(d) A copy of each regulation promulgated under this section must be filed by the Commission with the following persons:

(1) The Secretary of State;
(2) The clerks of superior court of Davidson and Rowan Counties;
(3) The Executive Director of the Wildlife Resources Commission; and
(4) The federal Energy Regulatory Commission licensee for High Rock Lake.

(e) Any official designated in subsection (d) above may issue certified copies of regulations filed with the official under the seal of the official's office. Such certified copies may be received in evidence in any proceeding.

(f) Publication and filing of regulations promulgated under this section as required above are for informational purposes and is not a prerequisite to their validity if they in fact have been duly promulgated, the public has been notified as to the substance of the regulations, a copy of the text of all regulations is in fact available to any person who may be affected, and no party to any proceeding has been prejudiced by any defect that may exist with respect to publication and filing. Rules and regulations promulgated by the Commission under the provisions of other sections of this Article relating to internal governance of the Commission need not be filed or published. Where posting of any sign, notice, or marker, or the making of other communication is essential to the validity of a regulation duly promulgated, it is presumed in any proceeding that prior notice was given and maintained and the burden lies upon the party asserting to the contrary to prove lack of adequate notice of any regulation. (1993, c. 355, s. 8; 1993 (Reg. Sess., 1994), c. 767, s. 27.)

§ 77-58. Enforcement.

(a) Where a joint ordinance so provides, all law enforcement officers, or those officers as may be designated in the joint ordinance, with territorial jurisdiction as to any part of High Rock Lake or its shoreline area within the limitations of their subject matter jurisdiction, have the authority of peace officers in enforcing the laws over all of High Rock Lake and its shoreline area. A certificate of training issued by the North Carolina Criminal Justice Education and Training Standards Commission or the North Carolina Sheriffs' Education and Training Standards Commission will suffice for certification for the purposes of this Article.

(b) Every criminal violation shall be tried in the county where it occurred.

(c) Where a law enforcement officer with jurisdiction over any part of High Rock Lake or its shoreline area is performing duties relating to the enforcement of the laws on High Rock Lake or in its shoreline area, the officer shall have such extraterritorial jurisdiction as may be necessary to perform the officer's duties. These duties include investigations of crimes an officer reasonably believes have been, or are about to be, committed within the area in question. This includes traversing by reasonable routes from one portion of this area to another although across territory not within the boundaries of High Rock Lake and its shoreline area; conducting prisoners in custody to a court or to detention facilities as may be authorized by law, although this may involve going outside the area in question; execution of process connected with any criminal offense alleged to have been committed within the boundaries in question, except that this process may not be executed by virtue of this provision beyond the boundaries of the two counties. This also includes continuing pursuit of and arresting any violator or suspected violator as to which grounds for arrest arose within the area in question.

(d) Where law enforcement officers are given additional territorial jurisdiction under the provisions of this section, this shall be considered an extension of the duties of the office held and no officer shall take any additional oath or title of office. (1993, c. 355, s. 9.)

§§ 77-59 through 77-69: Reserved for future codification purposes.

ARTICLE 6.

Mountain Island Lake Marine Commission.

§ 77-70. Definitions.

For purposes of this Article:

(1) "Board" means the board of commissioners of one of the three counties.

(2) "Commission" means the Mountain Island Lake Marine Commission or its governing board, as the case may be.

(3) "Commissioner" means a member of the governing board of the Mountain Island Lake Marine Commission.

(4) "Joint resolution" means a resolution or ordinance substantially identical in content adopted separately by the governing boards in each of the three counties.

(5) "Mountain Island Lake" means the impounded body of water along the Catawba River in the three counties extending from the Cowans Ford Dam downstream to the Mountain Island Dam.

(6) "Shoreline area" means, except as modified by a joint resolution, the area within the three counties lying within 1,000 feet of the full pond elevation contour on Mountain Island Lake. In addition, the shoreline area includes all islands within Mountain Island Lake and all peninsulas extending into the waters of Mountain Island Lake.

(7) "Three counties" means Gaston, Lincoln, and Mecklenburg Counties.

(8) "Wildlife Commission" means the North Carolina Wildlife Resources Commission. (1997-257, s. 1.)

Editor's Note. — Session Laws 1997-257, ss. 1-9 were codified as this Article at the direction of the Revisor of Statutes.

§ 77-71. Authority to create Commission; withdrawal from and dissolution of Commission.

The three counties may by joint resolution create the Mountain Island Lake Marine Commission. Upon its creation the Commission has the powers, duties, and responsibilities conferred upon it by joint resolution, subject to the provisions of this Article. The provisions of any joint resolution may be modified, amended, or rescinded by a subsequent joint resolution. A county may unilaterally withdraw from participation as provided by any joint resolution or the provisions of this Article, once the Commission has been created, and any county may unilaterally withdraw from the Commission at the end of any budget period upon 90 days prior written notice. Upon the effectuation of the withdrawal, the Commission is dissolved, and all property of the Commission must be distributed to or divided among the three counties and any other public agency or agencies serving the Mountain Island Lake area in a manner considered equitable by the Commission by resolution adopted by it prior to dissolution. (1997-257, s. 2.)

§ 77-72. Membership; terms.

Upon its creation, the Commission shall have a governing board of seven. Except as otherwise provided for the initial appointees, each commissioner shall serve a three-year term. Upon creation of the Commission, the Boards of Commissioners of Gaston County and Mecklenburg County shall appoint three commissioners each, and the Board of Commissioners of Lincoln County shall appoint one commissioner. Of the initial appointees:

(1) One commissioner appointed by Gaston County and one member appointed by Mecklenburg County shall serve one-year terms;
(2) One commissioner appointed by Gaston County and one member appointed by Mecklenburg County shall serve two-year terms; and
(3) One member appointed by Gaston County, one member appointed by Mecklenburg County, and the member appointed by Lincoln County shall serve three-year terms.

Any commissioner who has served two consecutive terms, including any initial term of less than three years, may not be reappointed to a third consecutive term. Such a member may, however, be appointed to serve again after the expiration of the term of the member's successor.

On the death of a commissioner, resignation, incapacity, or inability to serve, as determined by the board appointing that commissioner, or removal of the commissioner for cause, as determined by the board appointing that commissioner, the board affected may appoint another commissioner to fill the unexpired term. (1997-257, s. 3.)

§ 77-73. Compensation; budget.

The joint resolution of the three counties shall state the terms relating to compensation to commissioners, if any, compensation of consultants and staff members employed by the Commission, and reimbursement of expenses incurred by commissioners, consultants, and employees. The Commission shall be governed by those budgetary and accounting procedures specified by joint resolution. (1997-257, s. 4.)

§ 77-74. Organization and meetings.

Upon creation of the Commission, its governing board shall meet at a time and place agreed upon by the boards of the three counties concerned. The commissioners shall elect a chairman and officers as they choose. All officers shall serve one-year terms. The governing board shall adopt rules and regulations as it deems necessary, not inconsistent with the provisions of this Article or of any joint resolution, for the proper discharge of its duties and for the governance of the Commission. In order to conduct business, a quorum must be present. The chairman may adopt those committees as authorized by those rules and regulations. The Commission shall meet regularly at times and places as specified in its rules and regulations or in any joint resolution. However, meetings of the Commission must be held in all three counties on a rotating basis so that an equal number of meetings is held in each county. Special meetings may be called as specified in the rules and regulations. The provisions of the Open Meetings Law, Article 33C of Chapter 143 of the General Statutes, shall apply. (1997-257, s. 5.)

§ 77-75. Powers of the Commission; administration and funding.

(a) Within the limits of funds available to it and subject to the provisions of this Article and of any joint resolution, the Commission may:

(1) Hire and fix the compensation of permanent and temporary employees and staff as it may deem necessary in carrying out its duties;
(2) Contract with consultants for services it requires;
(3) Contract with the State of North Carolina or the federal government, or any agency or department, or subdivision of them, for property or services as may be provided to or by these agencies and carry out the provisions of these contracts;
(4) Contract with persons, firms, and corporations generally as to all matters over which it has a proper concern, and carry out the provisions of contracts;
(5) Lease, rent, purchase, or otherwise obtain suitable quarters and office space for its employees and staff, and lease, rent, purchase, or otherwise obtain furniture, fixtures, vessels, vehicles, firearms, uniforms, and other supplies and equipment necessary or desirable for carrying out the duties imposed in or under the authority of this Article; and
(6) Lease, rent, purchase, construct, otherwise obtain, maintain, operate, repair, and replace, either on its own or in cooperation with other public or private agencies or individuals, any of the following: boat docks, navigation aids, waterway markers, public information signs and notices, and other items of real and personal property designed to enhance public safety in Mountain Island Lake and its shoreline area, or protection of property in the shoreline area subject however to Chapter 113 of the General Statutes and rules promulgated under that Chapter.

(b) The Commission may accept, receive, and disburse in furtherance of its functions any funds, grants, services, or property made available by the federal government or its agencies or subdivisions, by the State of North Carolina or its agencies or subdivisions, or by private and civic sources.

(c) The governing boards of the three counties may appropriate funds to the Commission out of surplus funds or funds derived from nontax sources. They may appropriate funds out of tax revenues and may also levy annually property taxes for the payments of such appropriation as a special purpose, in addition to any allowed by the Constitution, or as provided by G.S. 153A-149.

(d) The Commission shall be subject to those audit requirements as may be specified in any joint resolution.

(e) In carrying out its duties and either in addition to or in lieu of exercising various provisions of the above authorization, the Commission may, with the agreement of the governing board of the county concerned, utilize personnel and property of or assign responsibilities to any officer or employee of any of the three counties. Such contribution in kind, if substantial, may with the agreement of the other two counties be deemed to substitute in whole or in part for the financial contribution required of that county in support of the Commission.

(f) Unless otherwise specified by joint resolution, each of the three counties shall annually contribute an equal financial contribution to the Commission in an amount appropriate to support the activities of the Commission in carrying out its duties. (1997-257, s. 6.)

§ 77-76. Filing and publication of joint ordinances.

(a) A copy of the joint resolution creating the Commission and of any joint resolution amending or repealing the joint resolution creating the Commission shall be filed with the Executive Director of the Wildlife Commission. When the Executive Director receives resolutions that are in substance identical from all three counties concerned, the Executive Director shall within 10 days so certify and distribute a certified single resolution text to the following:

(1) The Secretary of State;
(2) The clerk to the governing board of each of the three counties;
(3) The clerks of Superior Court of Lincoln, Mecklenburg, and Gaston Counties. Upon request, the Executive Director also shall send a certified single copy of any and all applicable joint resolutions to the chairman of the Commission; and
(4) A newspaper of general circulation in the three counties.

(b) Unless a joint resolution specifies a later date, it shall take effect when the Executive Director's certified text has been submitted to the Secretary of State for filing. Certifications of the Executive Director under the seal of the Commission as to the text or amended text of any joint resolution and of the date or dates of submission to the Secretary of State shall be admissible in evidence in any court. Certifications by any clerk of superior court of the text of any certified resolution filed with him by the Executive Director is admissible in evidence and the Executive Director's submission of the resolution for filing to the clerk shall constitute prima facie evidence that that resolution was on the date of submission also submitted for filing with the Secretary of State. Except for the certificate of a clerk as to receipt and date of submission, no evidence may be admitted in court concerning the submission of the certified text of any resolution by the Executive Director to any person other than the Secretary of State. (1997-257, s. 7.)

§ 77-77. Regulatory authority.

(a) Except as limited in subsection (b) of this section, by restrictions in any joint resolution, and by other supervening provisions of law, the Commission may make regulations applicable to Mountain Island Lake and its shoreline area concerning all matters relating to or affecting the use of Mountain Island Lake. These regulations may not conflict with or supersede provisions of general or special acts or of regulations of State agencies promulgated under the authority of general law. No regulations adopted under this section may be adopted by the Commission except after public hearing, with publication of notice of the hearing being given in a newspaper of general circulation in the three counties at least 10 days before the hearing. In lieu of or in addition to passing regulations supplementary to State law and regulations concerning the operation of vessels on Mountain Island Lake, the Commission may, after public notice, request that the Wildlife Commission pass local regulations on this subject in accordance with the procedure established by appropriate State law.

(b) Violation of any regulation of the Commission commanding or prohibiting an act shall be a Class 3 misdemeanor.

(c) The regulations promulgated under this section take effect upon passage or upon dates as stipulated in the regulations, except that no regulation may be enforced unless adequate notice of the regulation has been posted in or on Mountain Island Lake or its shoreline area. Adequate notice as to a regulation affecting only a particular location may be by a sign, uniform waterway marker, posted notice, or other effective method of communicating the essential provisions of the regulation in the immediate vicinity of the location in question. Where a regulation applies generally as to Mountain Island Lake or its shoreline area, or both, there must be a posting of notices, signs, or markers communicating the essential provisions in at least three different places throughout the area, and it must be printed in a newspaper of general circulation in the three counties.

(d) A copy of each regulation promulgated under this section must be filed by the Commission with the following persons:
(1) The Secretary of State;

(2) The clerks of Superior Court of Gaston, Lincoln, and Mecklenburg Counties; and

(3) The Executive Director of the Wildlife Commission.

(e) Any official designated in subsection (d) above may issue certified copies of regulations filed with him under the seal of his office. Those certified copies may be received in evidence in any proceeding.

(f) Publication and filing of regulations promulgated under this section as required above is for informational purposes and shall not be a prerequisite to their validity if they in fact have been duly promulgated, the public has been notified as to the substance of regulations, a copy of the text of all regulations is in fact available to any person who may be affected, and no party to any proceeding has been prejudiced by any defect that may exist with respect to publication and filing. Rules and regulations promulgated by the Commission under the provisions of other sections of this Article relating to internal governance of the Commission need not be filed or published. Where posting of any sign, notice, or marker or the making of other communication is essential to the validity of a regulation duly promulgated, it shall be presumed in any proceeding that prior notice was given and maintained and the burden lies upon the party asserting to the contrary to prove lack of adequate notice of any regulation. (1997-257, s. 8.)

§ 77-78. Enforcement.

(a) Where a joint resolution so provides, all law enforcement officers, or those officers as may be designated in the joint resolution, with territorial jurisdiction as to any part of Mountain Island Lake or its shoreline area shall, within the limitations of their subject matter jurisdiction, have the authority of peace officers in enforcing the laws over all of Mountain Island Lake and its shoreline area.

(b) Where a joint resolution provides it, the Commission may hire special officers to patrol and enforce the laws on Mountain Island Lake and its shoreline area. These special officers have and exercise all the powers of peace officers generally within the area in question and shall take the oaths and be subject to all provisions of law relating to law enforcement officers.

(c) Unless a joint resolution provides otherwise, all courts in the three counties within the limits of their subject matter jurisdiction shall have concurrent jurisdiction as to all criminal offenses arising within the boundaries of Mountain Island Lake and its shoreline area.

(d) Where a law enforcement officer with jurisdiction over any part of Mountain Island Lake or its shoreline area is performing duties relating to the enforcement of the laws on Mountain Island Lake or in its shoreline area, the officer has the extraterritorial jurisdiction necessary to perform his duties. These duties include investigation of crimes an officer reasonably believes have been, or are about to be, committed within the area in question. This includes traversing by reasonable routes from one portion of that area to another although across territory not within the boundaries of Mountain Island Lake and its shoreline area; conducting prisoners in custody to court or detention facilities as authorized by law, although this may involve going outside the area in question; execution of process connected with any criminal offense alleged to have been committed within the boundaries in question, except that such process may not be executed by virtue of this provision beyond the boundaries of the three counties. This also includes continuing pursuit of and arresting any violator or suspected violator as to which grounds for arrest arose within the area in question.

(e) Where law enforcement officers are given additional territorial jurisdiction under the provisions of this section, this shall be deemed an extension of the duties of the office held, and no officer shall take any additional oath or title of office. (1997-257, s. 9.)

§ 77-79: Reserved for future codification purposes.

ARTICLE 6A.

Lake Lure Marine Commission.

§ 77-80. Definitions.

For purposes of this Article:

(1) "Board" means the Board of Commissioners of the Town of Lake Lure.
(2) "Commission" means the Lake Lure Marine Commission or its governing board, as the case may be.
(3) "Commissioner" means a member of the governing board of the Lake Lure Marine Commission.
(4) Lake Lure Reservoir, known for purposes of this Article as "Lake Lure" or "the waters of Lake Lure", means the body of water along the Broad River in Rutherford County, impounded by the dam at Tumbling Shoals, and lying below the 995-foot contour line above sea level.
(5) "Shoreline area" means the area submerged by the dam at Tumbling Shoals, lying below 955 feet above mean sea level of the normal full pond elevation of 992 feet above mean sea level, on Lake Lure.
(6) "Wildlife Commission" means the North Carolina Wildlife Resources Commission. (2003-332, s. 1.)

Editor's Note. — This article was enacted as Article 7A and has been redesignated as Article 6A at the direction of the Revisor of Statutes.

§ 77-81. Creation of Commission authorized.

The Board of Commissioners of the Town of Lake Lure may by ordinance create the Lake Lure Marine Commission. The Board shall hold a public hearing on the ordinance to create the Commission. The location of the public hearing shall be determined by the Boards and established by resolution. The Board shall cause notice of the hearing to be published once a week for two successive calendar weeks in a newspaper of general circulation in Rutherford County. The notice shall be published the first time not less than 10 days nor more than 25 days before the date fixed for the hearing. Upon its creation the Commission shall enjoy the powers and have the duties and responsibilities conferred upon it by the Lake Lure municipal ordinance, subject to the provisions of this Article and the laws of the State of North Carolina. The provisions of any ordinance may be modified, amended, or rescinded by a subsequent ordinance. (2003-332, s. 1.)

§ 77-82. Governing board.

Upon its creation, the Commission shall have a governing board. The governing board shall, unless otherwise stated by ordinance, be the Board of Commissioners of the Town of Lake Lure. (2003-332, s. 1.)

§ 77-83. Compensation; budgetary and accounting procedures.

The municipal ordinance shall state the terms relating to compensation to commissioners, if any, compensation of consultants and staff members employed by the Commission, and reimbursement of expenses incurred by commissioners, consultants, and employees. The Commission shall be governed by these budgetary and accounting procedures as may be specified by the municipal ordinance and the applicable laws of North Carolina. (2003-332, s. 1.)

§ 77-84. Organization and meetings.

Upon creation of the Commission, its governing board shall meet at a time and place set by the Town of Lake Lure ordinance. Unless otherwise stated in the ordinance, the mayor of the Town of Lake Lure shall act as the presiding officer. The governing board shall adopt such rules and regulations as it may consider necessary, not inconsistent with the provisions of this Article or of any ordinance of the Town of Lake Lure or the laws of the State of North Carolina, for the proper discharge of its duties and for the governance of the Commission. In order to conduct business, a quorum must be present. The presiding officer may appoint those committees as may be authorized by such rules and regulations. The Commission shall meet regularly at those times and places as may be specified in its rules and regulations or in the Town of Lake Lure municipal ordinance. Special meetings may be called as specified in the rules and regulations. The provisions of the Open Meetings Law, Article 33C of Chapter 143 of the General Statutes, apply. (2003-332, s. 1.)

§ 77-85. Powers of Commission; administrative provision.

(a) Within the limits of funds available to it, and subject to the provisions of this Article and of the Town of Lake Lure municipal ordinance, the Commission may:

(1) Hire and fix the compensation of permanent and temporary employees and staff as it may consider necessary in carrying out its duties;

(2) Contract with consultants for such services as it may require;

(3) Contract with the State of North Carolina or the federal government, or any agency or department or subdivision of them, for property or services as may be provided to or by these agencies, and carry out the provisions of such contracts;

(4) Contract with persons, firms, and corporations generally as to all matters over which it has a proper concern, and carry out the provisions of such contracts;

(5) Lease, rent, purchase, or otherwise obtain suitable quarters and office space for its employees and staff, and lease, rent, purchase, or otherwise obtain furniture, fixtures, vehicles, uniforms, and other supplies and equipment necessary or desirable for carrying out the duties imposed in or under the authority of this Article; and

(6) Lease, rent, purchase, construct, otherwise obtain, maintain, operate, repair, and replace, either on its own or in cooperation with other public or private agencies or individuals, any of the following: boat docks, navigation aids, waterway markers, public information signs and notices, and other items of real and personal property designed to enhance public recreation, public safety on the waters of Lake Lure and its shoreline area, or protection of property in the shoreline area, subject, however, to the provisions of Chapter 113 of the General

Statutes and rules promulgated under that Chapter as to property within North Carolina.

(b) The Commission may accept, receive, and disburse in furtherance of its functions any funds, grants, services, or property made available by the federal government or its agencies or subdivisions, or by private and civic sources.

(c) The Board of Commissioners of the Town of Lake Lure may appropriate funds to the Commission out of surplus funds or funds derived from nontax sources. It may appropriate funds out of tax revenues and may also levy annually taxes for the payment of such appropriation as a special purpose, in addition to any allowed by the North Carolina Constitution or as provided by G.S. 160A-209.

(d) The Commission shall be subject to such audit requirements as may be specified in the municipal ordinance.

(e) In carrying out its duties, and either in addition to or in lieu of exercising various provisions of the above authorizations, the Commission may, with the agreement of the Board of Commissioners of the Town of Lake Lure, utilize personnel and property of or assign responsibilities to any officer or employee of the Town of Lake Lure. Such contribution in kind, if substantial, may with agreement between the Board and the Commission be considered to substitute in whole or in part for the financial contribution required of the Town in support of the Commission. (2003-332, s. 1.)

§ 77-86. Filing and publication of applicable municipal ordinances.

(a) A copy of the initial municipal ordinance creating the Commission and of any ordinance amending or repealing the resolution creating the Commission shall be filed with:

(1) The Executive Director of the Wildlife Commission.
(2) The Secretary of State.
(3) The clerk to the Town of Lake Lure.
(4) The clerk of superior court of Rutherford County. Upon request, the Executive Director shall also send a certified single copy of any and all applicable ordinances to the chairman of the Commission.
(5) A newspaper of general circulation in Rutherford County.

(b) Unless the municipal ordinance specifies a later date, it shall take effect when the text has been submitted to the Secretary of State for filing. Certifications of the Board under the seal of the Commission as to the text or amended text of any municipal ordinance and of the date or dates of submission to the Secretary of State shall be admissible in evidence in any court. Certifications by the clerk of superior court of Rutherford County of the text of any certified ordinance filed with the clerk by the Board is admissible in evidence and the Board's submission of the resolution for filing to the clerk shall constitute prima facie evidence that such resolution was on the date of submission also submitted for filing with the Secretary of State. Except for the certificate of a clerk as to receipt and date of submission, no evidence may be admitted in court concerning the submission of the certified text of any ordinance by the Board to any person other than the Secretary of State. (2003-332, s. 1.)

§ 77-87. Regulatory authority.

(a) Except as limited in subsection (b) of this section, by restrictions in any municipal ordinance, and by other supervening provisions of law, the Commission may make regulations applicable to Lake Lure and its shoreline area concerning all matters relating to or affecting the use of Lake Lure. These regulations may not conflict with provisions of general or special acts or of regulations of State agencies promulgated under the authority of general law. No regulations adopted under the provisions of this section may be adopted by the Commission except after public hearing, with publication of notice of the hearing in a newspaper of general circulation in Rutherford County at least 10 days before the hearing. In lieu of or in addition to passing regulations supplementary to State law and regulations concerning the operation of vessels on Lake Lure, the Commission may, after public notice, request that the Wildlife Resources Commission pass local regulations on this subject in accordance with the procedure established by appropriate State law.

(b) Violation of any regulation of the Commission commanding or prohibiting an act shall be a Class 3 misdemeanor.

(c) The regulations promulgated under this section take effect upon passage or upon such dates as may be stipulated in the regulations except that no regulation may be enforced unless adequate notice of the regulation has been posted in or on Lake Lure or its shoreline area. Ordinances providing regulations for specific areas shall clearly establish the boundaries of the affected area by including a map of the regulated area, with the boundaries clearly drawn, by setting out the boundaries in a written description, or by a combination of these techniques. Adequate notice as to a regulation affecting only a particular location shall be given in the following manner. When an ordinance providing regulations for a specific area is proposed, owners of the parcel of land involved as shown on the county tax listing, and the owners of land within 500 feet of the proposed area to be regulated, as shown on the county tax listing, shall be mailed a notice of the proposed classification by first-class mail at the last addresses listed for such owners on the county tax abstracts. This mailing requirement does not apply in regulations affecting the entire lake. Notice shall also be given by a sign, uniform waterway marker, posted notice, or other effective method of communicating the essential provisions of the regulation in the immediate vicinity of the location in question. Where a regulation applies generally as to the waters of Lake Lure or its shoreline area, or both, there must be a posting of notices, signs, or markers communicating the essential provisions in at least three different places throughout the area, and it shall be printed in a newspaper of general circulation in Rutherford County.

(d) A copy of each regulation promulgated under this section must be filed by the Commission with the following persons:

(1) The Secretary of State;
(2) The clerk of superior court of Rutherford County;
(3) The Executive Director of the Wildlife Resources Commission; and
(4) The federal Energy Regulatory Commission licensee for Lake Lure, if other than the Town of Lake Lure.

(e) Any official designated in subsection (d) of this section may issue certified copies of regulations filed with the official under the seal of the official's office. Such certified copies may be received in evidence in any proceeding.

(f) Publication and filing of regulations promulgated under this section as required above are for informational purposes and are a prerequisite to their validity if they in fact have been duly promulgated, the public has been notified as to the substance of the regulations, a copy of the text of all regulations is in fact available to any person who may be affected, and no party to any proceeding has been prejudiced by any defect that may exist with respect to publication and filing. Rules and regulations promulgated by the Commission under the provisions of other sections of this Article relating to internal governance of the Commission need not be filed or published. Where posting of any sign, notice, or marker, or the making of other communication is essential to the validity of a regulation duly promulgated, it is presumed in any proceeding that prior notice was given and maintained, and the burden lies upon the party asserting to the contrary to prove lack of adequate notice of any regulation. (2003-332, s. 1.)

§ 77-88. Enforcement.

(a) Where a municipal ordinance so provides, all law enforcement officers, or those officers as may be designated in the municipal ordinance, with territorial jurisdiction as to any part of the waters of Lake Lure or its shoreline area within the limitations of their subject matter jurisdiction, have the authority of peace officers in enforcing the laws over all of the waters of Lake Lure and its shoreline area. A certificate of training issued by the North Carolina Criminal Justice Education and Training Standards Commission or the North Carolina Sheriffs' Education and Training Standards Commission will suffice for certification for the purposes of this Article.

(b) Where a law enforcement officer with jurisdiction over any part of the waters of Lake Lure or its shoreline area is performing duties relating to the enforcement of the laws on the waters of Lake Lure or in its shoreline area, the officer shall have such extraterritorial jurisdiction as may be necessary to perform the officer's duties. These duties include investigations of crimes an officer reasonably believes have been, or are about to be, committed within the area in question. This includes traversing by reasonable routes from one portion of this area to another although across territory not within the boundaries of the waters of Lake Lure and its shoreline area; conducting prisoners in custody to a court or to detention facilities as may be authorized by law, although this may involve going outside the area in question; execution of process connected with any criminal offense alleged to have been committed within the boundaries in question, except that this process may not be executed by virtue of this provision beyond the boundaries of Rutherford County. This also includes continuing pursuit of and arresting any violator or suspected violator as to which grounds for arrest arose within the area in question.

(c) Reserved for future codification purposes.

(d) Where law enforcement officers are given additional territorial jurisdiction under the provisions of this section, this shall be considered an extension of the duties of the office held, and no officer shall take any additional oath or title of office. (2003-332, s. 1.)

§ 77-89: Reserved for future codification purposes.

ARTICLE 7.

Roanoke River Basin Bi-State Commission; Roanoke River Basin Advisory Committee.

Part 1. Roanoke River Basin Bi-State Commission.

§ 77-90. Definitions.

The following definitions apply in this Article:

(1) "Commission" means the Roanoke River Basin Bi-State Commission.

(2) "Roanoke River Basin" or "Basin" means that land area designated as the Roanoke River Basin by the North Carolina Department of

Environment and Natural Resources pursuant to G.S. 143-215.8B and the Virginia State Water Control Board pursuant to Code of Virginia § 62.1-44.38. (2002-177, s. 1.)

§ 77-91. Commission established; purposes.

There is established the Roanoke River Basin Bi-State Commission. The Commission shall be composed of members from the State of North Carolina and the Commonwealth of Virginia. The purposes of the Commission shall be to:

(1) Provide guidance and make recommendations to local, state, and federal legislative and administrative bodies, and to others as it deems necessary and appropriate, for the use, stewardship, and enhancement of the water, and other natural resources, for all citizens within the Basin.
(2) Provide a forum for discussion of issues affecting the Basin's water quantity and water quality and issues affecting other natural resources.
(3) Promote communication, coordination, and education among stakeholders within the Basin.
(4) Identify problems and recommend appropriate solutions.
(5) Undertake studies and prepare, publish, and disseminate information through reports, and in other forms, related to water quantity, water quality, and other natural resources of the Basin. (2002-177, s. 1.)

§ 77-92. Membership; terms of office; eligibility for appointment.

(a) The Roanoke River Basin Bi-State Commission shall consist of 18 members with each state appointing nine members. The North Carolina delegation to the Commission shall consist of the six members of the General Assembly of North Carolina appointed to the North Carolina Roanoke River Basin Advisory Committee and three nonlegislative members of the North Carolina Roanoke River Basin Advisory Committee, established pursuant to G.S. 77-103, who represent different geographical areas of the North Carolina portion of the Basin and who reside within the Basin's watershed, to be appointed by the Governor of North Carolina. The Virginia delegation to the Commission shall be appointed as determined by the Commonwealth of Virginia.

(b) Members of the North Carolina House of Representatives, the North Carolina Senate, the Virginia House of Delegates, the Virginia Senate, and federal legislators, who have not been appointed to the Commission and whose districts include any portion of the Basin, may serve as nonvoting ex officio members of the Commission.

(c) Except as provided in this subsection, members of the North Carolina delegation to the Commission shall serve at the pleasure of the Governor of North Carolina. The Governor of North Carolina may not remove a legislative member of the North Carolina delegation to the Commission during the legislator's term of office, except that the Governor may remove any member of the North Carolina delegation to the Commission for misfeasance, malfeasance, or nonfeasance as provided in G.S. 143B-13. A legislative member of the North Carolina delegation to the Commission who ceases to be a member of the General Assembly of North Carolina shall cease to be a member of the Commission. The terms of members of the Virginia delegation to the Commission shall be determined by the Commonwealth of Virginia.

(d) Each state's delegation to the Commission may meet separately to discuss Basin-related issues affecting their state and may report their findings independently of the Commission. (2002-177, s. 1; 2005-37, ss. 2, 3.)

§ 77-93. Powers and duties.

(a) The Commission shall have no regulatory authority.

(b) To perform its duties and objectives, the Commission shall have the following powers:

(1) To develop rules and procedures for the conduct of its business or as may be necessary to perform its duties and carry out its objectives, including, but not limited to, selecting a chairman and vice-chairman, rotating chairmanships, calling meetings, and establishing voting procedures. Rules and procedures developed pursuant to this subdivision shall be effective upon an affirmative vote by a majority of the Commission members.

(2) To establish standing and ad hoc advisory committees pursuant to G.S. 77-94 in addition to the North Carolina Roanoke River Basin Advisory Committee established pursuant to Part 2 of this Article and the Virginia Roanoke River Basin Advisory Committee established pursuant to Chapter 5.4 of Title 62.1 of the Code of Virginia, which shall be constituted in a manner to ensure a balance between recognized interests. The Commission shall determine the purpose of each advisory committee.

(3) To seek, apply for, accept, and expend gifts, grants and donations, services, and other aid from public or private sources. With the exception of funds provided by the planning district commissions, councils of governments, and commissions and funds appropriated by the General Assemblies of Virginia and North Carolina, the Commission may accept funds only after an affirmative vote by a majority of the members of the Commission or by following any other procedures that are established by the Commission for the conduct of its business.

(4) To establish a nonprofit corporation to assist in the details of administering its affairs and in raising funds.

(5) To enter into contracts and execute all instruments necessary or appropriate.

(6) To perform any lawful acts necessary or appropriate for the furtherance of its work. (2002-177, s. 1.)

§ 77-94. Standing and ad hoc committees.

To facilitate communication among stakeholders in the Basin, and to maximize participation by all interested parties, the Commission shall establish both standing and ad hoc committees. The Commission shall appoint the members of the standing and ad hoc committees in accordance with guidelines adopted by the Commission. The standing committees shall include all of the following:

(1) Permit holders. — The Commission shall identify those entities that hold permits issued by a federal, state, or local regulatory agency pertaining to the water of the Basin. The entities may recommend representatives to be appointed to the committees by the Commission.

(2) Roanoke River Basin interest groups. — The Commission shall identify interest groups that may recommend representatives to be appointed to the committees by the Commission.

(3) Public officials and governmental entities. — The committees shall be composed of representatives of each county, city, and town located completely or partially within the Basin. Also, other governmental entities that the Commission deems appropriate may recommend one member to be appointed to the committees by the Commission. The committees may also include the United States Senators from North

Carolina and Virginia or their designees, and any member of the United States House of Representatives or the Representative's designee, whose district includes any portion of the Basin, if the members elect to serve on the committees.

(4) Agriculture, forestry, and soil and water conservation districts. — The Commission shall identify persons who represent agricultural and forestry interests throughout the Basin and representatives from the soil and water conservation districts within the Basin and shall appoint representatives from these groups to the committees. (2002-177, s. 1.)

§ 77-95. Staffing and support.

(a) The North Carolina Department of Environment and Natural Resources and the Virginia Department of Environmental Quality shall provide staff support to the Commission. Additional staff may be hired or contracted by the Commission through funds raised by or provided to it. The duties and compensation of any additional staff shall be determined and fixed by the Commission, within available resources.

(b) All agencies of the State of North Carolina and the Commonwealth of Virginia shall cooperate with the Commission and, upon request, shall assist the Commission in fulfilling its responsibilities. The North Carolina Secretary of Environment and Natural Resources and the Virginia Secretary of Natural Resources or their designees shall each serve as the liaison between their respective state agencies and the Commission. (2002-177, s. 1.)

§ 77-96. Funding.

(a) The Commission shall annually adopt a budget that shall include the Commission's estimated expenses. Funding for the Commission shall be shared and apportioned between the State of North Carolina and the Commonwealth of Virginia. The appropriation of public funds to the Commission shall be provided through each state's regular process for appropriating public funds. The North Carolina councils of governments and commissions named in G.S. 77-103(b)(5) shall bear a proportion of North Carolina's share of the expenses, which may be in the form of in-kind contributions.

(b) The Commission shall designate a fiscal agent.

(c) The accounts and records of the Commission showing the receipt and disbursement of funds from whatever source derived shall be in the form that the North Carolina Auditor and the Virginia Auditor of Public Accounts prescribe, provided that the accounts shall correspond as nearly as possible to the accounts and records for such matters maintained by similar enterprises. The accounts and records of the Commission shall be subject to an annual audit by the North Carolina Auditor and the Virginia Auditor of Public Accounts or their legal representatives, and the costs of the audit services shall be borne by the Commission. The results of the audits shall be delivered to the Joint Legislative Commission on Governmental Operations of the General Assembly of North Carolina and as provided by the Commonwealth of Virginia. (2002-177, s. 1.)

§ 77-97. Compensation and expenses of Commission members.

(a) The appointed members of the North Carolina delegation to the Commission shall receive per diem, subsistence, and travel expenses as follows:

(1) Commission members who are members of the General Assembly at the rate established in G.S. 120-3.1.

(2) Commission members who are officials or employees of the State or of local government agencies at the rate established in G.S. 138-6.

(3) All other Commission members at the rate established in G.S. 138-5.

(b) The members of the Virginia delegation to the Commission shall receive compensation as provided by the Commonwealth of Virginia.

(c) All expenses shall be paid from funds appropriated or otherwise available to the Commission. (2002-177, s. 1.)

§ 77-98. Annual report.

The Commission shall submit an annual report, including any recommendations, on or before 1 October of each year to the Governor of North Carolina, the Environmental Review Commission of the General Assembly of North Carolina, the Governor of Virginia, and the General Assembly of Virginia. (2002-177, s. 1; 2007-495, s. 22.)

§ 77-99. Termination.

The General Assembly of North Carolina may terminate the Commission by repealing this Part. The Commission shall terminate if the General Assembly of Virginia repeals the provisions of the Code of Virginia that are comparable to this Part. (2002-177, s. 1.)

§§ 77-100 through 77-102: Reserved for future codification purposes.

Part 2. Roanoke River Basin Advisory Committee.

§ 77-103. Committee established; membership; terms; vacancies.

(a) The North Carolina Roanoke River Basin Advisory Committee is established as an advisory committee to the North Carolina delegation to the Roanoke River Basin Bi-State Commission. The purpose of the Advisory Committee is to assist the delegation in achieving the purposes of the Commission as set out in G.S. 77-91 and in fulfilling the powers and duties set out in G.S. 77-93.

(b) The Advisory Committee shall be composed of 21 members as follows:

(1) Three members of the House of Representatives whose districts include a part of the North Carolina portion of the Basin, to be appointed by the Speaker of the House of Representatives.

(2) Three members of the Senate whose districts include a part of the North Carolina portion of the Basin, to be appointed by the President Pro Tempore of the Senate.

(3) The member of the United States House of Representatives who represents North Carolina Congressional District 1, if the Representative elects to serve on the Advisory Committee, or that Representative's designee.

(4) The member of the United States House of Representatives who represents North Carolina Congressional District 13, if the Representative elects to serve on the Advisory Committee, or that Representative's designee.

(5) Twelve persons who reside within the North Carolina portion of the Basin, who represent the diversity of interests in the Basin, and who have demonstrated interest, experience, or expertise in water-related Basin issues, appointed as provided in this subdivision. The chief

executive officer of each of the following councils and commissions shall each appoint two persons, one of whom may be the chief executive officer and at least one of whom shall reside in the area served by the council or commission, as members of the Advisory Committee:

a. Piedmont Triad Council of Governments.
b. Northwest Piedmont Council of Governments.
c. Kerr-Tar Regional Council of Governments.
d. Upper Coastal Plain Council of Governments.
e. Mid-East Commission.
f. Albemarle Economic Development Commission.

(6) The Secretary of Environment and Natural Resources or the Secretary's designee.

(c) The terms of each member of the Advisory Committee appointed as provided in subdivision (5) of subsection (b) of this section shall be two years. The term of one of these members shall expire on 1 January of even-numbered years, and the term of the other member shall expire on 1 January of odd-numbered years. A member who is appointed pursuant to subdivision (5) of subsection (b) of this section who attends at least one-half of the meetings of the Advisory Committee held during the member's term may be reappointed to another term, but no member shall serve more than three consecutive terms. The terms of all other members of the Advisory Committee shall begin when the member is appointed and end when the member's term as Representative, Senator, United States Representative, or Secretary ends. An appointment to fill a vacancy on the Advisory Committee shall be for the unexpired balance of the term. A vacancy on the Advisory Committee shall be filled in the same manner as the original appointment. (2002-177, s. 1.)

§ 77-104. Cochairs; meetings.

The Speaker of the House of Representatives and the President Pro Tempore of the Senate shall each appoint one member of the Advisory Committee as Cochair. The Advisory Committee shall meet upon the call of the Cochairs. (2002-177, s. 1.)

§ 77-105. Expenses of members.

Members of the Advisory Committee shall receive no salary or per diem as a result of service on the Advisory Committee but shall receive necessary subsistence and travel expenses in accordance with the provisions of G.S. 120-3.1, 138-5, and 138-6, as applicable. (2002-177, s. 1.)

§ 77-106. Staffing; meeting facilities; assistance by agencies.

The Department of Environment and Natural Resources shall provide staffing and meeting facilities for the Advisory Committee. All agencies of the State shall cooperate with the Advisory Committee and, upon request, shall assist the Advisory Committee in fulfilling its responsibilities. (2002-177, s. 1.)

§§ 77-107 through 77-109: Reserved for future codification purposes.

ARTICLE 8.

River Basins Advisory Commissions.

§ 77-110. Definitions.

The following definitions apply in this Article:

(1) "Commission" or "commissions" means (i) the Catawba/Wateree River Basin Advisory Commission, (ii) the Yadkin/Pee Dee River Basin Advisory Commission, or (iii) both commissions, as required by the context.

(2) "River basin" or "river basins" means (i) that land area designated as the Catawba River Basin pursuant to G.S. 143-215.22G and that land area designated as the Catawba/Wateree River Basin by the South Carolina Department of Health and Environmental Control, (ii) that land area designated as the Yadkin (Yadkin-Pee Dee) River Basin pursuant to G.S. 143-215.22G and that land area designated as the Yadkin/Pee Dee River Basin by the South Carolina Department of Health and Environmental Control, or (iii) both river basins, as required by the context. (2004-83, s. 1.)

Editor's Note. — Session Laws 2004-83, s. 3, provides: "This act shall not be construed to obligate the General Assembly of North Carolina or the General Assembly of South Carolina to appropriate any funds to implement the provisions of this act."

§ 77-111. Commissions established; purposes.

There is established the Catawba/Wateree River Basin Advisory Commission and the Yadkin/Pee Dee River Basin Advisory Commission. The commissions shall be constituted as described in this Article and there shall be a separate commission for each river basin. The commissions shall be permanent bodies composed of members from the State of North Carolina and the State of South Carolina. The purpose of each commission shall be to:

(1) Provide guidance and make recommendations to local, state, and federal legislative and administrative bodies, and to others as it considers necessary and appropriate, for the use, stewardship, and enhancement of the water, and other natural resources, for all citizens within the river basins.

(2) Provide a forum for discussion of issues affecting the river basin's water quantity and water quality, and issues affecting other natural resources.

(3) Promote communication, coordination, and education among stakeholders within the river basins.

(4) Identify problems and recommend appropriate solutions.

(5) Undertake studies related to water quantity, water quality, and other natural resources in the river basin based on existing data available from agencies located in either state.

(6) Determine the optimum approach to comprehensively and collaboratively provide recommendations for integrated river management including, but not limited to, the total assimilative capacity of the river basin. (2004-83, s. 1.)

§ 77-112. Powers and duties.

(a) The authority granted to each commission shall be advisory in nature and in no way shall either commission be construed to have any regulatory authority.

(b) Neither commission shall have any authority to obligate or otherwise bind the State of North Carolina, the State of South Carolina, or any agency or subdivision of either state.

(c) To achieve its purposes, each commission shall have all of the following powers and duties:

(1) To develop rules and procedures for the conduct of its business or as may be necessary to perform its duties and carry out its objectives including, but not limited to, calling meetings and establishing voting procedures. Rules and procedures developed pursuant to this item shall be effective upon an affirmative vote by a majority of the commission members.

(2) To establish standing and ad hoc committees, which shall be constituted in a manner to ensure a balance between recognized interests and states. The commissions shall determine the purpose of each standing or ad hoc committee.

(3) To seek, apply for, accept, and expend gifts, grants, donations, services, and other aid from public or private sources. The commissions may accept or expend funds only after an affirmative vote by a majority of the members of the commissions.

(4) To exercise the powers of a body corporate, including the power to sue and be sued, and adopt and use a common seal and alter the same.

(5) To enter into contracts and execute all instruments necessary or appropriate to achieve the purposes of the commissions.

(6) To designate a fiscal agent.

(7) To perform any lawful acts necessary or appropriate to achieve the purposes of the commissions. (2004-83, s. 1.)

§ 77-113. Membership; terms of office; eligibility for appointment; meetings.

(a) The Catawba/Wateree River Basin Advisory Commission shall be composed of 15 members as follows:

(1) Two members of the North Carolina House of Representatives whose districts include a part of the North Carolina portion of the river basin, to be appointed by the Speaker of the North Carolina House of Representatives.

(2) Two members of the North Carolina Senate whose districts include a part of the North Carolina portion of the river basin, to be appointed by the President Pro Tempore of the North Carolina Senate.

(3) Two members of the South Carolina House of Representatives, to be appointed by the Speaker of the South Carolina House of Representatives.

(4) Two members of the South Carolina Senate, to be appointed by the President Pro Tempore of the South Carolina Senate.

(5) One person from South Carolina representing a water or sewer municipal utility to be appointed by the South Carolina legislative members of the Commission.

(6) One person from a nonprofit land conservation trust operating within the North Carolina portion of the river basin, appointed by the Governor of North Carolina.

(7) The President of Duke Power or the President's designee.

(8) The Chair of the Bi-State Catawba River Task Force or the Chair's designee.

(9) The Chief Executive Officer of Carolina's Partnership, Inc., or the Chief Executive Officer's designee.

(10) One person to represent the following commissions, appointed jointly by the three chief executive officers of the commissions: the Lake

Wylie Marine Commission established pursuant to Article 4 of Chapter 77 of the General Statutes, the Mountain Island Lake Marine Commission established pursuant to Article 6 of Chapter 77 of the General Statutes, and the Lake Norman Marine Commission established pursuant to Chapter 1089 of the 1969 Session Laws.

(11) One member of a lake homeowner's association located on the Catawba/Wateree River whose members reside in South Carolina, to be appointed by the President Pro Tempore of the South Carolina Senate.

(b) The Yadkin/Pee Dee River Basin Advisory Commission shall be composed of 15 members as follows:

(1) Two members of the North Carolina House of Representatives whose districts include a part of the North Carolina portion of the river basin, to be appointed by the Speaker of the North Carolina House of Representatives.
(2) Two members of the North Carolina Senate whose districts include a part of the North Carolina portion of the river basin, to be appointed by the President Pro Tempore of the North Carolina Senate.
(3) Two members of the South Carolina House of Representatives, to be appointed by the Speaker of the South Carolina House of Representatives.
(4) Two members of the South Carolina Senate, to be appointed by the President Pro Tempore of the South Carolina Senate.
(5) One person from South Carolina representing a water or sewer municipal utility to be appointed by the South Carolina legislative members of the Commission.
(6) One person from South Carolina representing the agricultural community to be appointed by the South Carolina legislative members of the Commission.
(7) One person from a water or sewer municipal utility, appointed by the Governor of North Carolina.
(8) The President of Progress Energy or the President's designee.
(9) The President of Alcoa Power Generating, Inc., (APGI) or the President's designee.
(10) The President of Weyerhaeuser or the President's designee.
(11) A representative of the land development industry, whose organization does business within the Yadkin/Pee Dee River Basin and who shall be appointed by the Chair of the Commission.

(c) Each member appointed to the commissions pursuant to subdivisions (1) and (2) of subsections (a) and (b) of this section shall serve at the pleasure of the appointing authority so long as the member remains a Representative or Senator. Each member appointed to the commissions pursuant to subdivisions (3) and (4) of subsections (a) and (b) of this section shall serve as provided by the General Assembly of South Carolina. Each member appointed to the commissions pursuant to subdivisions (7) through (9) of subsection (a) and subdivisions (8) through (10) of subsection (b) of this section shall serve for so long as the member continues in the qualifying position or, if the member is a designee, at the pleasure of the designating authority. Each member appointed to the commissions pursuant to subdivisions (6) and (10) of subsection (a) and subdivisions (7) and (11) of subsection (b) of this section shall serve a term of two years and may be reappointed to serve no more than three consecutive full terms or 84 consecutive months, whichever is greater. The term of a person appointed to the commission pursuant to subdivision (10) of subsection (a) of this section shall expire on 1 January of even-numbered years. The term of a person appointed to the commission pursuant to subdivision (6) of subsection (a) of this section shall expire on 1 January of odd-numbered years. The term of a member who is appointed to the commissions pursuant to subdivisions (5) and (11) of subsection (a) and subdivisions (5) and (6) of subsection (b) of this section shall serve as provided by the General Assembly of South Carolina. An appointment to fill a vacancy on the commissions shall be for the unexpired portion of the term. A vacancy on the commissions shall be filled in the same manner as the original appointment. Members of the commissions who are appointed from or reside in North Carolina may be removed by the Governor of North Carolina for misfeasance, malfeasance, or nonfeasance, as provided in G.S. 143B-13.

(d) The legislative members of each commission may appoint additional members to the commission to serve as advisory members as the legislative members consider necessary.

(e) The members of each commission shall elect a Chair, Vice-Chair, and any other officers they consider necessary and shall determine the length of the term of office, not to exceed two years, of each officer. The Chair and the Vice-Chair shall not be from the same state and the Chair shall be rotated between the State of North Carolina and the State of South Carolina.

(f) Each commission shall meet upon the call of the Chair. A majority of each commission shall constitute a quorum for the transaction of business.

(g) The legislative members of the commissions from each state may meet separately to discuss river basin-related issues affecting their state and may report their findings independently of the commissions. (2004-83, s. 1; 2005-37, s. 1.)

Editor's Note. — Session Laws 2004-83, s. 2, provides: "Notwithstanding the provisions of G.S. 77-113(c), as enacted by Section 1 of this act, the initial term of the member of the Catawba/Wateree River Basin Advisory Commission appointed pursuant to G.S. 77-113(a)(10) shall expire 1 January 2006. Notwithstanding the provisions of G.S. 77-113(c), as enacted by Section 1 of this act, the initial term of the member of the Catawba/Wateree River Basin Advisory Commission appointed pursuant to G.S. 77-113(a)(6) shall expire 1 January 2007. The Catawba/Wateree River Basin Advisory Commission shall submit the first report pursuant to G.S. 77-117, as enacted by Section 1 of this act, on or before 1 October 2005. The Yadkin/Pee Dee River Basin Advisory Commission shall submit the first report pursuant to G.S. 77-117, as enacted by Section 1 of this act, on or before 1 October 2005."

§ 77-114. Staffing; meeting facilities; assistance by agencies.

(a) The North Carolina Department of Environment and Natural Resources and the South Carolina Department of Health and Environmental Control shall provide staff support and facilities to each commission within the existing programs of the respective agencies. Additional staff may be hired or contracted by each commission through funds raised by or provided to it. The duties and compensation of any additional staff shall be determined and fixed by each commission, within available resources.

(b) All agencies of the State of North Carolina and the State of South Carolina shall cooperate with the commissions and, upon request, shall assist each commission in fulfilling its responsibilities. The North Carolina Secretary of Environment and Natural Resources and the Commissioner of the South Carolina Department of Health and Environmental Control or their designees shall each serve as the liaison between their respective state agencies and each commission.

(c) The commissions may obtain information and data upon request from all state officers, agents, agencies, and departments of the State of North Carolina and the State of South Carolina while in discharge of their duties. (2004-83, s. 1.)

§ 77-115. Funding.

(a) Each commission shall annually adopt a budget that shall include the estimated income and expenses of each commission. Funding for the commissions shall be shared and apportioned between the State of North Carolina and the State of South Carolina as each state may provide through its regular appropriations process.

(b) The accounts and records of each commission showing the receipt and disbursement of funds from whatever source derived shall be in the form that the Auditor of North Carolina and the State Auditor of South Carolina prescribe. The accounts and records of each commission shall be subject to an annual audit by the Auditor of North Carolina and the State Auditor of South Carolina or their legal representatives. The cost of the annual audits shall be borne by each commission. The results of the audits shall be delivered to the Joint Legislative Commission on Governmental Operations of the General Assembly of North Carolina and to the General Assembly of South Carolina as the General Assembly of South Carolina shall provide. (2004-83, s. 1.)

§ 77-116. Compensation and expenses of members of the commissions.

(a) Members of the commissions who are appointed from or reside in North Carolina shall receive no salary for their service on the commissions but may be paid, within available resources, per diem, subsistence, and travel expenses as follows:

(1) Members of the commissions who are members of the General Assembly at the rate established in G.S. 120-3.1.

(2) Members of the commissions who are officials or employees of the State or of local government agencies at the rate established in G.S. 138-6.

(3) All other members of the commissions at the rate established in G.S. 138-5.

(b) Members of the commissions who are appointed from or reside in South Carolina shall be compensated as provided by the General Assembly of South Carolina.

(c) All expenses shall be paid from funds appropriated or otherwise available to the commissions. (2004-83, s. 1.)

§ 77-117. Annual report.

The commissions shall submit annual reports, including any recommendations, on or before 1 October of each year to the Governor of North Carolina, the Environmental Review Commission of the General Assembly of North Carolina, the Governor of South Carolina, and the General Assembly of South Carolina, as the Governor, the General Assembly of South Carolina, or the Commissioner of the South Carolina Department of Health and Environmental Control shall provide. (2004-83, s. 1.)

Editor's Note. — Session Laws 2004-83, s. 2, provides: "Notwithstanding the provisions of G.S. 77-113(c), as enacted by Section 1 of this act, the initial term of the member of the Catawba/Wateree River Basin Advisory Commission appointed pursuant to G.S. 77-113(a)(10) shall expire 1 January 2006. Notwithstanding the provisions of G.S. 77-113(c), as enacted by Section 1 of this act, the initial term of the member of the Catawba/Wateree River Basin Advisory Commission appointed pursuant to G.S. 77-113(a)(6) shall expire 1 January 2007. The Catawba/Wateree River Basin Advisory Commission shall submit the first report pursuant to G.S. 77-117, as enacted by Section 1 of this act, on or before 1 October 2005. The Yadkin/Pee Dee River Basin Advisory Commission shall submit the first report pursuant to G.S. 77-117, as enacted by Section 1 of this act, on or before 1 October 2005.

§ 77-118. Termination.

The General Assembly of North Carolina may terminate the commissions by repealing this Article. The commissions shall terminate if the General Assembly of South Carolina repeals the provisions of the South Carolina Code of Laws that are comparable to this Article. (2004-83, s. 1.)

§§ 77-119 through 77-124: Reserved for future codification purposes.

Article 9.

Clean Coastal Water and Vessel Act.

(Effective July 1, 2010)

§ 77-125. (Effective July 1, 2010) Definitions.

The following definitions apply in this Article:

(1) Department. — Department of Environment and Natural Resources.

(2) Large vessel marina. — A marina that has docking facilities and has more than 10 wet slips for vessels of 26 feet or more that have marine sanitation devices. The term includes privately and publicly owned marinas and anchorages.

(3) Marine sanitation device. — As defined in 33 U.S.C. § 1322. The term does not include "portable toilets" as defined in this act.

(4) Portable toilet. — A self-contained mobile toilet facility and holding tank for sewage.

(5) Pumpout facility. — The term includes stations affixed permanently to a dock, mobile stations mounted to a golf cart or hand truck, direct slipside connections, pumpout vessels, and tanker trucks.

(6) Sewage. — Treated or untreated human waste. As used in this act, the term includes effluent produced or held by any type of marine sanitation device.

(7) Vessel. — As defined in G.S. 75A-2. (2009-345, s. 1.)

Editor's Note. — Session Laws 2009-345, s. 3, makes this Article effective July 1, 2010, and applicable to offenses committed on or after that date.

Session Laws 2009-345, s. 2, provides: "The Division of Coastal Management of the Department of Environment and Natural Resources shall design and implement a pilot program in New Hanover County to begin phasing in the requirements of Section 1 of this act. The Department shall report to the Environmental Review Commission by December 1, 2009, regarding the design of the pilot program and shall implement the pilot program no later than January 1, 2010. The Department of Environment and Natural Resources shall report to the Environmental Review Commission by March 1, 2010, regarding the implementation of the pilot project."

§ 77-126. (Effective July 1, 2010) Marina pumpout facilities and services required in certain areas; marinas and local government may apply for grant funds.

(a) The owner or operator, as appropriate, of any large vessel marina that is located on coastal waters designated as a no discharge zone by the Environmental Protection Agency or that is located in a county or municipality that has adopted a resolution to petition the Environmental Protection Agency for a no discharge zone designation shall either (i) install and maintain an operational pumpout facility at the marina that is available to customers patronizing the marina or (ii) contract with an outside service provider to provide pumpout services on a regular basis to the marina.

(b) The owner or operator, as appropriate, of a large vessel marina may apply for any private, State, or federal grant funds that are available for the purpose of assisting with the cost of installing and maintaining a pumpout facility. A county or municipality may also apply for any private, State, or federal grant funds that are available for the purpose of assisting with the cost of installing and maintaining a pumpout facility. (2009-345, s. 1.)

§ 77-127. (Effective July 1, 2010) Department of Environment and Natural Resources establish pumpout facility criteria; inspection of pumpout facilities and vessels docked or moored at a marina.

(a) The Department of Environment and Natural Resources shall establish appropriate criteria for pumpout facilities and pumpout services provided at large vessel marinas that offer docking services to the general public. The criteria shall include requirements that the facility or services be available to the public, the pumpout facility be open during normal hours, and the pumpout facility be used for its intended purpose. The criteria also shall include a requirement that these marinas maintain records regarding the pumpout facility or services. The Department also shall develop guidelines for inspections of pumpout facilities at such marinas and of vessels that are docked or moored at these marinas.

(b) The Department also shall establish appropriate criteria for pumpout facilities and pumpout services provided at privately owned large vessel marinas that do not offer docking services to the general public. The criteria shall include requirements that the facility or services be made reasonably available to members of the private marina and the pumpout facility be used for its intended purpose. The criteria also shall include a requirement that these marinas maintain records regarding the pumpout facility or services. The Department also shall develop guidelines for inspections of pumpout facilities at such marinas and of vessels that are docked or moored at these marinas. (2009-345, s. 1.)

§ 77-128. (Effective July 1, 2010) Vessel owner and operator required to keep log of pumpout dates.

(a) Any owner or operator of a vessel that has a marine sanitation device shall maintain a record of the date of each pumpout of the marine sanitation device and the location of the pumpout facility. Each record shall be maintained for a period of one year from the date of the pumpout.

(b) A violation of this section is punishable as a Class 3 misdemeanor. No civil penalty shall be assessed under G.S. 77-130 for a violation of this section. (2009-345, s. 1.)

§ 77-129. (Effective July 1, 2010) No discharge of treated or untreated sewage in coastal waters; duty of marina owner or operator to report unlawful discharge.

(a) No person shall discharge treated or untreated sewage into coastal waters, including effluent produced or held by any type of marine sanitation device into coastal waters. The owner or operator of a vessel with a marine sanitation device shall keep the overboard waste discharge valves of the device secure by acceptable methods set forth under 33 C.F.R. § 159.7(b) so as to prevent the discharge of treated or untreated sewage, except when lawfully discharging sewage at a pumpout facility. A violation of this section is punishable as a Class 1 misdemeanor and also may be assessed a civil penalty pursuant to G.S. 77-130.

(b) If the owner or operator of a large vessel marina knows that the owner or operator of any vessel docked or moored at the marina knowingly and unlawfully discharged sewage, including effluent produced or held by a marine sanitation device, in coastal waters in violation of this section, then the marina owner or operator shall report the unlawful discharge to the appropriate law enforcement agency. A marina owner or operator who fails to report an unlawful discharge pursuant to this subsection may be assessed a civil penalty pursuant to G.S. 77-130. (2009-345, s. 1.)

§ 77-130. (Effective July 1, 2010) Enforcement.

(a) The following officers have authority to enforce this Article and to inspect a large vessel marina or vessel subject to this Article:

(1) Wildlife protectors.
(2) Marine fisheries inspectors.
(3) Any sworn local law enforcement officer with jurisdiction to enforce the laws in the county or municipality in which the marina or vessel is located.
(4) United States Coast Guard personnel.

(b) Officers enforcing the provisions of this Article shall report violations to the Department.

(c) Unless provided otherwise by this Article, a civil penalty of not more than ten thousand dollars ($10,000) may be assessed by the Secretary of Environment and Natural Resources against any person who violates this Article. If any action or failure for which a penalty may be assessed under this section is continuous, the Secretary of Environment and Natural Resources may assess a penalty not to exceed ten thousand dollars ($10,000) per day for so long as the violation continues. (2009-345, s. 1.)

§ 77-131. (Effective July 1, 2010) Application of Article.

The provisions of this Article apply only to the following:

(1) A large vessel marina that is located on coastal waters designated by the Environmental Protection Agency as a no discharge zone or that is located in a county or municipality that has adopted a resolution to petition the Environmental Protection Agency for a no discharge zone designation.
(2) A vessel in coastal waters that are either designated as a no discharge zone or are included in a petition to the Environmental Protection Agency to be designated as a no discharge zone unless the petition has been denied by the Environmental Protection Agency. (2009-345, s. 1.)

§ 77-132. (Effective July 1, 2010) Rule-making authority.

The Department shall adopt rules to implement this Article. (2009-345, s. 1.)

Chapter 78.

Securities Law.

§§ 78-1 through 78-25: Repealed by Session Laws 1973, c. 1380.

Cross References. — For present provisions relating to the North Carolina Securities Act, see G.S. 78A-1 et seq.

Chapter 78A.

North Carolina Securities Act.

Article 1.

Title and Definitions.

Sec.
78A-1. Title.
78A-2. Definitions.
78A-3 through 78A-7. [Reserved.]

Article 2.

Fraudulent and Other Prohibited Practices.

78A-8. Sales and purchases.
78A-9. Misleading filings.
78A-10. Unlawful representations concerning registration or exemption.
78A-11. Unlawful telephone rooms.
78A-12. Manipulation of market.
78A-13. Disclosures required in offer and sale of viaticals.
78A-14. Advertising of Viatical Settlement Contracts.
78A-15. [Reserved.]

Article 3.

Exemptions.

78A-16. Exempt securities.
78A-17. Exempt transactions.
78A-18. Denial and revocation of exemptions.
78A-19 through 78A-23. [Reserved.]

Article 4.

Registration and Notice Filing Procedures of Securities.

78A-24. Registration requirement.
78A-25. Registration by notification.
78A-26. Registration by coordination.
78A-27. Registration by qualification.
78A-28. Provisions applicable to registration generally.
78A-29. Denial, suspension, and revocation of registration.
78A-30. Application to exchange securities.
Sec.
78A-31. Notice filings for securities covered under federal law.
78A-32 through 78A-35. [Reserved.]

Article 5.

Registration of Dealers and Salesmen.

78A-36. Registration requirement.
78A-36.1. Limited registration of Canadian dealers and salesmen.
78A-37. Registration procedure.
78A-38. Post-registration provisions.
78A-39. Denial, revocation, suspension, censure, cancellation, and withdrawal of registration.
78A-40. Alternative methods of registration.
78A-41 through 78A-44. [Reserved.]

Article 6.

Administration and Review.

78A-45. Administration of Chapter.
78A-46. Investigations and subpoenas.
78A-47. Injunctions; cease and desist orders.
78A-48. Judicial review of orders.
78A-49. Rules, forms, orders, and hearings.
78A-50. Administrative files and opinions.
78A-51 through 78A-55. [Reserved.]

Article 7.

Civil Liabilities and Criminal Penalties.

78A-56. Civil liabilities.
78A-57. Criminal penalties.
78A-58. Obstruction of investigation.
78A-59 through 78A-62. [Reserved.]

Article 8.

Miscellaneous Provisions.

78A-63. Scope of the Chapter; service of process.
78A-64. Statutory policy.
78A-65. Repeal and saving provisions.
78A-66. Jurisdictional limitations.

ARTICLE 1.

Title and Definitions.

§ 78A-1. Title.

This Chapter shall be known and may be cited as the North Carolina Securities Act. (1925, c. 190, s. 1; 1927, c. 149, s. 1; 1943, c. 104, s. 1; 1973, c. 1380.)

Editor's Note. — Session Laws 1973, c. 1380 repealed former Chapter 78, Securities Law, and enacted present Chapter 78A in its place. Where appropriate, the historical citations to the sections of repealed Chapter 78 have been added to similar sections in new Chapter 78A. Many of the cases cited under the sections of Chapter 78A were decided under corresponding provisions of former Chapter 78.

Legal Periodicals. — For article on blue sky laws, see 1 N.C.L.Rev. 27 (1923).

For article discussing the history of blue sky laws, summarizing the various statutes, and discussing the North Carolina cases, see 3 N.C.L. Rev. 150 (1925).

For comment on limited offerings, the federal securities code and increased burdens on the North Carolina Securities Act, see 15 Wake Forest L. Rev. 506 (1979).

For article, "A Model for Determining the Excessive Trading Element in Churning Claims," see 68 N.C.L. Rev. 327 (1990).

For comment, "Fraud-on-the-Market Theory and Thinly-Traded Securities Under Rule 10b-5: How Does a Court Decide If a Stock Market Is Efficient?," see 25 Wake Forest L. Rev. 223 (1990).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under former Chapter 78.*

Constitutionality. — It is within the police power of the State to pass a statute for the protection of its citizens against the sale to them of worthless shares of stock in speculative companies in the exercise of a power in the State reserved from that grant to the federal government, and such a statute does not contravene either the State or federal Constitution. State ex rel. Smith v. Fidelity & Deposit Co., 191 N.C. 643, 132 S.E. 792 (1926), error dismissed, 275 U.S. 505, 48 S. Ct. 156, 72 L. Ed. 396 (1927).

Chapter Is Within Police Power. — The regulation of the sale of securities for the protection of the public is within the police power of the State. State v. Allen, 216 N.C. 621, 5 S.E.2d 844 (1939).

Application of Chapter. — This Chapter applies where money is invested in stock, securities, profit-sharing agreements, etc., with the purpose of securing an income from the employment of the money, and a contract whereby the owner of a copyright system gives the exclusive right to another to operate the system in certain counties, and in return is to receive a percentage of the gross receipts from the operation of the system, with further provision for a division of net profit from sales or contracts written by either party, does not contemplate the placing of money in a way to secure an income from its employment, but the earning of a portion of the gross receipts in return for individual services, and the agreement is not a profit-sharing scheme or investment contract within the intent and meaning of the statute. State v. Heath, 199 N.C. 135, 153 S.E. 855 (1930).

The purpose of "Blue Sky Laws" is to protect the general public from "wildcat" organizers, promoters and their agents, whether foreign or domestic, preying upon an unsuspecting and confiding public by selling "blue sky stock," without obtaining license and giving bond. State ex rel. Smith v. Fidelity & Deposit Co., 191 N.C. 643, 132 S.E. 792 (1926), error dismissed, 275 U.S. 505, 48 S. Ct. 156, 72 L. Ed. 396 (1927).

Cited in Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985); Mastrom, Inc. v. Continental Cas. Co., 78 N.C. App. 483, 337 S.E.2d 162 (1985); Ward v. Zabady, 85 N.C. App. 130, 354 S.E.2d 369 (1987); Heath v. Craighill, Rendleman, Ingle & Blythe, 97 N.C. App. 236, 388 S.E.2d 178 (1990); State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993); Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994).

OPINIONS OF ATTORNEY GENERAL

No Precedence over Administrative Procedure Act. — The provisions of this Chapter are not stated with the specificity and particularity sufficient to take precedence over any similar provisions of the Administrative Procedure Act, G.S. 150B-1 et seq., which might conceivably apply to the actions and proceedings addressed by the Securities Act. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

Contested Cases. — Determinations made by the securities administrator pursuant to his statutory authority are considered "contested cases" within the meaning of G.S. 150B-2(2). Such determinations control or restrict the activities of dealers, salesmen, or issuers of securities, but these determinations only become "contested cases" if the administrator's action is "disputed" by the subject of such determination. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

§ 78A-2. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Administrator" means the Secretary of State.

(2) "Dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Dealer" does not include:

- a. A salesman,
- b. A bank, savings institution, or trust company,
- c. A person who has no place of business in this State if
  - 1. He effects transactions in this State exclusively with or through (i) the issuers of the securities involved in the transactions, (ii) other dealers, or (iii) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or
  - 2. In the case of a person registered as a dealer with the Securities and Exchange Commission under the Securities Exchange Act of 1934 and in one or more states, during any period of 12 consecutive months he does not effect more than 15 purchases or sales in this State in any manner with persons other than those specified in clause 1, whether or not the dealer or any of the purchasers or sellers is then present in this State, or
- d. An issuer if
  - 1. The security is exempted under subdivisions (1), (2), (3), (4), (5), (7), (9), (10), (11), (13), or (14) of G.S. 78A-16, or the security is a security covered under federal law, or the transaction is exempted under G.S. 78A-17, except for G.S. 78A-17(19) if the security is a viatical settlement contract, or the transaction is in a security covered under federal law, and such exemption has not been denied or revoked under G.S. 78A-18, or
  - 2. The security is registered under this Chapter and it is offered and sold through a registered dealer, or
  - 3. All of the following conditions are met: (i) No commission or other remuneration is paid or given directly or indirectly for soliciting any prospective purchaser in this State; (ii) the total amount of the offering, both within and without this State, does not exceed two million five hundred thousand dollars ($2,500,000); and (iii) the total number of purchasers, both within and without this State, does not exceed 100. Provided, however, the Administrator may by rule or order waive the condition imposed by subdivision (iii) hereof; or
  - 4. The security is issued by an open-end management company that is registered under the Investment Company Act of 1940 and so long as no sales load is paid or given, directly or indirectly.
- e. A person who acts as a business broker with respect to a transaction involving the offer or sale of all of the stock or other equity interests in any closely held corporation provided that such stock or other equity interest is sold to no more than one person, as that term is defined herein.
- f. An individual who represents an issuer in effecting transactions in a security described in sub-subdivision (2)d. of this section or a

security covered under federal law, provided no commission or other special remuneration is paid or given directly or indirectly for soliciting any prospective purchaser in this State.

(2a) "Entity" includes a corporation, joint-stock company, limited liability company, business trust, limited partnership or other partnership in which the interests of the partners are evidenced by a security, trust in which the interests of the beneficiaries are evidenced by a security, any other unincorporated organization in which two or more persons have a joint or common economic interest evidenced by a security, and government or political subdivision of a government.

(3) "Fraud," "deceit," and "defraud" are not limited to common-law deceit.

(4) "Guaranteed" means guaranteed as to payment of principal, interest, dividends, or other distributions.

(5) "Issuer" means any person who issues or proposes to issue any security, except that

a. With respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or persons performing similar functions or of the fixed, restricted-management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued; and

b. With respect to certificates of interest or participation in oil, gas, or mining titles or leases or in payments out of production under such titles or leases, there is not considered to be any "issuer."

c. With respect to a viatical settlement contract, "issuer" means a person involved in creating, offering, transferring, or selling to an investor any interest in a viatical settlement contract, including, but not limited to, fractional or pooled interests.

(6) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

(7) "Person" means an individual, an entity, a partnership in which the interests of the partners are not evidenced by a security, a trust in which the interests of the beneficiaries are not evidenced by a security, or an unincorporated organization.

(8)a. "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.

b. "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

c. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value.

d. A purported gift of assessable stock or other ownership interest obligating the owner to make future payments is considered to involve an offer and sale.

e. Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.

f. The terms defined in this subdivision and the term "purchase" as used in this Chapter do not include any of the following:

1. Any bona fide loan, pledge, or other transaction creating a bona fide security interest.
2. Any stock split and any security dividend or distribution, whether the entity distributing the dividend or distribution is the issuer of the security or not, if nothing of value is given by security holders for the dividend or distribution other than the surrender of a right to a cash or property dividend or distribution when each security holder may elect to take the dividend or distribution in cash or property or in securities.

3., 4. Repealed by Session Laws 2001-201, s. 6, effective October 1, 2001.

(9) "Salesman" means any individual other than a dealer who represents a dealer in effecting or attempting to effect purchases or sales of securities. "Salesman" does not include an individual who represents a dealer in effecting transactions in this State limited to those transactions described in section 15(h)(2) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(h)(2)). A partner, executive officer, or director of a dealer, or a person occupying a similar status or performing similar functions, is a salesman only if that person otherwise comes within this definition.

(10) "Securities Act of 1933," "Securities Exchange Act of 1934," "Public Utility Holding Company Act of 1935," "Investment Company Act of 1940," and "Internal Revenue Code" mean the federal statutes of those names as amended before or after April 1, 1975.

(11) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract including without limitation any investment contract taking the form of a whiskey warehouse receipt or other investment of money in whiskey or malt beverages; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under a title or lease; viatical settlement contract or any fractional or pooled interest in a viatical settlement contract; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy, funding agreement, as defined in G.S. 58-7-16, or annuity contract under which an insurance company promises to pay (i) a fixed sum of money either in a lump sum or periodically for life or for some other specified period, or (ii) benefits or payments or value that vary so as to reflect investment results of any segregated portfolio of investments or of a designated separate account or accounts in which amounts received or retained in connection with a contract have been placed if the delivering or issuing insurance company has currently satisfied the Commissioner of Insurance that it is in compliance with G.S. 58-7-95.

(11a) "Security covered under federal law" means any security that is a covered security under section 18(b) of the Securities Act of 1933 (15 U.S.C. § 77r(b)) or rules or regulations adopted under that section.

(12) "State" means any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico.

(13) "Viatical settlement contract" means an agreement for the purchase, sale, assignment, transfer, devise, or bequest of all or any portion of

the death benefit or ownership of a life insurance policy or contract for consideration which is less than the expected death benefit of the life insurance policy or contract. "Viatical settlement contract" does not include:

a. The assignment, transfer, sale, devise, or bequest of a death benefit of a life insurance policy or contract made by the viator to an insurance company or to a viatical settlement provider or broker licensed pursuant to the Viatical Settlements Act (Part 5 of Article 58 of Chapter 58 of the General Statutes);

b. The assignment of a life insurance policy or contract to a bank, savings bank, savings and loan association, credit union, or other licensed lending institution as collateral for a loan; or

c. The exercise of accelerated benefits pursuant to the terms of a life insurance policy or contract and consistent with applicable law. (1925, c. 190, s. 2; 1927, c. 149, s. 2; 1933, c. 432; 1943, c. 104, ss. 2, 3; 1955, c. 436, s. 1; 1973, c. 1380; 1983, c. 817, ss. 1-3; 1987, c. 849, s. 1; 1989, c. 12, s. 1; 1993 (Reg. Sess., 1994), c. 600, s. 3; 1995, c. 509, s. 35; 1997-419, ss. 1-4; 2001-201, ss. 2, 3, 4, 5, 6; 2001-436, s. 6.)

CASE NOTES

Meaning of "Sale". — See Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

The definition of "sale" under paragraph (8)a of this section does not include the mere signing of a stock certificate by a corporate officer. State v. Williams, 98 N.C. App. 274, 390 S.E.2d 746 (1990).

The legislature has shown no intent to include both principal and agent transactions within the word "sale." Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

Sale Not Shown. — Actions of defendant, an attorney who drafted articles of incorporation and served as an original director and officer of corporation, did not constitute a "sale" and defendant was not a "seller," where there was neither evidence at trial that he was the owner of the security, nor that he was the one who successfully solicited the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner. State v. Williams, 98 N.C. App. 274, 390 S.E.2d 746, cert. denied, 327 N.C. 144, 394 S.E.2d 184 (1990).

Cattle feeding program involving the buying, financings, caring for and sale of cattle for investors, which was open to any interested investors and advertised in national publications, was an investment contract which was not entitled to a private placement exemption and hence a security within the meaning of the applicable federal and state securities laws. Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986), aff'd, 833 F.2d 1006 (4th Cir. 1987).

Value of Property Does Not Affect Definition as a Security. — In a prosecution for violation of the Capital Issues Law the fact that the property sold is of little value is irrelevant to the question of whether the property is a security as defined by the statute. State v. Allen, 216 N.C. 621, 5 S.E.2d 844 (1939).

No Transaction Involving a "Security" Shown. — Where defendant falsely told the victims that he would invest their money in stock options and subsequently falsely told the victims that he had invested their money in stock options when, in fact, defendant never actually purchased or sold a "security" as defined by subdivision (11), the State failed to present evidence linking defendant's offer to invest money for the victims to any participation of defendant in an actual transaction involving a "security" and defendant's misconduct (offering to transact business) did not fall within the scope of G.S. 78A-36. State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

Cited in Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994).

§§ 78A-3 through 78A-7: Reserved for future codification purposes.

ARTICLE 2.

Fraudulent and Other Prohibited Practices.

§ 78A-8. Sales and purchases.

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

(1) To employ any device, scheme, or artifice to defraud,
(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or,
(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. (1973, c. 1380.)

Legal Periodicals. — For note, "Skinner v. E.F. Hutton & Co.: North Carolina's Caveat Tipper Exception to the In Pari Delicto Doctrine," see 64 N.C.L. Rev. 1250 (1986).

CASE NOTES

Federal Law Paralleled. — The North Carolina securities anti-fraud provision closely parallels SEC Rule 10b-5. Among the fundamental purposes underlying § 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and SEC Rule 10b-5 are to promote free and open public securities markets, to protect the investing public from inequities in trading, and to insure that the investing public should be subject to identical market risks and allowed equal access to the rewards of participation in securities transactions. These securities laws seek to protect the innocent public who is not privy to selectively disclosed tips. Skinner v. E.F. Hutton & Co., 70 N.C. App. 517, 320 S.E.2d 424, modified on other grounds, 314 N.C. 267, 333 S.E.2d 236 (1985).

This section closely parallels the S.E.C. Rule 10(b)-5 antifraud provision, which is designed to ensure that investors are aware of market risks. State v. Williams, 98 N.C. App. 274, 390 S.E.2d 746 (1990).

The scope of this section applies only to those persons who sell or offer to sell a security. State v. Williams, 98 N.C. App. 274, 390 S.E.2d 746, cert. denied, 327 N.C. 144, 394 S.E.2d 184 (1990).

"Purchase". — Although "purchase" is not defined in this Chapter, it is generally defined as obtaining merchandise by paying money or its equivalent. State v. Williams, 98 N.C. App. 274, 390 S.E.2d 746, cert. denied, 327 N.C. 144, 394 S.E.2d 184 (1990).

Stock Options Are Securities. — The term "security" includes the offer, sale, or purchase of stock options. State v. Davidson, 131 N.C. App. 276, 506 S.E.2d 743 (1998).

Applicability of Subdivision (2). — Subdivision (2) of this section applies only when the alleged material statements are made or omitted in connection with the offer, sale or purchase of any security. State v. Williams, 98 N.C. App. 274, 390 S.E.2d 746, cert. denied, 327 N.C. 144, 394 S.E.2d 184 (1990).

"Tipper" and "Tippee" Defined. — Federal law has defined a "tipper" as a person who has possession of material inside information and who makes selective disclosure of such information for trading or other personal purposes. A "tippee" is one who receives such information from a "tipper." Skinner v. E.F. Hutton & Co., 70 N.C. App. 517, 320 S.E.2d 424, modified on other grounds, 314 N.C. 267, 333 S.E.2d 236 (1985).

Use of Securities Laws to Stop Both Tippers and Tippees. — Although heretofore securities laws promulgated to protect against the disclosure of "inside information" have primarily been used to stop tippers, so as to most effectively insure that the innocent investing public is protected, the unscrupulous tippee as well as the tipper must be deterred. Skinner v. E.F. Hutton & Co., 70 N.C. App. 517, 320 S.E.2d 424, modified on other grounds, 314 N.C. 267, 333 S.E.2d 236 (1985).

The concept of selective disclosure of inside information assumes the fact that the tipper will tell a tippee who will act on the information and unfairly profit by it at the public's expense. The investing public will more readily be protected if those tippees are discouraged from acting on any inside information illegally disclosed. It is also more probable that inside trading will stop if tippers realize the senselessness of risking criminal prosecution for disclosing inside information to a tippee who will not use the information. Moreover, there should be no opportunity in the scheme of securities laws' enforcement for the tippee to weigh the reliability and the value of the tip against the amount he may be able to recover in a lawsuit against the tipper for his disclosure of false inside information, especially when that tippee could conceivably recover treble damages under the Unfair Trade Practice Act. Skinner v. E.F. Hutton & Co., 70 N.C. App. 517, 320 S.E.2d 424, modified on other grounds, 314 N.C. 267, 333 S.E.2d 236 (1985).

Investor's Involvement in Constructing Offer Made to Him Did Not Bar Recovery. — Fact that investor in limited partnership was somehow involved in the construction of the terms of the offer made to him did not bar recovery in suit for recession of securities, violation of registration requirements and fraud.

Walker v. Montclaire Hous. Partners, 736 F. Supp. 1358 (M.D.N.C. 1990).

Cattle feeding program involving the buying, financings, caring for and sale of cattle for investors, which was open to any interested investors and advertised in national publications, was an investment contract which was not entitled to a private placement exemption and hence a security within the meaning of the applicable federal and state securities laws. Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986), aff'd, 833 F.2d 1006 (4th Cir. 1987).

To determine if an omitted fact is material under this section, evidence must be presented that there is a substantial likelihood that a reasonable purchaser would consider it important in deciding whether or not to purchase. State v. Williams, 98 N.C. App. 274, 390 S.E.2d 746, cert. denied, 327 N.C. 144, 394 S.E.2d 184 (1990).

Evidence Sufficient for Conviction. — The evidence supported defendant's conviction for making material misrepresentations and omissions in connection with the sale of securities, where the defendant convinced elderly investors to withdraw funds from a legitimate investment company and placed the funds in his own accounts and used them for risky investments. State v. Davidson, 131 N.C. App. 276, 506 S.E.2d 743 (1998).

Cited in Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978); Weft, Inc. v. G.C. Inv. Assocs., 630 F. Supp. 1138 (E.D.N.C. 1986); Simms Inv. Co. v. E.F. Hutton & Co., 688 F. Supp. 193 (M.D.N.C. 1988); Simpson v. Specialty Retail Concepts, Inc., 149 F.R.D. 94 (M.D.N.C. 1993); Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994); Jay Group, Ltd. v. Glasgow, 139 N.C. App. 595, 534 S.E.2d 233, 2000 N.C. App. LEXIS 975 (2000).

§ 78A-9. Misleading filings.

It is unlawful for any person to make or cause to be made, in any document filed with the Administrator or in any proceeding under this Chapter, any statement which is, at the time and in the light of the circumstances under which it is made false or misleading in any material respect. (1973, c. 1380.)

§ 78A-10. Unlawful representations concerning registration or exemption.

(a) Neither (i) the fact that an application for registration under Article 5 or a registration statement under Article 4 has been filed nor (ii) the fact that a person or security is effectively registered constitutes a finding by the Administrator that any document filed under this Chapter is true, complete, and not misleading. Neither any such fact nor the fact that an exemption or exception is available for a security or a transaction means that the Administrator has passed in any way upon the merits or qualifications of, or recommended or given approval to, any person, security, or transaction.

(b) It is unlawful to make, or cause to be made, to any prospective purchaser, customer, or client any representation inconsistent with subsection (a). (1973, c. 1380.)

§ 78A-11. Unlawful telephone rooms.

It is unlawful for any person to willfully manage, supervise, control, or own, directly or indirectly, either alone or in association with others, any telephone room in this State. For purposes of this section, "telephone room" means an enterprise in which two or more persons engage in telephone communications with members of the public using two or more telephones at one location, or more than one location in a common scheme or enterprise, in violation of G.S. 78A-8 or G.S. 78A-12. It is an affirmative defense to a prosecution under this section that the person acted in good faith and did not directly or indirectly induce an act or acts constituting a violation of G.S. 78A-8 or G.S. 78A-12. (1991, c. 456, s. 1.)

§ 78A-12. Manipulation of market.

(a) In addition to the prohibitions of G.S. 78A-8, it is unlawful for any person to do any of the following:

(1) Willfully quote a fictitious price with respect to a security.

(2) Effect a transaction in a security which involves no change in the beneficial ownership of the security, for the purpose of creating a false or misleading appearance of active trading in a security, or a false or misleading appearance of activity with respect to the market for the security.

(3) Enter an order for the purchase of a security with the knowledge that, at substantially the same time, an order of substantially the same size, and at substantially the same price, for the sale of the security has been, or will be, entered by or for the same person, or an affiliated person, for the purpose of creating a false or misleading appearance of active trading in a security, or a false or misleading appearance of activity with respect to the market for the security.

(4) Enter an order for the sale of a security with knowledge that, at substantially the same time, an order of substantially the same size, and at substantially the same price, for the purchase of the security has been, or will be, entered by or for the same person, or an affiliated person, for the purpose of creating a false or misleading appearance of active trading in a security, or a false or misleading appearance of activity with respect to the market for the security.

(5) Employ any other deceptive or fraudulent device, scheme, or artifice to manipulate the market in a security, including the issuance, with the intent to deceive or defraud, of analyses, reports, or financial statements that are false or misleading in any material respect.

(b) A transaction effected in compliance with the applicable provisions of the Securities Exchange Act of 1934 and the rules and regulations of the Securities and Exchange Commission thereunder is not manipulation of the market under subsection (a) of this section. (1991, c. 456, s. 1; 2003-413, s. 1.)

§ 78A-13. Disclosures required in offer and sale of viaticals.

(a) Disclosures Required Prior to Signing of Purchase Agreement or Transfer of Consideration. — The following disclosures shall be required in the offer and sale of viatical settlement contracts, whether such offer and sale is pursuant to an exemption from registration or pursuant to the registration of such securities, and shall be conspicuously displayed in each viatical settlement purchase agreement or in a separate document signed by the viatical settlement purchaser and by the issuer or its sales agent:

(1) Disclosures prior to payment of consideration. — On or before the date the viatical settlement purchaser remits consideration pursuant to the purchase agreement, the viatical settlement purchaser shall be provided the following written disclosures:

a. The name, principal business, and mailing addresses, and telephone number of the issuer;

b. The suitability standards for prospective purchasers as set forth by rule or order promulgated by the Administrator;

c. A description of the issuer's type of business organization and the state in which the issuer is organized or incorporated;

d. A brief description of the business of the issuer;

e. If the issuer retains ownership or becomes the beneficiary of the insurance policy, an audit report from an independent certified public accountant together with a balance sheet and related statements of income, retained earnings, and cash flows that reflect the issuer's financial position, the results of the issuer's operations, and the issuer's cash flows as of a date within six months before the date of the initial issuance of the securities described in this subdivision. The financial statements shall be prepared in conformity with generally accepted accounting principles. If the date of the audit report is more than 120 days before the date of the initial issuance of the securities described in this subdivision, the issuer shall provide unaudited interim financial statements;

f. The names of all directors, officers, partners, members, or trustees of the issuer;

g. A description of any order, judgment, or decree that is final as to the issuing entity of any state, federal, or foreign governmental agency or administrator, or of any state, federal, or foreign court of competent jurisdiction (i) revoking, suspending, denying, or censuring, for cause, any license, permit, or other authority of the issuer or of any director, officer, partner, member, trustee, or person owning or controlling, directly or indirectly ten percent (10%) or more of the outstanding interest or equity securities of the issuer, to engage in the securities, commodities, franchise, insurance, real estate, or lending business or in the offer or sale of securities, commodities, franchises, insurance, real estate, or loans, (ii) permanently restraining, enjoining, barring, suspending, or censuring any such person from engaging in or continuing any conduct, practice, or employment in connection with the offer or sale of securities, commodities, franchises, insurance, real estate, or loans, (iii) convicting any such person of, or pleading nolo contendere by any such person to, any felony or misdemeanor involving a security, commodity, franchise, insurance, real estate, or loan, or any aspect of the securities, commodities, franchise, insurance, real estate, or lending business, or involving dishonesty, fraud, deceit, embezzlement, fraudulent conversion, or misappropriation of property, or (iv) holding any such person liable in a civil action involving breach of a fiduciary duty, fraud, deceit, embezzlement, fraudulent conversion, or misappropriation of property. This subdivision does not apply to any order, judgment, or decree that has been vacated or overturned or is more than 10 years old;

h. Notice of the purchaser's right to rescind or cancel the investment and receive a refund;

i. A statement to the effect that any projected rate of return to the purchaser from the purchase of a viatical settlement contract or any fractionalized or pooled interest therein is based on an estimated life expectancy for the person insured under the life insurance policy; that the return on the purchase may vary substantially from the expected rate of return based upon the actual life expectancy of the insured that may be less than, may be equal to, or may greatly exceed the estimated life expectancy; and that the rate of return would be higher if the actual life expectancy were less than, and lower if the actual life expectancy were greater than, the estimated life expectancy of the insured at the time the viatical settlement contract was closed;

j. A statement that the purchaser should consult with his or her tax advisor regarding the tax consequences of the purchase of the viatical settlement contract or any fractionalized or pooled interest therein; and

k. Any other information as may be prescribed by rule or order of the Administrator.

(2) Disclosures prior to closing. — At least five business days prior to the date the purchase agreement is signed, the viatical settlement purchaser shall receive the following written disclosures:

a. The name, address, and telephone number of the issuing insurance company and the name, address, and telephone number of the state or foreign country regulator of the insurance company;

b. The total face value of the insurance policy and the percentage of the insurance policy the purchaser will own;

c. The insurance policy number, issue date, and type;

d. If a group insurance policy, the name, address, and telephone number of the group and, if applicable, the material terms and conditions of converting the policy to an individual policy, including the amount of increased premiums;

e. If a term insurance policy, the term and the name, address, and telephone number of the person who will be responsible for renewing the policy if necessary;

f. Whether the insurance policy is beyond the state statute for contestability and the reason therefor;

g. The insurance policy premiums and terms of premium payments;

h. The amount of the purchaser's money that will be set aside to pay premiums;

i. The name, address, and telephone number of the person who will be the insurance policy owner and the person who will be responsible for paying premiums;

j. The date on which the purchaser will be required to pay premiums and the amount of the premium, if known;

k. A statement of risk factors associated with investment in viatical settlement contracts, including, but not limited, to the following:

1. The purchaser will receive no returns (i.e., dividends and interest) until the insured dies.

2. The actual annual rate of return on a viatical settlement contract is dependent upon an accurate projection of the insured's life expectancy, and the actual date of the insured's death. An annual "guaranteed" rate of return is not determinable.

3. The viaticated life insurance contract should not be considered a liquid purchase since it is impossible to predict the exact timing of its maturity and the funds probably are not available until the death of the insured. There is no established secondary market for resale of these products by the purchaser.

4. The purchaser may lose all benefits or may receive substantially reduced benefits if the insurer goes out of business during the term of the viatical investment.

5. The purchaser is responsible for payment of the insurance premium or other costs related to the policy, if required by the terms of the viatical purchase agreement. These payments may reduce the purchaser's return. If a party other than the purchaser is responsible for the payment, the name and address of that party also shall be disclosed.

6. If the purchaser is responsible for payment of the insurance premiums or other costs related to the policy or if the insured returns to health, the amount of the premiums, if applicable.

7. The name and address of any person providing escrow services and the relationship to the issuer.
8. The amount of any trust fees or other expenses to be charged to the viatical settlement purchaser shall be disclosed.
9. Whether the purchaser is entitled to a refund of all or part of his or her investment under the settlement contract if the policy is later determined to be null and void.
10. A disclosure that group policies may contain limitations or caps in the conversion rights; that additional premiums may have to be paid if the policy is converted; the name of the party responsible for the payment of the additional premiums; and, if a group policy is terminated and replaced by another group policy, that there may be no right to convert the original coverage.
11. A disclosure of the risks associated with policy contestability including, but not limited to, the risk that the purchaser will have no claim or only a partial claim to death benefits should the insurer rescind the policy within the contestability period.
12. A disclosure of whether the purchaser will be the owner of the policy in addition to being the beneficiary, and if the purchaser is the beneficiary only and not also the owner, the special risks associated with that status, including, but not limited to, the risk that the beneficiary may be changed or the premium may not be paid.
13. The experience and qualifications of the person who determines the life expectancy of the insured, i.e., in-house staff, independent physicians, and specialty firms that weigh medical and actuarial data; the information this projection is based on; and the relationship of the projection maker to the viatical settlement provider, if any.
14. Disclosure to an investor shall include distribution of a brochure describing the process of investment in viatical settlements. The NAIC's form for the brochure shall be used unless the Administrator prescribes one by rule or order.

l. Any other information as may be prescribed by rule or order of the Administrator.

(b) Disclosures Required Upon Assignment or Sale of Underlying Insurance Policy. — The issuer shall provide the viatical settlement purchaser with at least the following disclosures no later than at the time of the assignment, transfer, or sale of all or a portion of an insurance policy underlying the viatical settlement contract, and the disclosure shall be contained in a document signed by the viatical settlement purchaser and by the issuer or its sales agent:

(1) Disclose all the life expectancy certifications obtained by the provider in the process of determining the price paid to the viator.

(2) State whether premium payments or other costs related to the policy have been escrowed. If escrowed, state the date upon which the escrowed funds will be depleted; whether the purchaser will be responsible for payment of premiums thereafter and, if so, the amount of the premiums; and the name and address of the escrow agent.

(3) State whether premium payments or other costs related to the policy have been waived. If waived, disclose whether the investor will be responsible for payment of the premiums if the insurer that wrote the policy terminates the waiver after purchase and the amount of those premiums.

(4) Disclose the type of policy offered or sold, i.e., whole life, term life, universal life, or a group policy certificate, any additional benefits contained in the policy, and the current status of the policy.

(5) If the policy is term insurance, disclose the special risks associated with term insurance including, but not limited to, the purchaser's responsibility for additional premiums if the viator continues the term policy at the end of the current term.
(6) State whether the policy is contestable.
(7) State whether the insurer that wrote the policy has any additional rights that could negatively affect or extinguish the purchaser's rights under the viatical settlement contract, what these rights are, and under what conditions these rights are activated.
(8) State the name and address of the person responsible for monitoring the insured's condition. Describe how often the monitoring of the insured's condition is done, how the date of death is determined, and how and when this information will be transmitted to the purchaser. (2001-436, s. 7.)

§ 78A-14. Advertising of Viatical Settlement Contracts.

(a) The purpose of this section is to provide prospective viatical settlement purchasers with clear and unambiguous statements in the advertisement of viatical settlement contracts and to assure the clear, truthful, and adequate disclosure of the benefits, risks, limitations, and exclusions of any contract or purchase agreement offered or sold. This purpose is intended to be accomplished by the establishment of guidelines and standards of permissible and impermissible conduct in the advertising of viatical settlement contracts to assure that product descriptions are presented in a manner that prevents unfair, deceptive, or misleading advertising and is conducive to accurate presentation and description of viatical settlement contracts through the advertising media and material used by issuers of viatical settlement contracts and their sales agents.

(b) This section shall apply to any advertising of viatical settlement contracts intended for dissemination in this State, including Internet advertising viewed by persons located in this State. Where disclosure requirements are established pursuant to federal regulation, this section shall be interpreted so as to minimize or eliminate conflict with federal regulation wherever possible.

(c) Every person offering or selling viatical settlement contracts shall establish and, at all times, maintain a system of control over the content, form, and method of dissemination of all advertisements of these securities. All advertisements, regardless of by whom written, created, designed, or presented, shall be the responsibility of the issuer. A system of control shall include regular routine notification, at least once a year, to agents and others authorized by the issuer who disseminate advertisements of the requirements and procedures for approval before the use of any advertisements not furnished by the issuer.

(d) Advertisements shall be truthful and not misleading in fact or by implication. The form and content of an advertisement of a contract or purchase agreement, product, or service shall be sufficiently complete and clear so as to avoid deception. It shall not have the capacity or tendency to mislead or deceive. Whether an advertisement has the capacity or tendency to mislead or deceive shall be determined by the Administrator from the overall impression that the advertisement may be reasonably expected to create upon a person of average education or intelligence within the segment of the public to which it is directed.

(e) Certain viatical settlement contract advertisements are deemed false and misleading on their face and are prohibited. False and misleading viatical settlement advertisements include, but are not limited to, the following representations:

(1) "Guaranteed", "fully secured", "100 percent secured", "fully insured", "secure", "safe", "backed by rated insurance companies", "backed by federal law", "backed by state law", or "state guaranty funds", or similar representations;
(2) "No risk", "minimal risk", "low risk", "no speculation", "no fluctuation", or similar representations;
(3) "Qualified or approved for individual retirement accounts (IRAs), Roth IRAs, 401(k) plans, simplified employee pensions (SEP), 403(b), Keogh plans, TSA, other retirement account rollovers", "tax deferred", or similar representations;
(4) Utilization of the word "guaranteed" to describe the fixed return, annual return, principal, earnings, profits, investment, or similar representations;
(5) "No sales charges or fees" or similar representations;
(6) "High yield", "superior return", "excellent return", "high return", "quick profit", or similar representations;
(7) Purported favorable representations or testimonials about the benefits of contracts or purchase agreements as an investment, taken out of context from newspapers, trade papers, journals, radio and television programs, and all other forms of print and electronic media.

(f) All information required to be disclosed under this section shall be set out conspicuously and in close conjunction with the statements to which such information relates or under appropriate captions of such prominence that it shall not be minimized, rendered obscure or presented in an ambiguous fashion, or intermingled with the context of the advertisement so as to be confusing or misleading.

(g) An advertisement shall not:
(1) Omit material information or use words, phrases, statements, references, or illustrations if the omission or use has the capacity, tendency, or effect of misleading or deceiving purchasers or prospective purchasers as to the nature or extent of any benefit, loss covered, premium payable, or state or federal tax consequence. The fact that the contract or purchase agreement offered is made available for inspection before consummation of the sale, or an offer is made to refund the payment if the purchaser is not satisfied or that the contract or purchase agreement includes a "free look" period that satisfies or exceeds legal requirements, does not remedy misleading statements.
(2) Use the name or title of a life insurance company or a policy unless the insurer has approved the advertisement.
(3) Represent that premium payments will not be required to be paid on the policy that is the subject of a contract or purchase agreement in order to maintain that policy, unless that is the fact.
(4) State or imply that interest charged on an accelerated death benefit or a policy loan is unfair, inequitable, or in any manner an incorrect or improper practice.
(5) State or imply that a contract or purchase agreement, benefit, or service has been approved or endorsed by a group of individuals, society, association, or other organization unless that is the fact and unless any relationship between an organization and the seller or its agents is disclosed. If the entity making the endorsement or testimonial is owned, controlled, or managed by the seller or its agents, or receives any payment or other consideration from the seller or its agents for making an endorsement or testimonial, that fact shall be disclosed in the advertisement.
(6) Contain statistical information unless it accurately reflects recent and relevant facts. The source of all statistics used in an advertisement shall be identified.

(7) Disparage insurers, providers, brokers, dealers, salesmen, insurance producers, policies, services, or methods of marketing.

(8) Use a trade name, group designation, name of the parent company of an issuer, name of a particular division of the issuer, service mark, slogan, symbol, or other device or reference without disclosing the name of the issuer, if the advertisement would have the capacity or tendency to mislead or deceive as to the true identity of the issuer, or to create the impression that a company other than the issuer would have any responsibility for the financial obligation under a contract or purchase agreement.

(9) Use any combination of words, symbols, or physical materials that by their content, phraseology, shape, color, or other characteristics are so similar to a combination of words, symbols, or physical materials used by a government program or agency or otherwise appear to be of such a nature that they tend to mislead prospective purchasers into believing that the solicitation is in some manner connected with a government program or agency.

(10) Create the impression that the issuer, its financial condition or status, the payment of its claims, or the merits, desirability, or advisability of its contracts or purchase agreement forms are recommended or endorsed by any government entity.

(h) The words “free”, “no cost”, “without cost”, “no additional cost”, “at no extra cost”, or words of similar import shall not be used with respect to any benefit or service unless true. An advertisement may specify the charge for a benefit or a service, may state that a charge is included in the payment, or use other appropriate language.

(i) Testimonials, appraisals, or analysis used in advertisements must be genuine; represent the current opinion of the author; be applicable to the contract or purchase agreement, product, or service advertised, if any; and be accurately reproduced with sufficient completeness to avoid misleading or deceiving prospective purchasers as to the nature or scope of the testimonials, appraisals, analysis, or endorsement. In using testimonials, appraisals, or analysis, the issuer makes as its own all the statements contained therein, and the statements are subject to all the provisions of this section.

(j) If the individual making a testimonial, appraisal, analysis, or an endorsement has a financial interest in the issuer or related entity as a stockholder, director, officer, employee, or otherwise, or receives any benefit directly or indirectly other than required union scale wages, that fact shall be prominently disclosed in the advertisement.

(k) When an endorsement refers to benefits received under a contract or purchase agreement, all pertinent information shall be retained for a period of five years after its use.

(*l*) The name of the issuer shall be clearly identified in all advertisements about the issuer or its contract or purchase agreements, products, or services, and if any specific contract or purchase agreement is advertised, the contract or purchase agreement shall be identified either by form number or some other appropriate description. If an application is part of the advertisement, the name of the issuer shall be shown on the application.

(m) An advertisement may state that issuer is registered in the state where the advertisement appears, provided it does not exaggerate that fact or suggest or imply that a competing issuer may not be so licensed. The advertisement may ask the audience to consult the issuer’s web site or contact the department of insurance and/or the state securities regulatory agency to find out if the state requires licensing or registration and, if so, whether the issuer or its sales agents are licensed.

(n) The name of the actual issuer shall be stated in all of its advertisements. An advertisement shall not use a trade name, any group designation, name of any affiliate or controlling entity of the issuer, service mark, slogan, symbol, or other device in a manner that would have the capacity or tendency to mislead or deceive as to the true identity of the actual issuer or create the false impression that an affiliate or controlling entity would have any responsibility for the financial obligation of the issuer.

(o) An advertisement shall not directly or indirectly create the impression that any state or federal governmental agency endorses, approves, or favors:

(1) Any issuer or its business practices or methods of operation;
(2) The merits, desirability, or advisability of any contract or purchase agreement;
(3) Any contract or purchase agreement; or
(4) Any policy or life insurance company.

(p) If the advertiser emphasizes the speed with which the viatication will occur, the advertising must disclose the average time frame from completed application to the date of offer and from acceptance of the offer to receipt of the funds by the viator. (2001-436, s. 7.)

§ 78A-15: Reserved for future codification purposes.

Article 3.

Exemptions.

§ 78A-16. Exempt securities.

The following securities are exempted from G.S. 78A-24 and 78A-49(d):

(1) Any security (including a revenue obligation) issued or guaranteed by the United States, any state, any political subdivision of a state, or any agency or corporate or other instrumentality of one or more of the foregoing; or any certificate of deposit for any of the foregoing;
(2) Any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency of one or more of the foregoing, or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;
(3) Any security issued by and representing an interest in or a debt of, or guaranteed by, any bank organized under the laws of the United States, or any bank, savings institution, or trust company organized and supervised under the laws of any state;
(4) Any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association, or any building and loan or similar association organized under the laws of any state and authorized to do business in this State;
(5) Any security issued by and representing an interest in or a debt of, or guaranteed by, any insurance company organized under the laws of any state and authorized to do business in this State; but this exemption does not apply to an annuity contract, investment contract, or similar security under which the promised payments are not fixed in dollars but are substantially dependent upon the investment results of a segregated fund or account invested in securities unless the issuing or delivering company has satisfied the Commissioner of Insurance that it is in compliance with G.S. 58-7-95;
(6) Any security issued or guaranteed by any federal credit union or any credit union, industrial loan association, or similar association organized and supervised under the laws of this State;

(7) Any security issued or guaranteed by any railroad, other common carrier, public utility, or holding company of one of the foregoing which is (i) subject to the jurisdiction of the Interstate Commerce Commission; (ii) a registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that act; (iii) regulated in respect of its rates and charges by a governmental authority of the United States or any state; or (iv) regulated in respect of the issuance or guarantee of the security by a governmental authority of the United States, any state, Canada, or any Canadian province;

(8) Repealed by Session Laws 2001-149, s. 1.

(9) Any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association provided, however, that the Administrator may by rule or order impose conditions upon this exemption either generally or in relation to specific securities or transactions;

(10) Any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine months of the date of issuance, exclusive of days of grace, or any renewal of such paper which is likewise limited, or any guarantee of such paper or of any such renewal;

(11) Any interest in an employees' stock or equity purchase, option, savings, pension, profit-sharing or other similar benefit plan;

(12) Any bond or note secured by lien on vessels shown by policies of marine insurance taken out in responsible companies to be of value, after deducting any and all other indebtedness secured by prior lien, of not less than one hundred twenty-five percent (125%) of the par amount of such bonds or notes;

(13) Any capital stock issued by a professional corporation organized pursuant to the provisions of the Professional Corporation Act, Chapter 55B;

(14) Any security issued by (i) any mutual association or agricultural marketing association organized or domesticated and existing under Subchapter IV or Subchapter V, respectively, of Chapter 54 of the General Statutes of North Carolina; or (ii) any electric or telephone membership corporation organized or domesticated and existing under Chapter 117 of the General Statutes of North Carolina.

(15) Any security listed or approved for listing upon notice of issuance on an exchange registered with the United States Securities and Exchange Commission or quoted or approved for quotation upon notice of issuance on an automated quotation system operated by a national securities association registered with the United States Securities and Exchange Commission, provided such security or class of securities, exchange or system is approved by rule of the Administrator; any other security of the same issuer which is of senior or substantially equal rank; any security called for by subscription rights or warrants so listed or approved; or any warrant or right to purchase or subscribe to any of the foregoing. (1925, c. 190, s. 3; 1927, c. 149, s. 3; 1931, c. 243, s. 5; 1955, c. 436, s. 2; 1967, c. 1233, s. 1; 1973, c. 1380; 1981, c. 624, s. 1; 1983, c. 817, ss. 4, 5; 1989 (Reg. Sess., 1990) c. 803, s. 1; 2001-149, s. 1; 2001-201, s. 7.)

CASE NOTES

Questions of Fact. — The questions of whether debentures of a finance company sold to individuals in this State in a given case are exempted securities and of whether such sales were transactions exempted from the operation and of whether the debentures sold to individuals in this State in a given case were of a class that should have been registered before being offered for sale or sold within this State are questions of fact. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

Questions of Law. — The questions of what securities are exempted securities and of what transactions are exempted from the operation of the Securities Law, and of what securities cannot be offered for sale or sold unless registered are questions of law. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

§ 78A-17. Exempt transactions.

Except as otherwise provided in this Chapter, the following transactions are exempted from G.S. 78A-24 and G.S. 78A-49(d):

(1) Any isolated nonissuer transaction, whether effected through a dealer or not.

(2) Any nonissuer distribution other than by a controlling person of an outstanding security if

a. A recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within 18 months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations, or

b. A registered dealer files with the Administrator such information relating to the issuer as the Administrator may by rule or order require, or

c. The security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal, interest, or dividends on the security.

(3) Any nonissuer transaction effected by or through a registered dealer pursuant to an unsolicited order or offer to buy; but the Administrator may by rule require that the customer acknowledge upon a specified form that the sale was unsolicited, and that a signed copy of each such form be preserved by the dealer for a specified period.

(4) Any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters.

(5) Any transaction in a bond or other evidence of indebtedness secured by a lien or security interest in real or personal property, or by an agreement for the sale of real estate or chattels, if the entire security interest or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit.

(6) Any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator.

(7) Any transaction executed by a person holding a bona fide security interest without any purpose of evading this Chapter.

(8) Any offer or sale to an entity which has a net worth in excess of one million dollars ($1,000,000) as determined by generally accepted accounting principles, bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a dealer, whether the purchaser is acting for itself or in some fiduciary capacity.

(9) Any transaction pursuant to an offer directed by the offeror to not more than 25 persons, other than those persons designated in subdivision (8), in this State during any period of 12 consecutive months, whether or not the offeror or any of the offerees is then present in this State, if the seller reasonably believes that all the buyers in this State are purchasing for investment. The Administrator may by rule or order withdraw, amend, or further condition this exemption for any security or security transaction. There is established a fee of one hundred fifty dollars ($150.00) to recover costs for any filing required.

(10) Any offer or sale of a preorganizational certificate or subscription if: (i) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber; (ii) no public advertising or solicitation is used in connection with the offer or sale; (iii) the number of subscribers does not exceed 10 and the number of offerees does not exceed 25; and (iv) no payment is made by any subscriber.

(11) Any transaction pursuant to an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within not more than 90 days of their issuance, if (i) no commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this State, or (ii) the issuer first files a notice specifying the terms of the offer and the Administrator does not by order disallow the exemption within the next 10 full business days.

(12) Any offer (but not a sale) of a security for which registration statements have been filed under both this Chapter and the Securities Act of 1933 if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending under either act.

(13) Any offer or sale by a domestic entity of its own securities if (i) the entity was organized for the purpose of promoting community, agricultural or industrial development of the area in which the principal office is located, (ii) the offer or sale has been approved by resolution of the county commissioners of the county in which its principal office is located, and, if located in a municipality or within two miles of the boundaries thereof, by resolution of the governing body of such municipality, (iii) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer in this State, and (iv) the entity is both organized and operated principally to promote some community, industrial, or agricultural development that confers a public benefit rather than organized and operated principally to generate a pecuniary profit.

(14) Any offer, sale or issuance of securities pursuant to an employees' stock or equity purchase, option, savings, pension, profit-sharing, or other similar benefit plan that is exempt under the provisions of G.S. 78A-16(11).

(15) Any offer or sale of limited partnership interests in a partnership organized under the North Carolina Uniform Limited Partnership Act for the sole purpose of constructing, owning and operating a low and moderate income rental housing project located in North Carolina if the total amount of the offering and the total number of limited partners, both within and without this State for each such partnership, does not exceed five hundred thousand dollars ($500,000) and 100 respectively. This exemption shall be allowed without limitation

as to (i) the number, either in total or within any time period, of separate partnerships which may be formed by the same general partner or partners, sponsors or individuals in which partnership interests are offered; (ii) the period over which such offerings can be made; (iii) the amount of each limited partner's investment; or (iv) the period over which such investment is payable to the partnership. For purposes of this subdivision (15), the term "low and moderate rental housing project" means:

a. Any housing project with respect to which a mortgage is insured or guaranteed under section 221(d)(3) or 221(d)(4) or 236 of the National Housing Act, or any housing project financed or assisted by direct loan, mortgage insurance or guaranty, or tax abatement under similar provisions of federal, State or local laws, whether now existing or hereafter enacted; or

b. Any housing project, some or all of the units of which are available for occupancy by families or individuals eligible to receive subsidies under section 8 of the United States Housing Act of 1937, as amended, or under the provisions of other federal, State or local law authorizing similar levels of subsidy for lower income families, whether now existing or hereafter enacted; or

c. Any housing project with respect to which a loan is made, insured or guaranteed under Title V, section 515, of the Housing Act of 1949, or under similar provisions of other federal, State or local laws, whether now existing or hereafter enacted.

(16) Any offer to purchase or to sell or any sale or issuance of a security, other than a security covered under federal law, pursuant to a plan approved by the Administrator after a hearing conducted pursuant to the provisions of G.S. 78A-30 or any transaction incident to any other judicially or governmentally approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims or property interests, or partly in such exchange and partly cash.

(17) Any transaction that is exempt pursuant to rules established by the Administrator creating limited offering transactional exemptions that are consistent with the objectives of compatibility with federal limited offering exemptions and uniformity among the states. There is established a fee of one hundred fifty dollars ($150.00) to recover costs for any filing required by such rules.

(18) Any transaction incident to a class vote by security holders, pursuant to the articles of incorporation or similar organizational document or the applicable statute governing the internal affairs of the entity, on a merger, conversion, consolidation, share exchange, reclassification of securities, or sale of an entity's assets in consideration of the issuance of securities of another entity.

(19) Any offer or sale of any viatical settlement contract or any fractionalized or pooled interest therein by the issuer in a transaction that meets all of the following criteria:

a. The underlying viatical settlement transaction with the viator was not in violation of any applicable state or federal law; and

b. The offer and sale of such contract or interest therein is conducted in accordance with such conditions as the Administrator requires by rule or order, including conditions governing advertising, suitability standards, financial statements, the investor's right of rescission, and the disclosure of information to offerees and purchasers.

The Administrator may establish a fee to recover costs for any filing required by such rules, not to exceed five hundred dollars ($500.00).

(1925, c. 190, s. 4; 1927, c. 149, s. 4; 1935, cc. 90, 154; 1955, c. 436, s. 3; 1959, c. 1185; 1967, c. 1233, ss. 2, 3; 1971, c. 572, s. 1; 1973, c. 1380; 1977, c. 162; c. 610, s. 1; 1979, c. 647, s. 1; 1981, c. 624, s. 2; 1981 (Reg. Sess., 1982), c. 1263, ss. 1, 2; 1983, c. 509, ss. 1, 2; c. 817, ss. 6, 7; 1997-419, s. 5; 2001-197, s. 1; 2001-201, ss. 8, 9, 10, 11, 12; 2001-436, s. 8; 2002-126, ss. 29A.22, 29A.23; 2004-203, s. 6.)

Legal Periodicals. — For comment on limited offerings, the federal securities code and increased burdens on the North Carolina Securities Act, see 15 Wake Forest L. Rev. 506 (1979).

CASE NOTES

Questions of Fact. — The questions of whether debentures of a finance company sold to individuals in this State in a given case are exempted securities, and of whether such sales were transactions exempted from the operation, and of whether the debentures sold to individuals in this State in a given case were of a class that should have been registered before being offered for sale or sold within this State are questions of fact. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

Questions of Law. — The questions of what securities are exempted securities and of what transactions are exempted from the operation of the Securities Law and of what securities cannot be offered for sale or sold unless registered are questions of law. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

Integration Doctrine Applicable to Sale of Securities. — The integration doctrine, a method used to combine two or more otherwise exempt securities sales into a single offering, was applicable to a sale of securities where initial purchaser was offered securities through a special arrangement with his broker and was classified as the sole preliminary limited partner, and where the other North Carolina purchasers were 1985 limited partners admitted pursuant to an offering about a month later. Walker v. Montclaire Hous. Partners, 736 F. Supp. 1358 (M.D.N.C. 1990).

Initial Offering Violated G.S. 78A-24 Registration Requirements and Precluded Subdivision (9) Protection. — Where it was clear that offering of securities initially to one purchaser and to five other purchasers a month later was part of a single financing plan since the second offering was contemplated at the time of the initial offering and it was apparent that the offering memorandum would not be published until sellers were sure initial offering was purchased and the consideration for all the offerings was the same, the initial offering violated the registration requirements of G.S. 78A-24 and such violation precluded protection under subdivision (9) and subjected the sellers to the civil liabilities provision of G.S. 78A-56(a)(1), even though the proceeds of the initial offering were for use as seed money while the proceeds of the second offering were for use as general operating expenses, and the profit and losses between the two types of offerings were allocated differently and each had different tax deduction consequences. Walker v. Montclaire Hous. Partners, 736 F. Supp. 1358 (M.D.N.C. 1990).

Cattle feeding program involving the buying, financings, caring for and sale of cattle for investors, which was open to any interested investors and advertised in national publications, was an investment contract which was not entitled to a private placement exemption and hence a security within the meaning of the applicable federal and state securities laws. Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986), aff'd, 833 F.2d 1006 (4th Cir. 1987).

§ 78A-18. Denial and revocation of exemptions.

(a) The Administrator may by order deny or revoke any exemption specified in subdivision (9), (11), or (15) of G.S. 78A-16 or in 78A-17 with respect to a specific security or transaction. No such order may be entered without appropriate prior notice to all interested parties, opportunity for hearing, and written findings of fact and conclusions of law, except that the Administrator may by order summarily deny or revoke any of the specified exemptions pending final determination of any proceeding under this section. Upon the entry of a summary order, the Administrator shall promptly notify all interested parties that it has been entered and of the reasons therefor and that within 20 days of the receipt of a written request the matter will be scheduled for hearing in accordance with Chapter 150B of the General Statutes. If no hearing is requested and none is ordered by the Administrator, the order will remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after notice of an opportunity for hearing to all interested persons, may not modify or vacate the order or extend it until final determination. No order under this subsection may operate retroactively. No person may be considered to have violated G.S. 78A-24 or 78A-49(d) by reason of any offer or sale effected after the entry of an order under this subsection if he sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the order.

(b) In a civil or administrative proceeding brought under this Chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it. In a criminal proceeding brought under this Chapter, the State has no initial burden of producing evidence to show that the defendant's actions do not fall within the exemption or exception; however, once the defendant introduces evidence to show that his conduct is within the exemption or exception, the burden of persuading the trier of fact that the exemption or exception does not apply falls upon the State. (1925, c. 190, ss. 5, 11; 1927, c. 149, ss. 5, 11; 1973, c. 1380; 1975, c. 19, s. 20; 1987, c. 849, s. 2; 1989 (Reg. Sess., 1990), c. 803, s. 2; 2001-126, s. 1; 2001-149, s. 2.)

Legal Periodicals. — For comment on limited offerings, the federal securities code and increased burdens on the North Carolina Securities Act, see 15 Wake Forest L. Rev. 506 (1979).

§§ 78A-19 through 78A-23: Reserved for future codification purposes.

ARTICLE 4.

Registration and Notice Filing Procedures of Securities.

§ 78A-24. Registration requirement.

It is unlawful for any person to offer or sell any security in this State unless (i) it is registered under this Chapter, (ii) the security or transaction is exempted under G.S. 78A-16 or 78A-17 and such exemption has not been denied or revoked under G.S. 78A-18, or (iii) it is a security covered under federal law. (1925, c. 190, s. 6; 1927, c. 149, s. 6; 1955, c. 436, s. 4; 1973, c. 1380; 1997-419, ss. 6, 7.)

CASE NOTES

"Sale". — The definition of "sale" under G.S. 78A-2(8)a does not include the mere signing of a stock certificate by a corporate officer. State v. Williams, 98 N.C. App. 274, 390 S.E.2d 746 (1990).

Integration Doctrine Was Applicable to Sale of Securities. — The integration doctrine, a method used to combine two or more otherwise exempt securities sales into a single offering, was applicable to a sale of securities where initial purchaser was offered securities through a special arrangement with his broker and was classified as the sole preliminary limited partner, and where the other North Carolina purchasers were 1985 limited partners admitted pursuant to an offering about a month later. Walker v. Montclaire Hous. Partners, 736 F. Supp. 1358 (M.D.N.C. 1990).

Sale Not Shown. — Actions of defendant, an attorney who drafted articles of incorporation and served as an original director and officer of corporation, did not constitute a "sale" and defendant was not a "seller," where there was neither evidence at trial that he was the owner of the security, nor that he was the one who successfully solicited the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner. State v. Williams, 98 N.C. App. 274, 390 S.E.2d 746, cert. denied, 327 N.C. 144, 394 S.E.2d 184 (1990).

Invalidation of Indemnity Agreement Between Broker and Issuer. — If a jury should find that an issuer of securities knowingly participated in the illegal sales of securities by a broker, public policy would prohibit enforcement of the indemnity agreement between the broker and the issuer. Premier Corp. v. Economic Research Analysts, Inc., 578 F.2d 551 (4th Cir. 1978).

Questions of Fact. — The questions of whether debentures of a finance company sold to individuals in this State in a given case are exempted securities and of whether such sales were transactions exempted from the operation and of whether the debentures sold to individuals in this State in a given case were of a class that should have been registered before being offered for sale or sold within this State are questions of fact. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

Questions of Law. — The questions of what securities are exempted securities and of what transactions are exempted from the operation of the Securities Law and of what securities cannot be offered for sale or sold unless registered are questions of law. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

Initial Securities Offering Violated This Section. — Where it was clear that offering of securities initially to one purchaser and to five other purchasers a month later were part of a single financing plan since the second offering was contemplated at the time of the initial offering and it was apparent that the offering memorandum would not be published until sellers were sure initial offering was purchased and the consideration for all the offerings was the same, the initial offering violated the registration requirements of this section and such violation precluded protection under G.S. 78A-17(9) and subjected the sellers to the civil liabilities provision of G.S. 78A-56(a)(1), even though the proceeds of the initial offering were for use as seed money while the proceeds of the second offering were for use as general operating expenses, and the profit and losses between the two types of offerings were allocated differently and each had different tax deduction consequences. Walker v. Montclaire Hous. Partners, 736 F. Supp. 1358 (M.D.N.C. 1990).

Cited in Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986).

§ 78A-25. Registration by notification.

(a) The following securities may be registered by notification whether or not they are also eligible for registration by coordination under G.S. 78A-26:

(1) Any security whose issuer and any predecessors have been in continuous operation for at least five years if

a. There has been no default during the current fiscal year or within the three preceding fiscal years in the payment of principal, interest, dividends, or distributions on any security of the issuer (or any predecessor) with a fixed maturity or a fixed interest or dividend or distribution provision, and

b. The issuer and any predecessors during the past three fiscal years have had average net earnings, determined in accordance with generally accepted accounting principles, (i) which are applicable to all securities without a fixed maturity or a fixed interest or dividend or distribution provision outstanding at the date the registration statement is filed and equal at least five percent (5%) of the amount of such outstanding securities (as measured by the maximum offering price or the market price on a day, selected by the registrant, within 30 days before the date of filing the registration statement, whichever is higher, or book value on a day, selected by the registrant, within 90 days of the date of filing the registration statement to the extent that there is neither a readily determinable market price nor a cash offering price), or (ii) which, if the issuer and any predecessors have not had any security of the type specified in clause (i) outstanding for three full fiscal years, equal at least five percent (5%) of the amount (as measured in clause (i)) of all securities which will be outstanding if all the securities being offered or proposed to be offered (whether or not they are proposed to be registered or offered in this State) are issued;

(2) Any security (other than a certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease) registered for nonissuer distribution if (i) any security of the same class has been registered under this Chapter or a predecessor law within five years of the date of filing the registration statement, or (ii) the security being registered was originally issued within five years of the date of filing the registration statement pursuant to an exemption under this Chapter or a predecessor law;

(3) Any bonds or notes secured by a first mortgage upon agricultural lands used and valuable for agricultural purposes (not including oil, gas or mining property or leases) and the principal value of the bonds or notes does not exceed sixty percent (60%) of the then fair market value of the lands and improvements thereon;

(4) Any bonds or notes secured by a first mortgage on city, town, or village real estate situated in any state or in Canada if the principal value of the bonds and notes does not exceed sixty percent (60%) of the fair market value of the land and improvements thereon and the real estate is used principally to produce through rental a net annual income or has a fair net rental value at least equal to the annual interest on the bonds and notes, plus not less than three percent (3%) of the principal of said mortgage indebtedness;

(5) Any bond or note secured by a first lien on collateral pledged as security with a bank or trust company as trustee, which bank or trust company is incorporated under the laws of and subject to examination and supervision by the United States or by a state of the United States, and which collateral shall consist of (i) a principal amount of first mortgage bonds or notes meeting the requirements of G.S. 78A-25(a)(3) or 78A-25(a)(4) or (ii) a principal amount of obligations of the United States or (iii) cash equal to not less than one hundred percent (100%) of the principal secured, or (iv) a principal amount of obligations meeting the requirements of (i), (ii) or (iii) of this subdivision in any combination.

(b) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in G.S. 78A-28(c) and the consent to service of process required by G.S. 78A-63(f):

(1) A statement demonstrating eligibility for registration by notification;

(2) With respect to the issuer and any significant subsidiary: its name, address, and form of organization; the state (or foreign jurisdiction) and the date of its organization; and the general character and location of its business;

(3) With respect to any person on whose behalf any part of the offering is to be made in a nonissuer distribution: his name and address; the amount of securities of the issuer held by him as of the date of the filing of the registration statement; and a statement of his reasons for making the offering;

(4) A description of the security being registered;

(5) The information and documents specified in subdivisions (8), (10) and (12) of G.S. 78A-27(b); and

(6) In the case of any registration under G.S. 78A-25(a)(2) which does not also satisfy the conditions of G.S. 78A-25(a)(1), a balance sheet of the issuer as of a date within four months prior to the filing of the registration statement, and a summary of earnings for each of the two fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessors' existence if less than two years.

(c) If no stop order is in effect and no proceeding is pending under G.S. 78A-29, a registration statement under this section automatically becomes effective at three o'clock Raleigh, North Carolina time in the afternoon of the tenth full business day after the filing of the registration statement or the last amendment, or at such earlier time as the Administrator determines. (1927, c. 149, s. 8; 1955, c. 436, s. 6; 1973, c. 1380; 1975, c. 144, s. 1; 2001-201, s. 13; 2003-413, s. 2.)

§ 78A-26. Registration by coordination.

(a) Any security for which a registration statement has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination.

(b) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in G.S. 78A-28(c) and the consent to service of process required by G.S. 78A-63(f):

(1) One copy of the latest form of prospectus filed under the Securities Act of 1933;

(2) A copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect, a copy of any agreements with or among underwriters, a copy of any indenture or other instrument governing the issuance of the security to be registered, and a specimen or copy of the security;

(3) If the Administrator requests, any other information or copies of any other documents filed under the Securities Act of 1933; and

(4) An undertaking to forward all future amendments to the federal prospectus, other than an amendment which merely delays the effective date of the registration statement, promptly and in any event not later than the first business day after they are forwarded to or filed with the Securities and Exchange Commission, whichever first occurs.

(c) A registration statement under this section automatically becomes effective at the moment the federal registration statement becomes effective if all the following conditions are satisfied: (i) no stop order is in effect and no proceeding is pending under G.S. 78A-29; (ii) the registration statement has been on file with the Administrator for at least 10 days; and (iii) a statement of the maximum proposed offering price and the maximum underwriting discounts and commissions expressed as a percentage of the final offering price has been on file for two full business days or such shorter period as the Administrator permits by rule or otherwise and the offering is made within those limitations. The registrant shall promptly notify the Administrator by telephone or telegram of the date and time when the federal registration statement became effective and the content of the price amendment, if any, and shall promptly file a post-effective amendment containing the information and documents in the price amendment. "Price amendment" means the final federal amendment which includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price. Upon failure to receive the required notification and post-effective amendment with respect to the price amendment, the Administrator may enter a stop order without notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with this subsection, if he promptly notifies the registrant by telephone or telegram (and promptly confirms by letter or telegram when he notifies by telephone) of the issuance of the order. If the registrant proves compliance with the requirements of this subsection as to notice and post-effective amendment, the stop order is void as of the time of its entry. The Administrator may by rule or otherwise waive either or both of the conditions specified in clauses (ii) and (iii). If the federal registration statement becomes effective before all the conditions in this subsection are satisfied and they are not waived, the registration statement automatically becomes effective as soon as all the conditions are satisfied. If the registrant advises the Administrator of the date when the federal registration statement is expected to become effective, the Administrator shall promptly advise the registrant by telephone or telegraph, at the registrant's expense, whether all the conditions are satisfied and whether he then contemplates the institution of a proceeding under G.S. 78A-29; but this advice by the Administrator does not preclude the institution of such a proceeding at any time. (1925, c. 190, s. 6; 1927, c. 149, s. 6; 1955, c. 436, s. 4; 1973, c. 1380; 1981, c. 624, s. 6.)

§ 78A-27. Registration by qualification.

(a) Any security may be registered by qualification upon the following conditions.

(b) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in G.S. 78A-28(c) and the consent to service of process required by G.S. 78A-63(f):

(1) With respect to the issuer and any significant subsidiary: its name, address, and form of organization; the state or foreign jurisdiction and date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;

(2) With respect to every director and officer of the issuer or person occupying a similar status or performing similar functions: his name, address, and principal occupation for the past five years; the amount of securities of the issuer held by him as of a specified date within 30 days of the filing of the registration statement; the amount of the securities covered by the registration statement to which he has indicated his intention to subscribe; and a description of any material interest in any material transaction with the issuer or any significant subsidiary effected within the past three years or proposed to be effected;

(3) With respect to persons covered by subdivision (2): the remuneration paid during the past 12 months or fiscal year and estimated to be paid during the next fiscal year, directly or indirectly, by the issuer (together with all predecessors, parents, subsidiaries, and affiliates) to all those persons in the aggregate;

(4) With respect to any person owning of record or beneficially if known, ten percent (10%) or more of the outstanding shares of any class of equity security of the issuer: the information specified in subdivision (2) other than his occupation;

(5) With respect to every promoter if the issuer was organized within the past three years: the information specified in subdivision (2), any amount paid to him within that period or intended to be paid to him, and the consideration for any such payment;

(6) With respect to any person on whose behalf any part of the offering is to be made in a nonissuer distribution: his name and address; the amount of securities of the issuer held by him as of the date of the filing of the registration statement; a description of any material

interest in any material transaction with the issuer or any significant subsidiary effected within the past three years or proposed to be effected; and a statement of his reasons for making the offering;

(7) The capitalization and long-term debt (on both current and a pro forma basis) of the issuer and any significant subsidiary including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration (whether in the form of cash, physical assets, services, patents, goodwill, or anything else) for which the issuer or any subsidiary has issued any of its securities within the past three years or is obligated to issue any of its securities;

(8) The kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation therefrom at which any proportion of the offering is to be made to any person or class of persons other than the underwriters, with a specification of any such person or class; the basis upon which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finders' fees (including separately, cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering) or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of every underwriter and every recipient of a finder's fee; a copy of any underwriting or selling-group agreement pursuant to which the distribution is to be made, or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities which are to be offered otherwise than through an underwriter;

(9) The estimated cash proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amount of any funds to be raised from other sources to achieve the purposes stated; the sources of any such funds; and, if any part of the proceeds is to be used to acquire any property (including goodwill) otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons who have received commissions in connection with the acquisition, and the amounts of any such commissions and any other expense in connection with the acquisition (including the cost of borrowing money to finance the acquisition);

(10) A description of any stock options or other security options outstanding, or to be created in connection with the offering, together with the amount of any such options held or to be held by every person required to be named in subdivisions (2), (4), (5), (6), or (8) and by any person who holds or will hold ten percent (10%) or more in the aggregate of any such options;

(11) The dates of, parties to, and general effect concisely stated of, every management or other material contract made or to be made otherwise than in the ordinary course of business if it is to be performed in whole or in part at or after the filing of the registration statement or was made within the past two years, together with a copy of every such contract; and a description of any pending litigation or proceeding to which the issuer is a party and which materially affects its business

or assets (including any such litigation or proceeding known to be contemplated by governmental authorities);

(12) A copy of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature intended as of the effective date to be used in connection with the offering; if the security is a viatical settlement contract, the prospectus and advertising shall comply with G.S. 78A-13 and G.S. 78A-14 relating to the offering of viatical settlement contracts;

(13) A specimen or copy of the security being registered; a copy of the issuer's articles of incorporation and bylaws, or their substantial equivalents, as currently in effect; and a copy of any indenture or other instrument covering the security to be registered;

(14) A signed or conformed copy of an opinion of counsel as to the legality of the security being registered (with an English translation if it is in a foreign language), which shall state whether the security when sold will be legally issued, fully paid, and nonassessable, and, if a debt security, a binding obligation of the issuer;

(15) The written consent of any accountant, engineer, appraiser, or other person whose profession gives authority to a statement made by him, if any such person is named as having prepared or certified a report or valuation (other than a public and official document or statement) which is used in connection with the registration statement;

(16) A balance sheet of the issuer as of a date within four months prior to the filing of the registration statement; a profit and loss statement and analysis of surplus for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessors' existence if less than three years; and, if any part of the proceeds of the offering is to be applied to the purchase of any business, the same financial statements which would be required if that business were the registrant; and

(17) Such additional information as the Administrator requires by rule or order.

(c) A registration statement under this section becomes effective when the Administrator so orders.

(d) The Administrator may by rule or order require as a condition of registration under this section that a prospectus containing any designated part of the information specified in subsection (b) be sent or given to each person to whom an offer is made before or concurrently with (i) the first written offer made to him (otherwise than by means of a public advertisement) by or for the account of the issuer or any other person on whose behalf the offering is being made, or by any underwriter or dealer who is offering part of an unsold allotment or subscription taken by him as a participant in the distribution, (ii) the confirmation of any sale made by or for the account of any such person, (iii) payment pursuant to any such sale, or (iv) delivery of the security pursuant to any such sale, whichever first occurs. (1927, c. 149, s. 9; 1955, c. 436, s. 7; 1973, c. 1380; 1975, c. 19, s. 21; 2001-436, s. 9.)

§ 78A-28. Provisions applicable to registration generally.

(a) A registration statement may be filed by the issuer, any other person on whose behalf the offering is to be made, or a registered dealer.

(b) Every person filing a registration statement shall pay a filing fee of two thousand dollars ($2,000). When a registration statement is withdrawn before the effective date or a pre-effective stop order is entered under G.S. 78A-29, the Administrator shall retain the filing fee. A registration statement relating to redeemable securities to be offered for a period in excess of one year, other than securities covered under federal law, must be renewed annually by payment of a renewal fee of one hundred dollars ($100.00) and by filing any documents or reports that the Administrator may by rule or order require.

(c) Every registration statement shall specify (i) the amount of securities to be offered in this State; (ii) the states in which a registration statement or similar document in connection with the offering has been or is expected to be filed; and (iii) any adverse order, judgment, or decree entered in connection with the offering by the regulatory authorities in each state or by any court or the Securities and Exchange Commission.

(d) Any document filed under this Chapter or a predecessor law within five years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the document is currently accurate.

(e) The Administrator may by rule or otherwise permit the omission of any item of information or document from any registration statement.

(f) In the case of a nonissuer distribution, information may not be required under G.S. 78A-27 or 78A-28(i) unless it is known to the person filing the registration statement or to the persons on whose behalf the distribution is to be made, or can be furnished by them without unreasonable effort or expense.

(g) The Administrator may by rule or order require as a condition of registration by qualification or coordination (i) that any security issued within the past three years or to be issued to a promoter for a consideration substantially different from the public offering price, or to any person for a consideration other than cash, be deposited in escrow; and (ii) that the proceeds from the sale of the registered security in this State be impounded until the issuer receives a specified amount from the sale of the securities either in this State or elsewhere. The Administrator may by rule or order determine the conditions of any escrow or impounding required hereunder, but he may not reject a depository solely because of location in another state.

(h) Except during the time a stop order is in effect under G.S. 78A-29, a registration statement relating to redeemable securities to be offered for a period in excess of one year, other than securities covered under federal law, expires on December 31 of each year or some other date not more than one year from its effective date as the Administrator may by rule or order provide. Every other registration statement is effective for one year from its effective date, or any longer period during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by any underwriter or dealer who is still offering part of an unsold allotment or subscription taken by him as a participant in the distribution, except during the time a stop order is in effect under G.S. 78A-29. All outstanding securities of the same class as a registered security are considered to be registered for the purpose of any nonissuer transaction (i) so long as the registration statement is effective and (ii) between the thirtieth day after the entry of any stop order suspending or revoking the effectiveness of the registration statement under G.S. 78A-29 (if the registration statement did not relate in whole or in part to a nonissuer distribution) and one year from the effective date of the registration statement. A registration statement may not be withdrawn for one year from its effective date if any securities of the same class are outstanding. A registration statement may be withdrawn otherwise only in the discretion of the Administrator.

(i) So long as a registration statement is effective, the Administrator may by rule or order require the person who filed the registration statement to file reports, not more often than quarterly, to keep reasonably current the information contained in the registration statement and to disclose progress of the offering.

(j) A registration statement filed in accordance with subsection (b) of this section may be amended after its effective date to increase the securities specified as proposed to be offered. Such an amendment becomes effective when the Administrator so orders. Every person filing such an amendment shall pay a filing fee of fifty dollars ($50.00) with respect to the additional securities proposed to be offered. (1973, c. 1380; 1979, 2nd Sess., c. 1148, s. 1; 1981, c. 452; c. 624, s. 3; c. 682, s. 14; 1983, c. 713, ss. 45-47; 1998-212, s. 29A.9(b).)

§ 78A-29. Denial, suspension, and revocation of registration.

(a) The Administrator may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, any registration statement if he finds

(1) That the order is in the public interest and

(2) That:

a. The registration statement as of its effective date or as of any earlier date in the case of an order denying effectiveness, or any amendment under G.S. 78A-28(j) as of its effective date, or any report under G.S. 78A-28(i) is incomplete in any material respect or contains any statement which was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact; or

b. Any provision of this Chapter or any rule, order, or condition lawfully imposed under this Chapter has been willfully violated, in connection with the offering, by (i) the person filing the registration statement, (ii) the issuer, any partner, officer, or director of the issuer, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling or controlled by the issuer, but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer, or (iii) any underwriter; or

c. The security registered or sought to be registered is the subject of an administrative stop order or similar order or a permanent or temporary injunction of any court of competent jurisdiction entered under any other federal or state act applicable to the offering; but (i) the Administrator may not institute a proceeding against an effective registration statement under paragraph c more than one year from the date of the order or injunction relied on, and (ii) he may not enter an order under paragraph c on the basis of an order or injunction entered under any other state act unless that order or injunction was based on facts which would currently constitute a ground for a stop order under this section; or

d. The issuer's enterprise or method of business includes or would include activities which are illegal where performed; or

e. The offering has worked or tended to work a fraud upon purchasers or would so operate; or

f. The offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options; or

g. When a security is sought to be registered by notification, it is not eligible for such registration; or

h. When a security is sought to be registered by coordination, there has been a failure to comply with the undertaking required by G.S. 78A-26(b)(4); or

i. The applicant or registrant has failed to pay the proper fees; but the Administrator may enter only a denial order under this paragraph and he shall vacate any such order when the deficiency has been corrected.

The Administrator may not institute a stop-order proceeding against an effective registration statement on the basis of a fact or transaction known to him when the registration statement became effective unless the proceeding is instituted within the next 30 days.

(b) The following provisions govern the application of G.S. 78A-29(a)(2)f:

(1) The Administrator may not enter a stop order against a registration statement based on one or more of the grounds set forth in paragraph f of G.S. 78A-29(a)(2) if the offering, or the dealer, or any dealers, making or participating in the offering, is subject to rules, promulgated by any national securities association registered with the Securities and Exchange Commission pursuant to section 15A of the Securities Exchange Act of 1934, providing safeguards against unreasonable profits or unreasonable rates or commissions or other charges, and such rules are complied with.

(2) The Administrator may by rule or order require such evidence of compliance with such rules as he may deem advisable.

(c) The Administrator may by order summarily postpone or suspend the effectiveness of the registration statement pending final determination of any proceeding under this section. Upon the entry of the order, the Administrator shall promptly notify each person specified in subsection (d) that it has been entered and of the reasons therefor and that within 20 days after the receipt of a written request the matter will be scheduled for hearing in accordance with chapter 150B of the General Statutes. If no hearing is requested and none is ordered by the Administrator, the order will remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after notice of an opportunity for hearing to each person specified in subsection (d), may modify or vacate the order or extend it until final determination.

(d) No stop order may be entered under any part of this section except the first sentence of subsection (c) without (i) appropriate prior notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered, (ii) opportunity for hearing, and (iii) written findings of fact and conclusions of law.

(e) The Administrator may vacate or modify a stop order if he finds that the conditions which prompted entry have changed or that it is otherwise in the public interest to do so. (1973, c. 1380; 2001-126, s. 2.)

OPINIONS OF ATTORNEY GENERAL

The statutory standards embodied in this section, G.S. 78A-39(a) and G.S. 78C-28(b) are the public health, safety or welfare criteria which must be considered prior to and upon which a summary suspension must be founded. Section 78A-39(c) requires the summary suspension order to include the reasons for its entry. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

Requirements of G.S. 150B-3(c) Do Not Conflict with This Section. — The requirements in G.S. 150B-3(c) that an agency make a finding that the "public health, safety, or welfare requires emergency action" prior to a summary suspension of a license or an occupational license, and that the agency incorporate such finding in its order of suspension, are not in any way in conflict with the findings required to be made by the securities administrator by G.S. 78A-39(a) prior to denying, suspending, or revoking the registration of a securities dealer or salesman and by this section prior to denying, suspending, or revoking the effectiveness of a securities registration statement. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

§ 78A-30. Application to exchange securities.

(a) When application is made for approval to issue securities or to deliver other consideration (whether or not the security or transaction is exempt from registration or qualification other than by the provisions of G.S. 78A-17(16) or not required to be qualified) in exchange for one or more bona fide securities, claims, or property interests, or partly in such exchange and partly in cash, the Administrator is expressly authorized to approve the terms and conditions of such issuance and exchange or such delivery and exchange and the fairness of such terms and conditions, and is expressly authorized to hold a hearing upon the fairness of such terms and conditions, at which all persons to whom it is proposed to issue securities or to deliver such other consideration in such exchange have the right to appear. Notice of such hearing shall be mailed by United States Mail, Postage Prepaid, to all persons to whom it is proposed to issue securities or to deliver such other consideration in such exchange, not less than 10 days prior to such hearing, and such notice shall be effective upon mailing. The application for approval to issue securities or to deliver other consideration shall be in such form, contain such information and be accompanied by such documents as shall be required by rule or order of the Administrator.

(b) The Administrator shall be required to hold a hearing on an application for approval within 30 days after the filing of the application and supporting documents required by rule of the Administrator. Provided, however, if the securities or the transaction regarding which the fairness hearing is sought are otherwise exempt from the registration provisions of this Chapter: (1) the Administrator shall have until 45 days after the filing of the application and supporting documents to hold a hearing on the application for approval; and (2) the hearing on the application shall not be held until at least 10 business days after the filing of the application.

(c) Within 10 business days after holding the hearing under subsection (a), the Administrator shall issue his approval or a statement that his approval will not be forthcoming.

(d) The Administrator's authority under this section shall extend to the issuance or the delivery of securities or other consideration:

(1) By any entity organized under the laws of this State; or

(2) In any transaction which is subject to the registration or qualification requirements of this Chapter or which would be so subject except for the availability of an exemption under G.S. 78A-16 or G.S. 78A-17, or by reason that the security is a security covered under federal law.

(e) The provisions of this section shall be permissive only and no request for approval, failure to request approval, withdrawal of a request for approval, or denial of approval by the Administrator shall affect the availability of any exemption from the registration or qualification requirements other than the exemption available under G.S. 78A-17(16), and shall not be admissible as evidence in any legal or administrative proceeding.

(f) This section is intended to provide for a fairness hearing before the Administrator with respect to transactions which, if approved by the Administrator, would be exempt from the registration requirements of the federal securities laws under section 3(a)(10) of the Securities Act of 1933, or any section comparable thereto which may subsequently be enacted.

(g) The Administrator shall charge a fee for a fairness hearing that the Administrator holds under this section. The Administrator shall set the fee based upon the time and expenses incurred by the Administrator. The fee may not be less than five hundred dollars ($500.00), and it may not exceed five thousand dollars ($5,000). (1979, c. 647, ss. 2, 3; 1987, c. 849, s. 8; 1997-419, s. 8; 1998-212, s. 29A.9(c); 2001-201, s. 14.)

§ 78A-31. Notice filings for securities covered under federal law.

(a) The Administrator, by rule or order, may require the filing of any of the following documents with regard to a security covered under section 18(b)(2) of the Securities Act of 1933 (15 U.S.C. § 77r(b)(2)):

(1) Prior to the initial offer of the security in this State, all documents that are part of a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933, or, in lieu thereof, a form prescribed by the Administrator, together with a consent to service of process signed by the issuer and with the payment of a notice filing fee of two thousand dollars ($2,000).

(2) After the initial offer of the security in this State, all documents that are part of an amendment to a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933, or, in lieu thereof, a form prescribed by the Administrator, which shall be filed concurrently with the Administrator.

(3) A report of the value of securities covered under federal law that are offered or sold in this State.

(4) A notice filing pursuant to this section shall expire on December 31 of each year or some other date not more than one year from its effective date as the Administrator may by rule or order provide. A notice filing of the offer of securities covered under federal law that are to be offered for a period in excess of one year shall be renewed annually by payment of a renewal fee of two thousand dollars ($2,000) and by filing any documents and reports that the Administrator may by rule or order require consistent with this section. The renewal shall be effective upon the expiration of the prior notice period.

(5) A notice filed in accordance with this section may be amended after its effective date to increase the securities specified as proposed to be offered. An amendment becomes effective upon receipt by the Administrator. Every person submitting an amended notice filing shall pay a filing fee of fifty dollars ($50.00) with respect to the additional securities proposed to be offered.

(b) With regard to any security that is covered under section 18(b)(4)(D) of the Securities Act of 1933 (15 U.S.C. § 77r(b)(4)(d)), the Administrator, by rule or order, may require the issuer to file a notice on SEC Form D (17 C.F.R. § 239.500) and a consent to service of process signed by the issuer no later than 15 days after the first sale of the security in this State. There is established a fee of three hundred fifty dollars ($350.00) to recover costs for filing required by this section.

(c) The Administrator, by rule or order, may require the filing of any document filed with the Securities and Exchange Commission under the Securities Act of 1933, with respect to a security covered under section 18(b)(3) or (4) of the Securities Act of 1933 (15 U.S.C. § 77r(b)(3) or (4)). The Administrator may, by rule, establish a fee to recover costs for any filing required under this section, not to exceed one hundred fifty dollars ($150.00).

(d) The Administrator may suspend the offer and sale of a covered security, except a covered security under section 18(b)(1) of the Securities Act of 1933 (15 U.S.C. § 77r(b)(1)), if the Administrator finds that (i) the order is in the public interest, and (ii) there is a failure to comply with any condition established under this section.

(e) The Administrator, by rule or order, may waive any of the requirements set by this section. (1997-419, s. 9; 1998-212, s. 29A.9(d); 2002-126, ss. 29A.24, 29A.37; 2002-189, s. 4; 2003-284, s. 35B.2(a); 2008-107, s. 29.3(a).)

Editor's Note. — Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 29.3(a), effective July 20, 2008, substituted "two thousand dollars ($2,000)" for "two hundred fifty dollars ($250.00)" in subdivision (a)(4).

§§ 78A-32 through 78A-35: Reserved for future codification purposes.

ARTICLE 5.

Registration of Dealers and Salesmen.

§ 78A-36. Registration requirement.

(a) It is unlawful for any person to transact business in this State as a dealer or salesman unless he is registered under this Chapter. No dealer shall be eligible for registration under this Chapter, or for renewal of registration hereunder, unless such dealer is at the time registered as a dealer with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

(b) It is unlawful for any dealer to employ a salesman unless the salesman is registered. The registration of a salesman is not effective during any period when he is not associated with a particular dealer registered under this Chapter. When a salesman begins or terminates those activities which make him a salesman, the salesman as well as the dealer shall promptly notify the Administrator.

The Administrator may by rule or order require the return of a salesman's license upon the termination of those activities which make him a salesman or, if such return is impossible, require a bond or evidence satisfactory to the Administrator of such impossibility. No salesman may be registered with more than one dealer.

(c) Every registration expires on the thirty-first day of March of each year (or such other date not more than one year from its effective date as the Administrator may by rule or order provide) unless renewed. (1925, c. 190, s. 19; 1927, c. 149, s. 19; 1955, c. 436, s. 9; 1959, c. 1122; 1971, c. 831, s. 1; 1973, c. 1380; 1975, c. 144, s. 2; 1979, 2nd Sess., c. 1148, s. 2; 1981, c. 624, s. 4; 1983, c. 817, s. 8; 2001-182, s. 1.)

CASE NOTES

Where defendant did not "sell" unregistered security in question, he was not a "salesman" (or a dealer), and therefore was not subject to the requirements of this section. State v. Williams, 98 N.C. App. 274, 390 S.E.2d 746, cert. denied, 327 N.C. 144, 394 S.E.2d 184 (1990).

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Registration with Secretary of State. — This section makes it unlawful to engage in the business of affecting transactions in securities without being registered with the Secretary of State. That registration is encompassed by the definition of "occupational license" at G.S. 150B-2(4a) in that registration confers the right or privilege to engage in a field of endeavor regulated by an occupational licensing agency. See opinion of Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

§ 78A-36.1. Limited registration of Canadian dealers and salesmen.

(a) A dealer that is a resident of Canada and that has no office or other physical presence in this State may effect transactions in securities with or for, or induce or attempt to induce the purchase or sale of any security by:

(1) A person from Canada who is residing in this State temporarily and with whom the Canadian dealer had a bona fide dealer-client relationship before the person entered the United States; or

(2) A person from Canada who is a resident of this State and whose transactions are in a self-directed tax advantaged retirement plan in Canada of which the person is the holder or contributor.

This subsection only applies to dealers that are registered in accordance with this section.

(b) A salesman who will be representing a Canadian dealer registered under this section may effect transactions in securities in this State as permitted for the dealer in subsection (a) of this section, only if the salesman is registered in accordance with this section.

(c) A Canadian dealer may register under this section provided that it meets all of the following conditions:

(1) The dealer files an application in the form required by the jurisdiction in which it has its head office.

(2) The dealer files a consent to service of process.

(3) The dealer is registered as a dealer in good standing in the jurisdiction from which it is effecting transactions into this State and files evidence thereof.

(4) The dealer is a member of a self-regulatory organization, the Bureau des services financiers or a stock exchange in Canada.

(d) A salesman who will be representing a Canadian dealer registered under this section in effecting transactions in securities in this State may register under this section provided that the salesman meets all of the following conditions:

(1) The salesman files an application in the form required by the jurisdiction in which the dealer has its head office.

(2) The salesman files a consent to service of process.

(3) The salesman is registered in good standing in the jurisdiction from which the salesman is effecting transactions into this State and files evidence thereof.

(e) If no denial order is in effect and no proceeding is pending under G.S. 78A-39, registration becomes effective on the thirtieth day after an application is filed, unless the registration is made effective earlier.

(f) A Canadian dealer registered under this section shall meet all of the following conditions:

(1) The dealer maintains its provincial or territorial registration and its membership in a self-regulatory organization, the Bureau des services financiers or a stock exchange in good standing.

(2) The dealer provides the Administrator, upon request, with its books and records relating to its business in this State as a dealer.

(3) The dealer informs the Administrator forthwith of any criminal action taken against it or of any finding or sanction imposed on the dealer as a result of any self-regulatory or regulatory action involving fraud, theft, deceit, misrepresentation, or similar conduct.

(4) The dealer discloses to its clients in this State that the dealer and its agents are not subject to the full regulatory requirements under this Article.

(g) A salesman of a Canadian dealer registered under this section shall meet all of the following conditions:

(1) The salesman maintains the salesman's provincial or territorial registration in good standing.

(2) The salesman informs the Administrator forthwith of any criminal action taken against the salesman or of any finding or sanction imposed on the salesman as a result of any self-regulatory or regulatory action involving fraud, theft, deceit, misrepresentation, or similar conduct.

(h) Renewal applications for Canadian dealers and salesmen under this section shall be filed before December 31 of each year and may be made by filing the most recent renewal application, if any, filed in the jurisdiction in which the dealer has its head office, or if no such renewal application is required, the most recent application filed pursuant to subdivision (c)(1) of this section or subdivision (d)(1) of this section, as applicable.

(i) Every applicant for registration or renewal of registration under this section shall pay the fee for dealers and salesmen as required in this Chapter.

(j) Every Canadian dealer or salesman registered under this section may effect transactions in this State only:

(1) As permitted in subsection (a) or (b) of this section, and

(2) With or through:

  a. The issuers of the securities involved in the transactions;

  b. Other dealers; and

  c. Banks, savings institutions, trust companies, insurance companies, investment companies, as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees.

(k) Article 2 of this Chapter applies to Canadian dealers and salesmen registered under this section.

(*l*) Except as otherwise provided in this section, Canadian dealers or salesmen registered under this section and acting in accordance with the limitations set out in subsection (j) of this section are exempt from all of the requirements of this Chapter. A registration under this section may be denied, suspended, or revoked pursuant to G.S. 78A-39 only for a breach of Article 2 of this Chapter or this section. (2001-225, s. 1.)

§ 78A-37. Registration procedure.

(a) A dealer or salesman may obtain an initial or renewal registration by filing with the Administrator an application together with a consent to service of process pursuant to G.S. 78A-63(f). The application shall contain whatever information the Administrator by rule requires concerning such matters as (i) the applicant's form and place of organization; (ii) the applicant's proposed method of doing business; (iii) the qualifications and business history of the applicant; in the case of a dealer, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the dealer, and a representation that the applicant dealer is duly registered as a dealer under the Securities Exchange Act of 1934; (iv) any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony; and (v) the applicant's financial condition and history. If no denial order is in effect and no proceeding is pending under G.S. 78A-39, registration becomes effective at noon of the thirtieth day after an application is filed. The Administrator may by rule or order specify an earlier effective date and may by order defer the effective date until noon of the thirtieth day after the filing of any amendment. Registration of a dealer automatically constitutes registration of any salesman who is a partner, executive officer, or director, or a person occupying a similar status or performing similar functions. After the Administrator institutes a proceeding under G.S. 78A-39 to postpone or deny an application for registration, withdrawal of the application shall be allowed only at such time and under such conditions as the Administrator may by order determine.

(b) Every applicant for initial or renewal registration shall pay a filing fee of three hundred dollars ($300.00) in the case of a dealer and one hundred twenty-five dollars ($125.00) in the case of a salesman. The Administrator may by rule reduce the registration fee proportionately when the registration will be in effect for less than a full year.

(c) A registered dealer may file an application for registration of a successor, whether or not the successor is then in existence, for the unexpired portion of the year. There shall be no filing fee.

(d) The Administrator may by rule require registered dealers to post surety bonds in amounts up to one hundred thousand dollars ($100,000) and salesmen to post surety bonds in amounts up to ten thousand dollars ($10,000), and may determine their conditions. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond so required. No bond may be required of any registrant whose net capital, which may be defined by rule, exceeds one hundred thousand dollars ($100,000). Every bond shall provide for suit thereon by any person who has a cause of action under G.S. 78A-56 and, if the Administrator by rule or order requires, by any person who has a cause of action not arising under this Chapter. Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought within two years after the sale or other act upon which it is based. (1925, c. 190, s. 19; 1927, c. 149, s. 19; 1955, c. 436, s. 9; 1959, c. 1122; 1971, c. 831, s. 1; 1973, c. 1380; 1983, c. 713, s. 48; c. 817, ss. 9, 10; 1987, c. 566, s. 1; 1991 (Reg. Sess., 1992), c. 965, s. 2; 2002-126, s. 29A.34; 2003-413, s. 3; 2009-451, s. 24.1(a).)

Editor's Note. — Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2009-451, s. 24.1(a), effective August 15, 2009, substituted "one hundred twenty-five dollars ($125.00)" for "seventy-five dollars ($75.00)" in the first sentence of subsection (b).

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Registration of Securities Dealers and Salesmen Constitutes Granting a License. — The registration of securities dealers and salesmen by the Securities Division pursuant to this section constitutes the granting of an "occupational license" within the meaning of G.S. 150B-2(4a). See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

§ 78A-38. Post-registration provisions.

(a) Every registered dealer shall make and keep such accounts, correspondence, memoranda, papers, books, and other records as the Administrator by rule prescribes, subject to the limitations of section 15 of the Securities Exchange Act of 1934 (15 U.S.C. § 78o).

(b) Every registered dealer shall file such financial reports as the Administrator by rule prescribes, subject to the limitations of section 15 of the Securities Exchange Act of 1934 (15 U.S.C. § 78o).

(c) If the information contained in any document filed with the Administrator is or becomes inaccurate or incomplete in any material respect, the registrant shall promptly file a correcting amendment unless notification of the correction has been given under G.S. 78A-36(b).

(d) All the records referred to in subsection (a) of this section are subject at any time or from time to time to such reasonable periodic, special, or other examinations by representatives of the Administrator, within or without this State, as the Administrator deems necessary or appropriate in the public interest or for the protection of investors. For the purpose of avoiding unnecessary duplication of examinations, the Administrator, insofar as he deems it practicable in administering this subsection, may cooperate with the securities administrators of other states, the Securities and Exchange Commission, and any national securities exchange or national securities association registered under the Securities Exchange Act of 1934. (1925, c. 190, ss. 14, 15; 1927, c. 149, ss. 14, 15; 1973, c. 1380; 1997-419, s. 10.)

§ 78A-39. Denial, revocation, suspension, censure, cancellation, and withdrawal of registration.

(a) The Administrator may by order deny, suspend, or revoke any registration in whole or in part or restrict or limit as to any person, office, function, or activity or censure the registrant if he finds

(1) That the order is in the public interest and

(2) That the applicant or registrant or, in the case of a dealer, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the dealer:

a. Has filed an application for registration which as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact; or

b. Has willfully violated or willfully failed to comply with any provision of this Chapter or a predecessor law or any rule or order under this Chapter or a predecessor law or any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisors Act of 1940, or the Commodity Exchange Act; or

c. Has been convicted, within the past 10 years, of any misdemeanor involving a security or any aspect of the securities business, or any felony; or

d. Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities business; or

e. Is the subject of an order of the Administrator denying, suspending, or revoking registration as a dealer or salesman; or

f. Is the subject of an order entered within the past five years by the securities administrator of any state or by the Securities and Exchange Commission denying or revoking registration as a dealer or salesman, or the substantial equivalent of those terms as defined in this Chapter, or is the subject of a final order suspending or expelling him from a national securities exchange or national securities association registered under the Securities Exchange Act of 1934, or is the subject of a United States post office fraud order; but (i) the Administrator may not institute a revocation or suspension proceeding under subdivision (2)f of subsection (a) more than one year from the date of the order relied on, and (ii) the Administrator may not enter an order under subdivision (2)f of subsection (a) on the basis of an order under another state act unless that order was based on facts which would currently constitute a ground for an order under this section; or

g. Has engaged in dishonest or unethical practices in the securities business; or

h. Is insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature; but the Administrator may not enter an order against a dealer under this paragraph without a finding of insolvency as to the dealer; or

i. Is not qualified on the basis of such factors as training, experience, and knowledge of the securities business, except as otherwise provided in subsection (b).

(a1) The Administrator may by order deny, suspend, or revoke any registration in whole or in part or restrict or limit as to any person, office, function, or activity or censure the registrant if he finds

(1) That the order is in the public interest and

(2) That the applicant or registrant:

a. Has failed reasonably to supervise his salesmen if he is a dealer; or

b. Has failed to pay the proper filing fee; but the Administrator may enter only a denial order under this clause, and he shall vacate any such order when the deficiency has been corrected.

The Administrator may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to him when registration became effective unless the proceeding is instituted within the next 120 days.

(b) The following provisions govern the application of G.S. 78A-39(a)(2)i:

(1) The Administrator may not enter an order against a dealer on the basis of the lack of qualification of any person other than (i) the dealer himself if he is an individual or (ii) a salesman of the dealer.

(2) The Administrator may not enter an order solely on the basis of lack of experience if the applicant or registrant is qualified by training or knowledge or both or, in the case of a dealer if he is registered and in good standing under the Securities Exchange Act of 1934.

(3) The Administrator shall consider that a salesman who will work under the supervision of a registered dealer need not have the same qualifications as a dealer.

(4) The Administrator may by rule provide for an examination which may be written or oral or both, to be taken by any class of or all applicants.

(c) The Administrator may by order summarily postpone or suspend registration pending final determination of any proceeding under this section. Upon the entry of the order, the Administrator shall promptly notify the applicant or registrant, as well as the employer or prospective employer if the applicant or registrant is a salesman, that it has been entered and of the reasons therefor and that within 20 days after the receipt of a written request the matter will be scheduled for hearing in accordance with Chapter 150B of the General Statutes. If no request for a hearing, other responsive pleading, or submission is received by the Administrator within 30 business days of receipt of service of notice of the order upon the applicant or registrant and no hearing is ordered by the Administrator, the order shall become final and remain in effect unless it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after notice of and opportunity for hearing, may modify or vacate the order or extend it until final determination.

(d) If the Administrator finds that any registrant or applicant for registration is no longer in existence or has ceased to do business as a dealer or salesman, or is subject to an adjudication of mental incompetence or to the control of a committee, conservator, or guardian, or cannot be located after reasonable search, the Administrator may by order cancel the registration or application.

(e) Withdrawal from registration as a dealer or salesman becomes effective 90 days after receipt of an application to withdraw or within such shorter period of time as the Administrator may determine, unless a revocation or suspension proceeding is pending when the application is filed or a proceeding to revoke or suspend or to impose conditions upon the withdrawal is instituted within 90 days after the application is filed. If a proceeding is pending or instituted, withdrawal becomes effective at such time and upon such conditions as the Administrator by order determines. If no proceeding is pending or instituted and withdrawal automatically becomes effective, the Administrator may nevertheless institute a revocation or suspension proceeding under G.S. 78A-39(a)(2)b within one year after withdrawal became effective and enter a revocation or suspension order as of the last date on which registration was effective.

(f) No order may be entered under any part of this section except the first sentence of subsection (c) without (i) appropriate prior notice to the applicant or registrant (as well as the employer or prospective employer if the applicant or registrant is a salesman), (ii) opportunity for hearing, and (iii) written findings of fact and conclusions of law. (1925, c. 190, s. 19; 1927, c. 149, s. 19; 1955, c. 436, s. 9; 1959, c. 1122; 1971, c. 831, s. 1; 1973, c. 1380; 1983, c. 817, ss. 11-15; 1997-456, s. 27; 1997-462, ss. 1, 2; 2001-126, s. 3.)

Editor's Note. — The latter portion of former subsection (a) was redesignated as subsection (a1) pursuant to Session Laws 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

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The statutory standards embodied in this section, G.S. 78A-29(a) and G.S. 78C-28(b) are the public health, safety or welfare criteria which must be considered prior to and upon which a summary suspension must be founded. This section requires the summary suspension order to include the reasons for its entry. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

Requirements of G.S. 150B-3(c) Do Not Conflict with This Section. — The requirements in G.S. 150B-3(c) that an agency make a finding that the "public health, safety, or welfare requires emergency action" prior to a summary suspension of a license or an occupational license, and that the agency incorporate such finding in its order of suspension, are not in any way in conflict with the findings required to be made by the securities administrator by this section prior to denying, suspending, or revoking the registration of a securities dealer or salesman and by G.S. 78A-29(a) prior to denying, suspending, or revoking the effectiveness of a securities registration statement. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

Article 3A of Chapter 150B Does Not Restrict or Modify This Section. — Even though the Securities Division is an "occupational licensing agency" within the meaning of G.S. 150B-2(4b), the provisions of Article 3A of Chapter 150B, G.S. 150B-38 et seq., relating to the procedure for conduct of administrative hearings by occupational licensing agencies, in no way restrict or modify the provisions of subsections (a), (c), (e) and (f) of this section or

G.S. 78A-45 or G.S. 78A-46(b). See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

§ 78A-40. Alternative methods of registration.

(a) The Administrator may by rule or order provide an alternative method of registration by which any dealer or salesman acting in that capacity or as a principal may satisfy the requirements of this Article by furnishing the information otherwise required to be filed pursuant to this Article. The Administrator may provide for, among other things, alternative filing periods for dealers or salesmen, elimination of the issuance of a paper license and alternative methods for the payment and collection of initial or renewal filing fees, which shall be known as "alternative filing fees". The alternative filing fees shall be the same as provided in G.S. 78A-37(b).

(b) The Administrator may not adopt an alternative method of registration unless its purpose is to facilitate a central registration depository whereby dealers or salesmen can centrally or simultaneously register and pay fees for all states in which they plan to transact business that require registration. The Administrator may enter into an agreement with or otherwise facilitate an alternative method of registration with any national securities association registered with the Securities and Exchange Commission pursuant to Section 15A of the Securities Exchange Act of 1934, any national securities exchange registered under the Securities Exchange Act of 1934, or any national association of state securities Administrators or similar association to effectuate the provisions of this section.

(c) Nothing in this section shall be construed to prevent the exercise of the authority of the Administrator as provided in G.S. 78A-39. (1981, c. 624, s. 5; 1983, c. 817, s. 16; 1987, c. 849, s. 3.)

§§ 78A-41 through 78A-44: Reserved for future codification purposes.

Article 6.

Administration and Review.

§ 78A-45. Administration of Chapter.

(a) This Chapter shall be administered by the Secretary of State. The Secretary of State as Administrator may delegate all or part of the authority under this Chapter to the Deputy Securities Administrator including, but not limited to, the authority to conduct hearings, make, execute and issue final agency orders and decisions. The Secretary of State may appoint such clerks and other assistants as may from time to time be needed. The Secretary of State may designate one or more hearing officers for the purpose of conducting administrative hearings.

(b) It is unlawful for the Administrator or any of his officers or employees to use for personal benefit any information which is filed with or obtained by the Administrator and which is not made public. No provision of this Chapter authorizes the Administrator or any of his officers or employees to disclose any such information except among themselves or when necessary or appropriate in a proceeding or investigation under this Chapter. No provision of this Chapter either creates or derogates from any privilege which exists at common law or otherwise when documentary or other evidence is sought under a subpoena directed to the Administrator or any of his officers or employees.

(c) All fees provided for under this Chapter shall be collected by the Administrator and shall be paid over to the State Treasurer to go into the general fund. (1925, c. 190, ss. 20, 21; 1927, c. 149, ss. 20, 21; 1973, c. 1380; 1983, c. 817, s. 17; 2001-126, s. 9.)

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Article 3A of Chapter 150B Does Not Restrict or Modify This Section. — Even though the Securities Division is an "occupational licensing agency" within the meaning of G.S. 150B-2(4b), the provisions of Article 3A of Chapter 150B, G.S. 150B-38 et seq., relating to the procedure for conduct of administrative hearings by occupational licensing agencies, in no way restrict or modify the provisions of G.S. 78A-39(a), (c), (e) and (f), this section or G.S. 78A-46(b). See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

§ 78A-46. Investigations and subpoenas.

(a) The Administrator in his discretion

(1) May make any investigation within or outside of this State as the Administrator deems necessary to determine whether any person has violated or is about to violate any provision of this Chapter or any rule or order hereunder, or to aid in the enforcement of this Chapter or in the prescribing of rules and forms hereunder,

(2) May require or permit any person to file a statement in writing, under oath or otherwise as the Administrator determines, as to all the facts and circumstances concerning the matter to be investigated,

(3) May publish information concerning any violation of this Chapter or any rule or order hereunder, and

(4) May appoint employees of the Securities Division as securities law enforcement agents and as other enforcement personnel.

a. Subject matter jurisdiction — The responsibility of an agent shall be enforcement of this Chapter and Chapters 78C and 78D of the General Statutes.

b. Territorial jurisdiction — A securities law enforcement agent is a State officer with jurisdiction throughout the State.

c. Service of orders of the Administrator — Securities law enforcement agents may serve and execute notices, orders, or demands issued by the Administrator for the surrender of registrations or relating to any administrative proceeding. While serving and executing such notices, orders, or demands, securities law enforcement agents shall have all the power and authority possessed by a law enforcement officer.

(b) For the purpose of any investigation or proceeding under this Chapter, the Administrator or any officer designated by him may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the Administrator deems relevant or material to the inquiry.

(c) In case of contumacy by, or refusal to obey a subpoena issued to any person, any court of competent jurisdiction, upon application by the Administrator, may issue to the person an order requiring him to appear before the Administrator, or the officer designated by him, there to produce documentary evidence if so ordered or to give evidence touching the matter under investigation or in question. Failure to obey the order of the court may be punished by the court as a contempt of court.

(d) Repealed by Session Laws 1977, c. 610, s. 2.

(e) The Administrator may act under subsection (b) or apply under subsection (c) to enforce subpoenas in this State at the request of a securities agency or administrator of any state if the alleged activities constituting a violation for which the information is sought would be a violation of this Chapter or any rule hereunder if the alleged activities had occurred in this State. (1925, c. 190, s. 16; 1927, c. 149, s. 16; 1973, c. 1380; 1977, c. 610, s. 2; 1987, c. 849, s. 4; 1991, c. 456, s. 2; 1997-462, s. 3.)

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Article 3A of Chapter 150B Does Not Restrict or Modify This Section. — Even though the Securities Division is determined to be an "occupational licensing agency" within the meaning of G.S. 150B-2(4b), the provisions of Article 3A of Chapter 150B, G.S. 150B-38 et seq., relating to the procedure for conduct of administrative hearings by occupational licensing agencies, in no way restrict or modify the provisions of G.S. 78A-39(a), (c), (e) and (f), G.S. 78A-45 or this section. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

This section and G.S. 78C-27(b) are the equivalent of grand jury proceedings. So long as the exercise of these powers does not result in action on a registration without an opportunity to be heard under G.S. 78A-39, it is not a function to which Chapter 150B has any application. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

§ 78A-47. Injunctions; cease and desist orders.

(a) Whenever it appears to the Administrator that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may in his discretion bring an action in any court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with this Chapter or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. In addition to any other remedies provided by this Chapter, the Administrator may apply to the court hearing this matter for an order of restitution whereby the defendant in such action shall be ordered to make restitution of those sums shown by the Administrator to have been obtained by him in violation of any of the provisions of this Chapter. Such restitution shall be payable, in the discretion of the court, to the Administrator or receiver appointed pursuant to this section for the benefit of those persons whose assets were obtained in violation of this Chapter, or directly to those persons. The court may not require the Administrator to post a bond.

(b)(1) If the Administrator determines after giving notice of and opportunity for a hearing, that any person has engaged in or is about to engage in, any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may order such person to cease and desist from such unlawful act or practice and take such affirmative action as in the judgment of the Administrator will carry out the purposes of this Chapter.

(2) If the Administrator makes written findings of fact that the public interest will be irreparably harmed by delay in issuing an order under G.S. 78A-47(b)(1), the Administrator may issue a temporary cease and desist order. Upon the entry of a temporary cease and desist order, the Administrator shall promptly notify in writing the person subject to the order that such order has been entered, the reasons therefor, and that within 20 days after the receipt of a written request from such person the matter shall be scheduled for hearing in accordance with Chapter 150B of the General Statutes to determine whether or not the order shall become permanent and final. If no request for a hearing, other responsive pleading, or submission is received by the Adminis-

trator within 30 business days of receipt of service of notice of the order upon the person subject to the order and no hearing is ordered by the Administrator, the order shall become final and remain in effect unless it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after giving notice of an opportunity for a hearing to the person subject to the order, shall by written findings of fact and conclusion of law, vacate, modify, or make permanent the order.

(3) No order under subsection (b), except an order issued pursuant to G.S. 78A-47(b)(2), may be entered without prior notice of an opportunity for hearing. The Administrator may vacate or modify an order under this subsection (b) upon his finding that the conditions which required such an order have changed and that it is in the public interest to so vacate or modify.

(4) A final order issued pursuant to the provisions of subsection (b) shall be subject to review as provided in G.S. 78A-48.

(c) The Administrator may issue an order against an applicant, registered person, or other person who willfully violates this Chapter or a rule or order of the Administrator under this Chapter:

(1) Imposing a civil penalty of up to two thousand five hundred dollars ($2,500) for a single violation or of up to twenty-five thousand dollars ($25,000) for multiple violations in a single proceeding or a series of related proceedings; and

(2) Requiring reimbursement of the costs of investigation.

The clear proceeds of civil penalties imposed under this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Any reimbursement imposed under this subsection shall be paid into the General Fund. No order under this subsection may be entered without prior notice and an opportunity for a hearing conducted pursuant to Article 3 of Chapter 150B of the General Statutes. (1925, c. 190, s. 16; 1927, c. 149, s. 16; 1973, c. 1380; 1983, c. 817, s. 18; 1991, c. 456, ss. 3, 4; 1997-462, s. 4; 1998-215, s. 120; 2001-126, s. 4.)

CASE NOTES

Cited in Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978).

§ 78A-48. Judicial review of orders.

(a) Any person aggrieved by a final order of the Administrator may obtain a review of the order in the Superior Court of Wake County by filing in court, within 30 days after a written copy of the decision is served upon the person by personal service or by registered or certified mail, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition shall be forthwith served upon the Administrator, and thereupon the Administrator shall certify and file in court a copy of the filing and evidence upon which the order was entered. When these have been filed, the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in whole or in part. The findings of the Administrator as to the facts, if supported by competent, material and substantial evidence, are conclusive. If either party applies to the court for leave to adduce additional material evidence, and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearings before the Administrator, the court may order the additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such conditions as the court considers proper. The Administrator may modify his findings and order by reason of the additional evidence and shall file in court the additional evidence together with any modified or new findings or order. The judgment of the court is final, subject to review by the Court of Appeals.

(b) The commencement of proceedings under subsection (a) does not, unless specifically ordered by the court, operate as a stay of the Administrator's order. (1925, c. 190, s. 18; 1927, c. 149, s. 18; 1973, c. 1380; 1977, c. 610, s. 3; 1983, c. 817, s. 19; 1987, c. 849, s. 5.)

§ 78A-49. Rules, forms, orders, and hearings.

(a) The Administrator may from time to time make, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of this Chapter, including rules and forms governing registration statements, applications, and reports, and defining any terms, whether or not used in this Chapter, insofar as the definitions are not inconsistent with the provisions of this Chapter. For the purpose of rules and forms the Administrator may classify securities, persons, and matters within his jurisdiction, and prescribe different requirements for different classes. In order to protect the investing public, the Administrator may by rule or order prescribe suitability standards for investments in viatical settlement contracts.

(b) No rule, form, or order may be made, amended, or rescinded unless the Administrator finds that the action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this Chapter. In prescribing rules and forms the Administrator may cooperate with the securities administrators of the other states and the Securities and Exchange Commission with a view to effectuating the policy of this statute to achieve maximum uniformity in the form and content of registration statements, applications, and reports wherever practicable.

(c) The Administrator may by rule or order prescribe (i) the form and content of financial statements required under this Chapter, (ii) the circumstances under which consolidated financial statements shall be filed, and (iii) whether any required financial statements shall be certified by independent or certified public accountants. All financial statements required to be filed with the Administrator shall be audited and shall be prepared in accordance with generally accepted accounting principles, except where the Administrator may by rule or order provide otherwise. In determining whether to permit the filing of financial statements that have not been audited, the Administrator shall consider all of the following factors:

(1) Whether lesser standards for financial statements will impair investor protection.
(2) The cost of preparation of audited financial statements relative to the proposed offering amount.
(3) Whether recently audited financial statements of the issuer are available in addition to current interim statements.
(4) Whether the issuer has commenced significant business operations.
(5) Any other factors that are relevant to the protection of the investing public.

(d) The Administrator may by rule or order require the filing of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, unless the security or transaction is exempted by G.S. 78A-16 or 78A-17 (except 78A-17(9), (17), and (19)) and such exemption has not been denied or revoked under G.S. 78A-18 or the security is a security covered under federal law or the transaction is with respect to a security covered under federal law.

(e) All rules and forms of the Administrator shall be published.

(f) No provision of this Chapter imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form, or order of the Administrator, notwithstanding that the rule, form, or order may later be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(g) Every hearing in an administrative proceeding shall be public unless the Administrator in his discretion grants a request joined in by all the respondents that the hearing be conducted privately. (1925, c. 190, s. 11; 1927, c. 149, s. 11; 1973, c. 1380; 1987, c. 849, s. 6; 1997-419, s. 11; 2001-436, s. 10; 2003-413, s. 4.)

§ 78A-50. Administrative files and opinions.

(a) A document is filed when it is received by the Administrator.

(b) The Administrator shall keep a register of all applications for registration and registration statements which are or have been effective under this Chapter and all denial, suspension, or revocation orders which have been entered under this Chapter. The register shall be open for public inspection.

(c) The information contained in or filed with any registration statement, application, or report may be made available to the public under such rules as the Administrator prescribes.

(c1) The files and records of the Administrator relating to criminal investigations and enforcement proceedings undertaken pursuant to this Chapter are subject to the provisions of G.S. 132-1.4.

(c2) The files and records of the Administrator relating to noncriminal investigations and enforcement proceedings undertaken pursuant to this Chapter shall not be subject to inspection and examination pursuant to G.S. 132-6 until the investigations and proceedings are completed and cease to be active.

(c3) Any information obtained by the Administrator from any law enforcement agency, administrative agency, or regulatory organization on a confidential or otherwise restricted basis in the course of an investigation or proceeding undertaken pursuant to this Chapter shall be confidential and exempt from G.S 132-6 to the same extent that it is confidential in the possession of the providing agency or organization.

(d) Upon request and at such reasonable charges as the administrator prescribes, the Administrator shall furnish to any person photostatic or other copies (certified under the seal of office if requested) of any entry in the register or any document which is a matter of public record. In any proceeding or prosecution under this Chapter, any copy so certified is prima facie evidence of the contents of the entry or document certified.

(e) The Administrator may honor requests from interested persons for interpretative opinions. When an exemption is claimed in writing, cites the section relied upon, and is considered eligible upon the showing made, a "no action" letter will be furnished upon request and upon the payment of a fee of one hundred fifty dollars ($150.00). (1925, c. 190, s. 17; 1927, c. 149, s. 17; 1955, c. 436, s. 8; 1973, c. 1380; 1979, 2nd Sess., c. 1148, s. 3; 1987, c. 566, s. 2; 1997-462, s. 5.)

§§ 78A-51 through 78A-55: Reserved for future codification purposes.

ARTICLE 7.

Civil Liabilities and Criminal Penalties.

§ 78A-56. Civil liabilities.

(a) Any person who:

(1) Offers or sells a security in violation of G.S. 78A-8(1), 78A-8(3), 78A-10(b), 78A-13, 78A-14, 78A-24, or 78A-36(a), or of any rule or order under G.S. 78A-49(d) which requires the affirmative approval of sales literature before it is used, or of any condition imposed under G.S. 78A-27(d) or 78A-28(g), or

(2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission,

is liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if the purchaser no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at the legal rate as provided by G.S. 24-1 from the date of disposition.

(b) Any person who purchases a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the seller not knowing of the untruth or omission), and who does not sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, shall be liable to the person selling the security to him, who may sue either at law or in equity to recover the security, plus any income received by the purchaser thereon, upon tender of the consideration received, or for damages if the purchaser no longer owns the security. Damages are the excess of the value of the security when the purchaser disposed of it, plus interest at the legal rate as provided by G.S. 24-1 from the date of disposition, over the consideration paid for the security.

(b1) A person who willfully violates G.S. 78A-12 is liable to a person who purchases or sells a security, other than a security traded on a national securities exchange or quoted on a national automated quotation system administered by a self-regulatory organization, at a price that was affected by the act or transaction for the damages sustained as a result of the act or transaction. Damages are the difference between the price at which the securities were purchased or sold and the value the securities would have had at the time of the person's purchase or sale in the absence of the act or transaction, plus interest at the legal rate as provided by G.S. 24-1 from the date of the purchase or sale, costs, and reasonable attorneys' fees determined by the court.

(c)(1) Every person who directly or indirectly controls a person liable under subsection (a), (b), or (b1) of this section, every partner, officer, or director of the person, every person occupying a similar status or performing similar functions, and every dealer or salesman who materially aids in the sale is also liable jointly and severally with and to the same extent as the person, unless able to sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

(2) Unless liable under subdivision (1) of this subsection, every employee of a person liable under subsection (a), (b), or (b1) of this section who materially aids in the transaction giving rise to the liability and every other person who materially aids in the transaction giving rise to the liability is also liable jointly and severally with and to the same extent as the person if the employee or other person actually knew of the existence of the facts by reason of which the liability is alleged to exist.

(3) There is contribution among the several persons liable under subdivisions (1) and (2) of this subsection as provided among tort-feasors pursuant to Chapter 1B of the General Statutes.

(d) Any tender specified in this section may be made at any time before entry of judgment. Tender shall require only notice of willingness to exchange the security for the amount specified. Any notice may be given by service as in civil actions or by certified mail addressed to the last known address of the person liable.

(e) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(f) No person may sue under this section for a violation of G.S. 78A-24 or G.S. 78A-36 more than two years after the sale or contract of sale.

No person may sue under this section for any other violation of this Chapter more than three years after the person discovers facts constituting the violation, but in any case no later than five years after the sale or contract of sale, except that if a person who may be liable under this section engages in any fraudulent or deceitful act that conceals the violation or induces the person to forgo or postpone commencing an action based upon the violation, the suit may be commenced not later than three years after the person discovers or should have discovered that the act was fraudulent or deceitful.

(g)(1) No purchaser may sue under this section if, before suit is commenced, the purchaser has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the purchaser of his rights; offering to repurchase the security for cash payable on delivery of the security equal to the consideration paid, together with interest at the legal rate as provided by G.S. 24-1 from the date of payment, less the amount of any income received on the security or, if the purchaser no longer owns the security, offering to pay the purchaser upon acceptance of the offer an amount in cash equal to the damages computed in accordance with subsection (a); and stating that the offer may be accepted by the purchaser at any time within 30 days of its receipt; and the purchaser has failed to accept such offer in writing within the specified period.

(2) No seller may sue under this section if, before suit is commenced, the seller has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the seller of his rights; offering to return the security plus the amount of any income received thereon upon payment of the consideration received, or, if the purchaser no longer owns the security, offering to pay the seller upon acceptance of the offer an amount in cash equal to the damages computed in accordance with subsection (b); and providing that the offer may be accepted by the seller at any time within 30 days of its receipt; and the seller has failed to accept such offer in writing within the specified period.

(3) Offers shall be in the form and contain the information the Administrator by rule prescribes. Every offer under subsection (g) of this

section shall be delivered to the offeree or sent by certified mail addressed to the offeree at the offeree's last known address. The person making the offer shall file a copy of the rescission offer with the Administrator at least 10 days before delivering the offer to the offeree. If an offer is not performed in accordance with its terms, suit by the offeree under this section shall be permitted without regard to this subsection.

(h) No person who has made or engaged in the performance of any contract in violation of any provision of this Chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(i) Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this Chapter or any rule or order hereunder is void.

(j) The rights and remedies provided by this Chapter are in addition to any other rights or remedies that may exist at law or in equity, but this Chapter does not create any cause of action not specified in this section or G.S. 78A-37(d). If the requirements of Chapter 1D of the General Statutes are met, punitive damages are available to the extent provided in that Chapter.

(k) The purchaser of a viatical settlement contract may rescind or cancel the purchase agreement for any reason by providing written notice of rescission or cancellation to the issuer or the issuer's agent, by certified mail, return receipt requested, within 10 business days after each of the following: (i) the date on which the purchase agreement for the viatical settlement contract is signed by the purchaser, and (ii) the date of actual notice to the purchaser of the assignment, transfer, or sale of all or a portion of an insurance policy on which the viatical settlement contract is based. Notice of rescission is effective upon deposit in the United States mail. The notice of rescission need not take a particular form and is sufficient if it expresses the intention of the purchaser to rescind the transaction. For purposes of this subsection and subsection (k1) of this section only, the rescission period of 10 business days following the purchaser's signing of the purchase agreement shall also be known as the "initial 10-day rescission period."

(k1) Immediately upon receipt of any consideration by an issuer or its agent pursuant to a viatical settlement purchase agreement, the issuer or its agent shall deliver the consideration to a domestic independent escrow agent. For purposes of this section, "domestic independent escrow agent" means an escrow agent, located in this State, and not affiliated with the issuer, its affiliate, its officers or directors, or its promoter, or any agents thereof. The domestic independent escrow agent shall maintain the funds received, in their entirety, in an escrow account or trust account located in this State, for the initial 10-day rescission period following the signing of the purchase agreement, as provided in subsection (k) of this section, unless the domestic independent escrow agent, prior to the completion of the initial 10-day rescission period, receives notice of the purchaser's cancellation or rescission of the purchase agreement in accordance with this section. If the purchase agreement is rescinded or cancelled within the initial 10-day rescission period, the domestic independent escrow agent shall immediately deliver the funds, in their entirety along with any interest earned on the funds during the time in which the funds were held in escrow, to the purchaser upon receiving notice, by certified mail, from the issuer or its agent that the purchase agreement has been rescinded or cancelled by the purchaser. If the purchase agreement has not been rescinded or cancelled within the initial 10-day rescission period, the domestic independent escrow agent shall release the funds to the issuer or its agent in a manner to be determined by agreement between the issuer and the domestic independent escrow agent. Until the funds become available for release by the domestic independent escrow agent to the issuer upon the expiration of the initial 10-day rescission period without rescission or cancellation by the purchaser, the funds are not subject to claims by creditors of the issuer, its affiliates, or associates.

(*l*) Within 90 days after the sale or execution of a contract of sale for an investment of funds intended to be used to purchase a viatical settlement contract or contracts, the seller shall provide the purchaser with a rescission offer in accordance with rules prescribed by the Administrator, if, within that period, there has not been the identification of each and every viatical settlement contract acceptable to the purchaser which has been or shall be purchased for the investment. The purchaser may accept the rescission offer within 10 business days after receiving it. Acceptance of the rescission offer is effective upon compliance by the purchaser with the procedural requirements for notice of rescission or cancellation by a viatical settlement purchaser set forth in subsection (k) of this section. The seller shall keep a record of the rescission offer and its acceptance or rejection for at least three years after providing that offer and shall provide that record to the Administrator at the Administrator's request. For purposes of this subsection only, "purchaser" means a person who executes a contract of sale, with a seller, for an investment of funds to be used to purchase a viatical settlement contract or viatical settlement contracts when, at the time of execution of the contract, each and every viatical settlement contract to be purchased pursuant to the investment has not been identified. (1925, c. 190, s. 23; 1927, c. 149, s. 23; 1955, c. 436, s. 10; 1971, c. 572, s. 2; 1973, c. 1380; 1975, c. 19, s. 22; c. 144, s. 3; 1977, c. 781, s. 2; 1983, c. 817, ss. 20, 21; 1987, c. 282, s. 9; 1991, c. 456, s. 5; 2001-183, s. 1; 2001-436, s. 11; 2003-413, ss. 5-10.)

Legal Periodicals. — For survey of 1974 case law on securities fraud, see 53 N.C.L. Rev. 1104 (1975).

For article discussing applicable statute of limitations in actions under the Federal Racketeer Influenced and Corrupt Organizations Act, see 7 Campbell L. Rev. 299 (1985).

For note, "Skinner v. E.F. Hutton & Co.: North Carolina's Caveat Tipper Exception to the In Pari Delicto Doctrine," see 64 N.C.L. Rev. 1250 (1986).

CASE NOTES

Punitive damages are not included in the relief available under this section. Hunt v. Miller, 908 F.2d 1210 (4th Cir. 1990).

Applicability to Federal Claims. — The proper limitations period for G.S. 10(b) and Rule 10b-5 federal security claims is the two year limitations period under subsection (f) of this section. Cooke v. Manufactured Homes, Inc., 998 F.2d 1256 (4th Cir. 1993).

Construction. — Because this section parallels § 12(2) of the Securities Act of 1933, cases construing § 12(2) should be considered when interpreting this section. Venturtech II v. Deloitte Haskins & Sells, 790 F. Supp. 576 (E.D.N.C. 1992), aff'd, 993 F.2d 228 (4th Cir. 1993).

G.S. 1-22 Tolled Two-Year Limitations Period of Subsection (f). — Since this section is a statute of limitations and not a statute of repose in action seeking recession of purchase of securities, the two-year statute of limitations provided for in subsection (f) was tolled by operation of G.S. 1-22 because plaintiffs brought their claim within the one-year extension provided by that section. Walker v. Montclaire Hous. Partners, 736 F. Supp. 1358 (M.D.N.C. 1990).

Integration Doctrine Applicable to Sale of Securities. — The integration doctrine, a method used to combine two or more otherwise exempt securities sales into a single offering, was applicable to a sale of securities where initial purchaser was offered securities through a special arrangement with his broker and was classified as the sole preliminary limited partner, and where the other North Carolina purchasers were 1985 limited partners admitted pursuant to an offering about a month later. Walker v. Montclaire Hous. Partners, 736 F. Supp. 1358 (M.D.N.C. 1990).

Initial Offering Violated G.S. 78-24 Registration Requirements and Subjected Sellers to Liability. — Where it was clear that offering of securities initially to one purchaser and to five other purchasers a month later were part of a single financing plan since the second offering was contemplated at the time of the initial offering and it was apparent that the offering memorandum would not be published until sellers were sure initial offering was purchased and the consideration for all the offerings was the same, the initial offering violated the registration requirements of G.S. 78A-24 and such violation precluded protection under G.S. 78A-17(9) and subjected the sellers to the civil liabilities provision of subdivision (a)(1), even though the proceeds of the initial offering were for use as seed money while the proceeds of the second offering were for use as general operating expenses, and the profit and losses between the two types of offerings were allocated differently and each had different tax deduction consequences. Walker v. Montclaire Hous. Partners, 736 F. Supp. 1358 (M.D.N.C. 1990).

"Control Persons". — Controlling shareholders, officers and directors were "control persons" within the meaning of this section. Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986), aff'd, 833 F.2d 1006 (4th Cir. 1987).

For purposes of G.S. 78A-56(a)(2)(c), an arbitration panel's imposition of control person liability on two stock purchasers' claims against the president and two directors of a brokerage firm manifestly disregarded the law and facts; there was no evidence that the president or directors were involved in the allegedly unsuitable and unauthorized transactions in the stock purchasers' accounts with the brokerage firm or in the misrepresentations of fraud by a defrauding broker, and the task of supervising the operations of the brokerage firm was not in the hands of the president or the directors. Wallace v. Buttar, 239 F. Supp. 2d 388, 2003 U.S. Dist. LEXIS 316 (2003).

A cause of action for aiding and abetting a securities violation is comprised of three elements. The plaintiff must prove (1) a primary violation by another person; (2) the aider and abettor's "knowledge" of the primary violation; and (3) substantial assistance by the aider and abettor in the achievement or consummation of the primary violation. Venturtech II v. Deloitte Haskins & Sells, 790 F. Supp. 576 (E.D.N.C. 1992), aff'd, 993 F.2d 228 (4th Cir. 1993).

Aider and Abettor's Intent. — As to the second element in a cause of action for aiding and abetting a securities violation, absent a duty owed to the plaintiff by the alleged aider and abettor, the defendant aider and abettor must possess a high conscious intent and a conscious and specific motivation to aid the fraud. Venturtech II v. Deloitte Haskins & Sells, 790 F. Supp. 576 (E.D.N.C. 1992), aff'd, 993 F.2d 228 (4th Cir. 1993).

Because investment firms failed to prove that public accounting firm possessed a "high conscious intent" to assist company in soliciting investors by untrue and misleading statements, and that public accounting firm substantially assisted such a violation, the investment firms could not establish a claim for aiding and abetting a violation of G.S. 78A-56. Venturtech II v. Deloitte Haskins & Sells, 790 F. Supp. 576 (E.D.N.C. 1992), aff'd, 993 F.2d 228 (4th Cir. 1993).

Cattle feeding program involving the buying, financings, caring for and sale of cattle for investors, which was open to any interested investors and advertised in national publications, was an investment contract which was not entitled to a private placement exemption and hence a security within the meaning of the applicable federal and state securities laws. Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986), aff'd, 833 F.2d 1006 (4th Cir. 1987).

Finance Company Held Liable. — Finance company, the sole purpose of which was to provide financing to investors in cattle program which was found to be an investment contract and hence a security within the meaning of the federal and North Carolina securities laws and which was never properly registered, was liable to plaintiff as a matter of law under this section as an aider and abettor. Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986), aff'd, 833 F.2d 1006 (4th Cir. 1987).

Valid Rescission Offer Shown. — Investment firm, which employed broker who engaged in fraudulent activity, nevertheless made a valid rescission offer under the terms of subdivision (g)(1) of this section and therefore plaintiff was precluded from maintaining action seeking damages for breach of contract, fraud and negligence. Mashburn v. First Investors Corp., 111 N.C. App. 398, 432 S.E.2d 869 (1993).

Invalidation of Indemnity Agreement Between Broker and Issuer. — If a jury should find that an issuer of securities knowingly participated in the illegal sales of securities by a broker, public policy would prohibit enforcement of the indemnity agreement between the broker and the issuer. Premier Corp. v. Economic Research Analysts, Inc., 578 F.2d 551 (4th Cir. 1978).

Investor's Involvement in Constructing Offer Made to Him Did Not Bar Recovery. — Fact that investor in limited partnership was somehow involved in the construction of the terms of the offer made to him did not bar recovery in suit for recession of securities, violation of regulation requirements and fraud. Walker v. Montclaire Hous. Partners, 736 F. Supp. 1358 (M.D.N.C. 1990).

Evidence of Liability Sufficient. — Evidence that broker discussed realty partnership and various securities of his security firm employer in the same conversation with one investor, that he was an employee and representative of the firm that whole time, that he operated out of firm's office in his dealings with the investors, received mail there concerning the realty partnership and in at least one case transferred money for the realty investment out of an investor's firm account, that the transfer was recorded on the firm's computer system but was never questioned by its managers, who were responsible for monitoring all transactions and who admitted that broker required more supervision than any other employee in the firm's office, was more than sufficient to sustain verdict finding firm liable as a controlling person of broker. Hunt v. Miller, 908 F.2d 1210 (4th Cir. 1990).

No Error in Holding Firm Jointly and Severally Liable with Employee. — In action against securities firm and broker employee of firm for securities fraud, evidence was sufficient to establish that firm as controlling party and breached a duty owed investers by permitting employee to engage in fraudulent conduct that was within the scope of his apparent authority as an employee of the securities firm and of the same general nature as that authorized or incidental to the conduct authorized by the firm; therefore, it was not error to hold the firm jointly and severally liable with employee for attorneys' fees. Hunt v. Miller, 908 F.2d 1210 (4th Cir. 1990).

Failure to Establish Active Misstatement of Any Material Facts. — Grant of summary judgment to the employing corporation and its stockholder on the former employee's G.S. 78A-56(b) claim was proper as the employee, who sold his stock in the corporation to the stockholder upon the employee's leaving the corporation because he had signed an agreement stating that only employees could own stock, did not establish that the corporation or the stockholder actively misstated any material facts regarding the sale of the stock. Sullivan v. Mebane Packaging Group, Inc., 158 N.C. App. 19, 581 S.E.2d 452, 2003 N.C. App. LEXIS 944 (2003), cert. denied, 357 N.C. 511, 588 S.E.2d 473 (2003).

Amendment to Complaint Held Prejudicial. — When plaintiff's new counsel filed motion to amend plaintiff's complaint to include a cause of action under subsection (a)(2) almost two years after the filing of the original complaint and approximately 9 months prior to trial, the trial court denied plaintiff's motion on the basis that it would be unfairly prejudicial to the defendant. Freese v. Smith, 110 N.C. App. 28, 428 S.E.2d 841 (1993).

Failure to Give Instruction Regarding Controlling Firm's Culpable Participation Not Error. — In action by investors against securities firm and its employee for securities fraud, since it is only required of a controlling person that he maintain an adequate system of internal control in a diligent manner, jury instruction which contained this language was adequate to permit the jury to find that firm had failed to adequately supervise its employee; failure to give instruction regarding culpable participation was not error. Hunt v. Miller, 908 F.2d 1210 (4th Cir. 1990).

Acknowledgments Held Void. — To extent that acknowledgments signed by stock purchasers could be seen as releases of securities claims, they were void under subsection (1) of this section. Signature of waiver stating that purchasers received all necessary information, when they may not have, constituted anticipatory waiver of duty to disclose, and purchasers could not have known of any misrepresentation or omission at time of signing. Jadoff v. Gleason, 140 F.R.D. 330 (M.D.N.C. 1991).

Jury Question. — Where it was shown that plaintiffs had reason to know of their securities claims based on the alleged fraud in the financial projections and real estate appraisal from the beginning of their investment due to the cautionary language in a confidential offering memorandum, remaining securities claims had to be resolved by a jury. Andrews v. Fitzgerald, 823 F. Supp. 356 (M.D.N.C. 1993).

Motion to Dismiss Claims as Barred by This Section Denied. — Since the dates for the sale or contract for sale of securities could not be determined from the face of the complaint, plaintiffs' claims were not barred on their face by the North Carolina Securities Act's two-year statute of limitations, and defendant's motion to dismiss the North Carolina Securities Act claims as barred by that statute was denied. Liner v. DiCresce, 905 F. Supp. 280 (M.D.N.C. 1994).

Statute of limitations defense failed where count related back to the original complaint which was filed well within the two-year period of subsection (f). Simpson v. Specialty Retail Concepts, Inc., 908 F. Supp. 323 (M.D.N.C. 1995).

Applied in Umstead v. Durham Hosiery Mills, Inc., 578 F. Supp. 342 (M.D.N.C. 1984); Heath v. Craighill, Rendleman, Ingle & Blythe, 97 N.C. App. 236, 388 S.E.2d 178 (1990); Andrews v. Fitzgerald, 823 F. Supp. 356 (M.D.N.C. 1993).

Cited in Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985); McGarity v. Craighill, Rendleman, Ingle & Blythe, 83 N.C. App. 106, 349 S.E.2d 311 (1986); Weft, Inc. v. G.C. Inv. Assocs., 630 F. Supp. 1138 (E.D.N.C. 1986); Simms Inv. Co. v. E.F. Hutton & Co., 688 F. Supp. 193 (M.D.N.C. 1988); Simpson v. Specialty Retail Concepts, Inc., 149 F.R.D. 94 (M.D.N.C. 1993); Tierney v. Garrard, 124 N.C. App. 415, 477 S.E.2d 73 (1996); Jay Group, Ltd.

v. Glasgow, 139 N.C. App. 595, 534 S.E.2d 233, 2000 N.C. App. LEXIS 975 (2000).

§ 78A-57. Criminal penalties.

(a) Any person who willfully violates any provision of this Chapter except G.S. 78A-8, 78A-9, 78A-11, 78A-12, 78A-13, or 78A-14 is guilty of a Class I felony.

(a1) Any person who willfully violates any rule or order under this Chapter is guilty of a Class I felony. No person may be imprisoned for the violation of any rule if the person proves that the person had no knowledge of the rule. It is an affirmative defense to a charge of violating an order under this Chapter that the person had no knowledge of the order.

(a2) Any person who willfully violates G.S. 78A-8, 78A-11, 78A-13, or 78A-14 is guilty of a felony. If the losses caused by a single act or a series of related acts in a common scheme or plan are one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony. If the losses caused by a single act or a series of related acts in a common scheme or plan are less than one hundred thousand dollars ($100,000), the person is guilty of a Class H felony.

(a3) Any person who willfully violates G.S. 78A-9 knowing the statement made to be false or misleading in any material respect is guilty of a Class H felony. Any other willful violation of G.S. 78A-9 constitutes a Class 2 misdemeanor.

(a4) Any person who willfully violates G.S. 78A-12 is guilty of a Class H felony.

(b) The Administrator may refer such evidence as is available concerning violations of this Chapter or of any rule or order hereunder to the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter. Upon receipt of a reference, the district attorney may request that a duly employed attorney of the Administrator prosecute or assist in the prosecution of the violation or violations on behalf of the State. Upon approval of the Administrator, the employee may be appointed a special prosecutor for the district attorney to prosecute or assist in the prosecution of the violations without receiving compensation from the district attorney. Such a special prosecutor shall have all the powers and duties prescribed by law for district attorneys and such other powers and duties as are lawfully delegated to the special prosecutor by the district attorney for violations of this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law. (1925, c. 190, s. 23; 1927, c. 149, s. 23; 1955, c. 436, s. 10; 1971, c. 572, s. 2; 1973, c. 47, s. 2; c. 1380; 1987, c. 849, s. 7; 1991, c. 456, s. 6; 2001-436, s. 12; 2003-413, s. 11.)

CASE NOTES

Corporate Officers and Agents May Be Held Criminally Liable Individually. — Any officers, directors, or agents of a corporation actively participating in a violation of the provisions of this section in the conduct of the company's business, or which such conduct they have actively directed, may be held criminally liable individually therefor. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 78A-58. Obstruction of investigation.

A person is guilty of a Class H felony if the person willfully does any of the following for the purpose of interfering with the performance of any audit, examination, or investigation by the Administrator under this Chapter:

(1) Makes or causes to be made to the Administrator or the Administrator's designated representative any false or misleading oral or written statement.

(2) Creates, causes to be made, or delivers any record, report, or document knowing that it is false or misleading in any material respect.

(3) Destroys or alters any record, report, or document.

(4) Conceals or secretes any record, report, or document. (2003-413, s. 12.)

§§ 78A-59 through 78A-62: Reserved for future codification purposes.

ARTICLE 8.

Miscellaneous Provisions.

§ 78A-63. Scope of the Chapter; service of process.

(a) G.S. 78A-8, 78A-10, 78A-13, 78A-14, 78A-24, 78A-31, 78A-36(a), and 78A-56 apply to persons who sell or offer to sell when (i) an offer to sell is made in this State, or (ii) an offer to buy is made and accepted in this State.

(b) G.S. 78A-8, 78A-10, 78A-36(a) and 78A-56(b) apply to persons who buy or offer to buy when (i) an offer to buy is made in this State, or (ii) an offer to sell is made and accepted in this State.

(b1) G.S. 78A-12 applies when any act instrumental to effecting prohibited conduct is done in this State.

(c) For the purpose of this section, an offer to sell or to buy is made in this State, whether or not either party is then present in this State, when the offer (i) originates from this State or (ii) is directed by the offeror to this State and received at the place to which it is directed (or at any post office in this State in the case of a mailed offer).

(d) For the purpose of this section, an offer to buy or to sell is accepted in this State when acceptance (i) is communicated to the offeror in this State and (ii) has not previously been communicated to the offeror, orally, or in writing, outside this State; and acceptance is communicated to the offeror in this State, whether or not either party is then present in this State when the offeree directs it to the offeror in this State reasonably believing the offeror to be in this State and it is received at the place to which it is directed (or at any post office in this State in the case of a mailed acceptance).

(e) An offer to sell or to buy is not made in this State when (i) the publisher circulates or there is circulated on his behalf in this State any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this State, or which is published in this State but has had more than two thirds of its circulation outside this State during the past 12 months, or (ii) a radio or television program originating outside this State is received in this State.

(f) Every applicant for registration under this Chapter and every issuer who proposes to offer a security in this State through any person acting on an agency basis in the common-law sense shall file with the Administrator, in such form as he by rule prescribes, an irrevocable consent appointing the Administrator or his successor in office to be his attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against him or his successor, executor or administrator which arises under this Chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. A person who has filed such a consent in connection with a previous registration or notice filing need not file another. Service may be made by leaving a copy of the process in the office of the Administrator, but it is not effective unless (i) the plaintiff, who may be the Administrator in a suit, action, or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his address on file with the Administrator, and (ii) the plaintiff's affidavit of compliance with the subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(g) When any person, including any nonresident of this State, engages in conduct prohibited or made actionable by this Chapter or any rule or order hereunder, and he has not filed a consent to service of process under subsection (f) and personal jurisdiction over him cannot otherwise be obtained in this State, that conduct shall be considered equivalent to his appointment of the Administrator or his successor in office to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor executor or administrator which grows out of that conduct and which is brought under this Chapter or any rule or order hereunder with the same force and validity as if served on him personally. Service may be made by leaving a copy of the process in the office of the Administrator, and it is not effective unless (i) the plaintiff, who may be the Administrator in a suit, action, or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last known address or takes other steps which are reasonably calculated to give actual notice, and (ii) the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(h) When process is served under this section, the court, or the Administrator in a proceeding before him, shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend.

(i) Interest charged by a broker or dealer registered under the Securities Exchange Act of 1934, as amended, or registered under this Chapter, as now or hereafter amended, on a debit balance in an account for a customer, shall be exempt from the provisions of Chapter 24 of the North Carolina General Statutes if such debit balance is payable at will without penalty and is secured by securities as defined in G.S. 25-8-102. (1927, c. 149, s. 24; 1955, c. 436, s. 10; 1973, c. 1380; 1975, c. 144, s. 4; 1997-181, s. 27; 1997-419, ss. 12, 13; 2001-436, s. 13; 2003-413, ss. 13-15.)

CASE NOTES

The scope of G.S. 78A-8 applies only to those persons who sell or offer to sell a security. State v. Williams, 98 N.C. App. 274, 390 S.E.2d 746, cert. denied, 327 N.C. 144, 394 S.E.2d 184 (1990).

Applied in Simms Inv. Co. v. E.F. Hutton & Co., 688 F. Supp. 193 (M.D.N.C. 1988).

Cited in Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986).

§ 78A-64. Statutory policy.

This Chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this Chapter with the related federal regulation. (1973, c. 1380.)

§ 78A-65. Repeal and saving provisions.

(a) The Securities Law of the State of North Carolina, G.S. 78-1 through 78-25, is repealed except as saved in this section.

(b) Prior law exclusively governs all suits, actions, prosecution, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before April 1, 1975, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within two years after April 1, 1975.

(c) All effective registrations under prior law, all administrative orders relating to such registrations, and all conditions imposed upon such registrations remain in effect so long as they would have remained in effect if this Chapter had not been passed. They are considered to have been filed, entered, or imposed under this Chapter, but are governed by prior law.

(d) Prior law applies in respect to any offer or sale made within one year after the effective date of this Chapter pursuant to an offering begun in good faith before April 1, 1975, on the basis of an exemption available under prior law.

(e) Judicial review of all administrative orders as to which review proceedings have not been instituted by April 1, 1975, are governed by G.S. 78A-48, except that no review proceeding may be instituted unless the petition is filed within any period of limitation which applied to a review proceeding when the order was entered and in any event within 60 days after April 1, 1975. (1973, c. 1380.)

CASE NOTES

Cited in Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994).

§ 78A-66. Jurisdictional limitations.

Nothing in this Chapter affects the Viatical Settlements Act or the jurisdiction of the North Carolina Department of Insurance. (2001-436, s. 14.)

Chapter 78B.

Tender Offer Disclosure Act.

§§ 78B-1 through 78B-11: Repealed by Session Laws 2001-201, s. 1, effective October 1, 2001.

interpretation and administration of this Chapter with the related federal regulation. (1973, c. 1380.)

§ 78A-65. Repeal and saving provisions.

(a) [illegible] 78-25, is repealed except as saved in [illegible]

(b) Prior law exclusively governs all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before April 1, 1975, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within four years after April 1, 1975.

(c) All effective registrations under prior law, all administrative orders relating to such registrations, and all conditions imposed upon such registrations remain in effect so long as they would have remained in effect if this Chapter had not been passed. They are considered to have been filed, entered, or imposed under this Chapter, but are governed by prior law.

(d) Prior law applies in respect to any offer or sale made within one year after the effective date of this Chapter pursuant to an offering begun in good faith before April 1, 1975, on the basis of an exemption available under prior law.

(e) Judicial review of all administrative orders as to which review proceedings have not been instituted by April 1, 1975, are governed by G.S. 78A-48, except that no review proceeding may be instituted unless the petition is filed within any period of limitation which applied to a review proceeding when the order was entered and in any event within 60 days after April 1, 1975. (1973, c. 1380.)

CASE NOTES

Cited in [illegible]

§ 78A-66. Jurisdictional limitations.

Nothing in this Chapter affects the Viatical Settlements Act or the jurisdiction of the North Carolina Department of Insurance. (2001-436, s. 14.)

Chapter 78C.

Investment Advisers.

Article 1.

Title and Definitions.

Sec.
78C-1. Title.
78C-2. Definitions.
78C-3 through 78C-7. [Reserved.]

Article 2.

Fraudulent and Prohibited Practices.

78C-8. Advisory activities.
78C-9. Misleading filings.
78C-10. Unlawful representations concerning registration or exemption.
78C-11 through 78C-15. [Reserved.]

Article 3.

Registration and Notice Filing Procedures of Investment Advisers and Investment Adviser Representatives.

78C-16. Registration and notice filing requirement.
78C-17. Registration and notice filing procedures.
78C-18. Post-registration provisions.
78C-19. Denial, revocation, suspension, bar, censure, cancellation, and withdrawal of registration.
78C-20. Methods of registration.
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Article 4.

Administration and Review.

78C-26. Administration of Chapter.
78C-27. Investigations and subpoenas.
78C-28. Injunctions; cease and desist orders; civil penalties.
78C-29. Judicial review of orders.
78C-30. Rules, forms, orders, and hearings.
78C-31. Administrative files and opinions.
78C-32 through 78C-37. [Reserved.]

Article 5.

Civil Liabilities and Criminal Penalties.

78C-38. Civil liabilities.
78C-39. Criminal penalties.
78C-40. Burden of proof.
78C-41 through 78C-45. [Reserved.]

Article 6.

Miscellaneous Provisions.

Sec.
78C-46. Scope of the Chapter; service of process.
78C-47. Statutory policy.
78C-48. Severability of provisions.
78C-49 through 78C-59. [Reserved.]

Article 7.

Sports Agents.

78C-60 through 78C-62. [Expired.]
78C-63 through 78C-70. [Reserved.]

Article 8.

Regulation of Athlete Agents.

78C-71 through 78C-81. [Repealed.]
78C-82 through 78C-84. [Reserved.]

Article 9.

Uniform Athlete Agents Act.

78C-85. Title.
78C-86. Definitions.
78C-87. Service of process; subpoenas.
78C-88. Athlete agents; registration required; exceptions; void contracts.
78C-89. Registration as athlete agent; form; requirements.
78C-90. Certificate of registration; issuance or denial; renewal.
78C-91. Suspension; revocation; refusal to renew registration.
78C-92. Temporary registration.
78C-93. Registration; renewal of fees.
78C-94. Required form of contract.
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78C-96. Student-athlete's right to cancel.
78C-97. Required records; waiver of attorney-client privilege.
78C-98. Prohibited conduct.
78C-99. Criminal penalties.
78C-100. Civil remedies.
78C-101. Administrative penalty.
78C-102. Uniformity of application and construction.
78C-103. Electronic Signatures in Global and National Commerce Act.
78C-104. Severability.
78C-105. Rules.

ARTICLE 1.

Title and Definitions.

§ 78C-1. Title.

This Chapter shall be known and may be cited as the North Carolina Investment Advisers Act. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 78C-2. Definitions.

When used in this Chapter, the definitions of G.S. 78A-2 shall apply along with the following, unless the context otherwise requires:

(1) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as a part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation. "Investment adviser" does not include:

  a. An investment adviser representative or a person excluded from the definition of investment adviser representative pursuant to G.S. 78C-2(3)c.

  b. A bank, savings institution, or trust company.

  c. A lawyer, accountant, engineer, or teacher whose performance of any such services is solely incidental to the practice of his profession.

  d. A dealer or its salesman whose performance of these services is solely incidental to the conduct of its business as a dealer and who receives no special compensation for them.

  e. A publisher of any newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client.

  f. A person solely by virtue of such person's services to or on behalf of any "business development company" as defined in Section 202(a)(22) of the Investment Advisers Act of 1940 provided the business development company is not an "investment company" by reason of Section 3(c)(1) of the Investment Company Act of 1940, as both acts were in effect on June 1, 1988.

  g. A personal representative of a decedent's estate, guardian, conservator, receiver, attorney in fact, trustee in bankruptcy, trustee of a testamentary trust, or a trustee of an inter vivos trust, not otherwise engaged in providing investment advisory services, and the performance of these services is not a part of a plan or scheme to evade registration or the substantive requirements of this Chapter.

h. A licensed real estate agent or broker whose only compensation is a commission on real estate sold.

i. An individual or company primarily engaged in acting as a business broker whose only compensation is a commission on the sale of a business.

j. An individual who, as an employee, officer or director of, or general partner in, another person and in the course of performance of his duties as such, provides investment advice to such other person, or to entities that are affiliates of such other person, or to employee benefit plans of such other person or its affiliated entities, or, with respect to such employee benefit plans, to employees of such other person or its affiliated entities.

k. Repealed by Session Laws 2003-413, s. 16, effective August 14, 2003.

l. An employee of a person described in subdivision b., e., f., g., h., or j. of G.S. 78C-2(1) acting on behalf of such person within the scope of his employment.

*l*1. An investment adviser who is covered under federal law as defined in subdivision (4) of this section.

m. Such other persons not within the intent of this subsection as the Administrator may by rule or order designate.

(2) "Investment Advisers Act of 1940" means the federal statute of that name as amended before or after the effective date of this Chapter.

(3) "Investment adviser representative" means, with respect to any investment adviser registered under this Chapter, any partner, officer, director (or a person occupying a similar status or performing similar functions) or other individual employed by or associated with an investment adviser, except clerical or ministerial personnel, who:

a. Makes any recommendations or otherwise renders advice regarding securities directly to clients,

b. Manages accounts or portfolios of clients,

c. Determines which recommendations or advice regarding securities should be given; provided, however if there are more than five such persons employed by or associated with an investment adviser, who do not otherwise come within the meaning of G.S. 78C-2(3) a., b., d., or e., then only the direct supervisors of such persons are deemed to be investment adviser representatives under G.S. 78C-2(3) c.,

d. Solicits, offers or negotiates for the sale of or sells investment advisory services, unless such person is a dealer or salesman registered under Chapter 78A of the General Statutes and the person would not be an investment adviser representative except for the performance of the activities described in G.S. 78C-2(3) d., or

e. Directly supervises investment adviser representatives as defined in G.S. 78C-2(3) a., b., c. (unless such investment adviser representatives are already required to register due to their role as supervisors by operation of G.S. 78C-2(3) c.), or d. in the performance of the foregoing activities.

Notwithstanding this subdivision, the term "investment adviser representative" as used in this Chapter and as applied to a person who is employed by, or associated with, an investment adviser covered under federal law only includes an individual who (i) has a "place of business" in the State, as that term is defined in rules or regulations adopted or promulgated under section 203A of the Investment Advisers Act of 1940 by the United States Securities and Exchange Commission and (ii) either:

a. Is an "investment adviser representative" as that term is defined in rules or regulations adopted or promulgated under section 203A of the Investment Advisers Act of 1940 by the United States Securities and Exchange Commission; or

b. Is not a "supervised person" as that term is defined in rules or regulations adopted or promulgated under the Investment Advisers Act of 1940 by the United States Securities and Exchange Commission and who solicits, offers, or negotiates for the sale of, or who sells, investment advisory services on behalf of an adviser covered under federal law.

(4) "Investment adviser covered under federal law" means any adviser who is registered with the Securities and Exchange Commission under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-3).

(5) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1989, c. 770, s. 12(a)-(c); 1997-419, s. 14; 1997-462, s. 6; 2001-273, s. 1; 2003-413, s. 16.)

Editor's Note. — This section is set out in the form above at the direction of the Revisor of Statutes.

§§ 78C-3 through 78C-7: Reserved for future codification purposes.

ARTICLE 2.

Fraudulent and Prohibited Practices.

§ 78C-8. Advisory activities.

(a) It is unlawful for any person who receives, directly or indirectly, any consideration from another person for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise,

(1) To employ any device, scheme, or artifice to defraud the other person,

(2) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person, or

(3) Acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this subdivision shall not apply to any transaction with a customer of a dealer if such dealer is not acting as an investment adviser in relation to such transaction.

(b) In the solicitation of advisory clients, it is unlawful for any person to make any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading.

(c) Except as may be permitted by rule or order of the Administrator, it is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract unless it provides in writing:

(1) That the investment adviser shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client (unless otherwise provided by subsection (d) or (f) below);

(2) That no assignment of the contract may be made by the investment adviser without the consent of the other party to the contract; and

(3) That the investment adviser, if a partnership, shall notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change.

(d) Subdivision (c)(1) does not apply to any person who is exempt from registration under the Investment Advisers Act of 1940 by operation of Section 203(b)(3) of said act or by operation of any rule or regulation promulgated by the United States Securities and Exchange Commission under or related to said Section 203(b)(3) provided that any reference in this subsection (d) to any statute, rule or regulation shall be deemed to incorporate said statute, rule or regulation (and any statute, rule or regulation referenced therein) as in effect on June 1, 1988. Subdivision (c)(1) does not prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates or taken as of a definite date. "Assignment," as used in subdivision (c)(2), includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but, if the investment adviser is a partnership, no assignment of an investment advisory contract is considered to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after admission, will be only a minority of the members and will have only a minority interest in the business.

(e) It is unlawful for any investment adviser to take or have custody of any securities or funds of any client in contravention of any rule or order of the Administrator prohibiting, limiting or regulating such custody.

(f) The Administrator may by rule or order adopt exemptions from subdivision (a)(3) and subdivisions (c)(1), (c)(2) and (c)(3) where such exemptions are consistent with the public interest and within the purposes fairly intended by the policy and provisions of this Chapter. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

CASE NOTES

There was sufficient evidence to support an indictment for a violation of this section where the State presented evidence showing that defendant advised the victims, for a 10 percent (10%) commission, to invest in the securities of several corporations and that defendant told the victims that the value of these securities would increase by various amounts in the future, promising extravagantly large returns on their original investment. State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 78C-9. Misleading filings.

It is unlawful for any person to make or cause to be made, in any document filed with the Administrator or in any proceeding under this Chapter, any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

§ 78C-10. Unlawful representations concerning registration or exemption.

(a) Neither (i) the fact that an application for registration under Article 3 of this Chapter has been filed nor (ii) the fact that a person is effectively registered constitutes a finding by the Administrator that any document filed under this Chapter is true, complete, and not misleading. Neither any such fact nor the fact that an exemption or exception is available means that the Administrator has passed in any way upon the merits or qualifications of, or recommended, or given approval to any person.

(b) It is unlawful to make, or cause to be made, to any prospective customer, or client, any representation inconsistent with subsection (a) of this section. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

§§ 78C-11 through 78C-15: Reserved for future codification purposes.

Article 3.

Registration and Notice Filing Procedures of Investment Advisers and Investment Adviser Representatives.

§ 78C-16. Registration and notice filing requirement.

(a) It is unlawful for any person to transact business in this State as an investment adviser unless:

(1) The person is registered under this Chapter;

(2) The person's only clients in this State are investment companies as defined in the Investment Company Act of 1940, other investment advisers, investment advisers covered under federal law, dealers, banks, trust companies, savings institutions, savings and loan associations, insurance companies, employee benefit plans with assets of not less than one million dollars ($1,000,000), and governmental agencies or instrumentalities, whether acting for themselves or as trustees with investment control, or other institutional investors as are designated by rule or order of the Administrator;

(3) The person has no place of business in this State, and during the preceding 12-month period has had not more than five clients, other than those specified in subdivision (2) of this subsection, who are residents of the State; or

(4) The person is exempt from registration under the Investment Advisers Act of 1940 by operation of section 203(b)(3) of that act or by operation of any rule or regulation promulgated by the United States Securities and Exchange Commission under or related to section 203(b)(3) provided that any reference in this subsection to any statute, rule, or regulation shall be deemed to incorporate the statute, rule, or regulation (and any statute, rule, or regulation referenced therein) as in effect June 1, 1988.

(a1) It is unlawful for any person to transact business in this State as an investment adviser representative unless:

(1) The person is registered under this Chapter; or

(2) The person is an investment adviser representative employed by or associated with an investment adviser exempt from registration under subdivision (2), (3), or (4) of subsection (a) of this section; or

(3) The person is an investment adviser representative employed by or associated with an investment adviser covered under federal law that is exempt from the notice filing requirements of G.S. 78C-17(a1).

(b) It is unlawful for any person required to be registered as an investment adviser under this Chapter to employ an investment adviser representative unless the investment adviser representative is registered under this Chapter. The registration of an investment adviser representative is not effective during any period when the investment adviser representative is not employed by (i) an investment adviser registered under this Chapter; or (ii) an investment adviser covered under federal law who has made a notice filing pursuant to the provisions of G.S. 78C-17(a1). When an investment adviser representative begins or terminates employment or association with an investment adviser who is registered under this Chapter, the investment adviser shall notify promptly the Administrator. When an investment adviser representative begins or terminates employment or association with an investment adviser covered under federal law, the investment adviser representative shall, and the investment adviser may, notify promptly the Administrator.

(b1) No investment adviser representative may be registered with more than one investment adviser registered under this Chapter or investment adviser covered under federal law unless each of the investment advisers which employs or associates the investment adviser representative is under common ownership or control.

(b2) Notwithstanding subsection (b1) of this section, an investment adviser representative may be registered with more than one investment adviser registered under this Chapter or investment adviser covered under federal law for the purposes of soliciting, offering, or negotiating for the sale of, or for selling investment advisory services for or on behalf of, those investment advisers. If an investment adviser representative is registered with more than one investment adviser pursuant to this subsection, the representative shall be registered separately with each investment adviser for whom the representative solicits business and shall provide in writing to each person solicited any information disclosing the terms of any compensation arrangement that is related to the representative's solicitation or referral activities and that is required by the Administrator pursuant to rule or order. The Administrator may, by rule or order, specify supervisory procedures consistent with regulations adopted by the United States Securities and Exchange Commission applicable to investment advisers who compensate persons for referrals of business.

(c) Every registration or notice filing expires December 31 of each year unless renewed.

(d) It is unlawful for any investment adviser covered under federal law to conduct advisory business in this State unless the investment adviser covered under federal law complies with the provisions of G.S. 78C-17(a1). (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-419, ss. 15, 16; 1998-217, s. 9; 2001-273, s. 2; 2003-413, ss. 17, 18.)

§ 78C-17. Registration and notice filing procedures.

(a) An investment adviser, or investment adviser representative may obtain an initial or renewal registration by filing with the Administrator or the Administrator's designee an application together with a consent to service of process pursuant to G.S. 78C-46(b) and paying any reasonable costs charged by the designee for processing the filings. The application shall contain whatever information the Administrator by rule requires concerning such matters as:

(1) The applicant's form and place of organization;

(2) The applicant's proposed method of doing business;

(3) The qualifications and business history of the applicant; in the case of an investment adviser, the qualifications and business history of any

partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the investment adviser;

(4) Any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony;

(5) The applicant's financial condition and history; and

(6) Any information to be furnished or disseminated to any client or prospective client.

If no denial order is in effect and no proceeding is pending under G.S. 78C-19, registration becomes effective at noon of the 30th day after an application is filed. The Administrator may by rule or order specify an earlier effective date and may by order defer the effective date until noon of the 30th day after the filing of any amendment. Registration of an investment adviser automatically constitutes registration of any investment adviser representative who is a partner, executive officer, or director, or a person occupying a similar status or performing similar functions. After the Administrator institutes a proceeding under G.S. 78C-19 to postpone or deny an application for registration, withdrawal of the application shall be allowed only at such time and under such conditions as the Administrator may by order determine.

(a1) The Administrator may require investment advisers covered under federal law to file with the Administrator any documentation filed with the Securities and Exchange Commission as a condition of doing business in this State. This subsection does not apply to (i) an investment adviser covered under federal law whose only clients are those described in G.S. 78C-16(a)(2), or (ii) an investment adviser covered under federal law who has no place of business in this State, and during the preceding 12-month period has had not more than five clients, other than those described in G.S. 78C-16(a)(2), who are residents of this State. A notice filing under this section may be renewed by (i) filing documents required by the Administrator and filed with the Securities and Exchange Commission, prior to the expiration of the notice filing, and (ii) paying the fee required under subsection (b1) of this section. A notice filed under this section may be terminated by the investment adviser by providing the Administrator notice of the termination, which shall be effective upon receipt by the Administrator.

(b) Every applicant for initial or renewal registration shall pay a filing fee of three hundred dollars ($300.00) in the case of an investment adviser, and seventy-five dollars ($75.00) in the case of an investment adviser representative. When an application is denied or withdrawn, the Administrator shall retain the fee.

(b1) Every person acting as an investment adviser covered under federal law in this State shall pay an initial filing fee of three hundred dollars ($300.00) and a renewal notice filing fee of three hundred dollars ($300.00).

(b2) Any person required to pay a fee under this section may transmit through any designee any fee required by this section or by the rules adopted pursuant to this section.

(c) A registered investment adviser may file an application for registration of a successor, whether or not the successor is then in existence, for the unexpired portion of the year. There shall be no filing fee.

(d) The Administrator may by rule establish minimum net capital requirements not to exceed one hundred thousand dollars ($100,000) for registered investment advisers, subject to the limitations of section 222 of the Investment Advisers Act of 1940 (15 U.S.C. § 80(b)-18a), which may include different requirements for those investment advisers who maintain custody of clients' funds or securities or who have discretionary authority over same and those investment advisers who do not.

(e) The Administrator may by rule require registered investment advisers who have custody of or discretionary authority over client funds or securities to post surety bonds in amounts up to one hundred thousand dollars ($100,000), subject to the limitations of section 222 of the Investment Advisers Act of 1940 (15 U.S.C. § 80(b)-18a), and may determine their conditions. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond so required. No bond may be required of any investment adviser whose minimum net capital, which may be defined by rule, exceeds one hundred thousand dollars ($100,000). Every bond shall provide for suit thereon by any person who has a cause of action under G.S. 78C-38 and, if the Administrator by rule or order requires, by any person who has a cause of action not arising under this Chapter. Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought within the time limitations of G.S. 78C-38(d). (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-419, s. 17; 2001-273, s. 3; 2002-126, s. 29A.35; 2002-189, ss. 2, 3; 2003-413, s. 19.)

§ 78C-18. Post-registration provisions.

(a) Every registered investment adviser shall make and keep such accounts, correspondence, memoranda, papers, books and records as the Administrator by rule prescribes, subject to the limitations of section 222 of the Investment Advisers Act of 1940 (15 U.S.C. § 80(b)-18a).

All records so required shall be preserved for three years unless the Administrator by rule prescribes otherwise for particular types of records.

(b) With respect to investment advisers, the Administrator may require that certain information be furnished or disseminated as necessary or appropriate in the public interest or for the protection of investors and advisory clients. To the extent determined by the Administrator in his discretion, information furnished to clients or prospective clients of an investment adviser pursuant to the Investment Advisers Act of 1940 and the rules thereunder may be used in whole or partial satisfaction of this requirement.

(c) Every registered investment adviser shall file such financial reports as the Administrator by rule prescribes, subject to the limitations of section 222 of the Investment Advisers Act of 1940 (15 U.S.C. § 80(b)-18a).

(d) If the information contained in any document filed with the Administrator is or becomes inaccurate or incomplete in any material respect, the registrant or an investment adviser covered under federal law shall promptly file a correcting amendment, if the document is filed with respect to a registrant or when the amendment is required to be filed with the Securities and Exchange Commission with respect to an investment adviser covered under federal law, unless notification of the correction has been given under G.S. 78C-16(b).

(e) All the records referred to in subsection (a) of this section are subject at any time or from time to time to such reasonable periodic, special, or other examinations by representatives of the Administrator, within or without this State, as the Administrator deems necessary or appropriate in the public interest or for the protection of investors. For the purpose of avoiding unnecessary duplication of examinations, the Administrator, insofar as he deems it practicable in administering this subsection, may cooperate with the securities administrators of other states, the Securities and Exchange Commission, and any national securities exchange or national securities association registered under the Securities Exchange Act of 1934. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-419, s. 18.)

§ 78C-19. Denial, revocation, suspension, bar, censure, cancellation, and withdrawal of registration.

(a) The Administrator may by order deny, suspend or revoke any registration, or bar or censure any registrant or any officer, director, partner or person occupying a similar status or performing similar functions for a registrant, from employment with a registered investment adviser, or restrict or limit a registrant as to any function or activity of the business for which registration is required in this State if he finds:

(1) That the order is in the public interest and;

(2) That the applicant or registrant or, in the case of an investment adviser, any partner, officer or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the investment adviser;

a. Has filed an application for registration which as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;

b. Has willfully violated or willfully failed to comply with any provision of this Chapter or Chapter 78A or any rule or order under this Chapter or Chapter 78A;

c. Has been convicted, within the past 10 years, of any misdemeanor involving a security or the financial services business, or any aspect of the securities business, or the financial services business, or any felony;

d. Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities or financial services business;

e. Is the subject of an order of the Administrator denying, suspending, barring, revoking, restricting or limiting registration as a dealer, salesman, investment adviser or investment adviser representative;

f. Is the subject of an adjudication or determination within the past five years by a securities, commodities or other financial services regulatory agency or an administrator of such laws of another state or a court of competent jurisdiction that the person has violated the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940 or the Commodity Exchange Act, or the securities or commodities law of any other state or any other financial services regulatory laws as the Administrator may designate by rule;

g. Has engaged in dishonest or unethical practices in the securities or financial services business;

h. Is insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature; but the Administrator may not enter an order against an investment adviser under this clause without a finding of insolvency as to the investment adviser;

i. Is not qualified on the basis of such factors as training, experience, and knowledge of the securities business, except as otherwise provided in subsection (b) of this section;

j. Has failed reasonably to supervise his salesmen or employees if he is a dealer or his investment adviser representatives or employees if he is an investment adviser to assure their compliance with this Chapter; or

k. Has failed to pay the proper filing fee; but the Administrator may enter only a denial order under this clause, and he shall vacate any such order when the deficiency has been corrected.

The Administrator may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to him when registration became effective unless the proceeding is instituted within the next 120 days.

(b) The following provisions govern the application of G.S. 78C-19(a)(2)i:

(1) The Administrator may not enter an order against an investment adviser on the basis of the lack of qualification of any person other than (i) the investment adviser himself if he is an individual or (ii) an investment adviser representative.

(2) The Administrator may not enter an order solely on the basis of lack of experience if the applicant or registrant is qualified by training or knowledge or both.

(3) The Administrator shall consider that an investment adviser representative who will work under the supervision of a registered investment adviser need not have the same qualifications as an investment adviser.

(4) The Administrator shall consider that an investment adviser or investment adviser representative is not necessarily qualified solely on the basis of experience as a dealer or salesman.

(5) The Administrator may by rule provide for an examination, including an examination developed or approved by an organization of securities administrators, which examination may be written or oral or both, to be taken by any class of or all applicants. The Administrator may by rule or order waive the examination requirement as to a person or class of persons if the Administrator determines that the examination is not necessary for the protection of advisory clients.

(c) The Administrator may by order summarily postpone or suspend registration pending final determination of any proceeding under this section. Upon the entry of the order, the Administrator shall promptly notify the applicant or registrant, as well as the employer or prospective employer if the applicant or registrant is an investment adviser representative, that it has been entered and of the reasons therefor and that within 20 days after the receipt of a written request the matter will be scheduled for hearing in accordance with Chapter 150B of the General Statutes. If no request for a hearing, other responsive pleading, or submission is received by the Administrator within 30 business days of receipt of service of notice of the order upon the applicant or registrant and no hearing is ordered by the Administrator, the order shall become final and remain in effect unless it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after notice of and opportunity for hearing, may modify or vacate the order or extend it until final determination.

(d) If the Administrator finds that any registrant or applicant for registration is no longer in existence or has ceased to do business as an investment adviser or investment adviser representative, or is subject to an adjudication of mental incompetence or to the control of a committee, conservator, or guardian, or cannot be located after reasonable search, the Administrator may by order cancel the registration or application.

(e) Withdrawal from registration as an investment adviser or investment adviser representative becomes effective 90 days after receipt of an application to withdraw or within such shorter period of time as the Administrator may determine, unless a revocation or suspension proceeding is pending when the application is filed or a proceeding to revoke or suspend or to impose conditions upon the withdrawal is instituted within 90 days after the application is filed. If a proceeding is pending or instituted, withdrawal becomes effective at such time and upon such conditions as the Administrator by order determines. If no proceeding is pending or instituted and withdrawal automatically becomes effective, the Administrator may nevertheless institute a revocation or suspension proceeding under G.S. 78C-19(a)(2)b within one year after withdrawal became effective and enter a revocation or suspension order as of the last date on which registration was effective.

(f) No order may be entered under any part of this section except the first sentence of subsection (c) of this section without (i) appropriate prior notice to the applicant or registrant (as well as the employer or prospective employer if the applicant or registrant is an investment adviser representative), (ii) opportunity for hearing, and (iii) written findings of fact and conclusions of law. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-462, s. 7; 2001-126, s. 5.)

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Since this section has no specific provisions regarding notice and hearing, the Administrative Procedure Act, G.S. 150B-1 et seq., will provide the procedures. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

§ 78C-20. Methods of registration.

(a) All applications for initial and renewal registrations or notice filings required under G.S. 78C-17 shall be filed with the Investment Adviser Registration Depository (IARD) operated by the National Association of Securities Dealers.

(b) Repealed by Session Laws 2001-273, s. 4, effective October 1, 2001.

(c) Nothing in this section shall be construed to prevent the exercise of the authority of the Administrator as provided in G.S. 78C-19. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 2001-273, s. 4; 2002-159, s. 16.)

§§ 78C-21 through 78C-25: Reserved for future codification purposes.

Article 4.

Administration and Review.

§ 78C-26. Administration of Chapter.

(a) This Chapter shall be administered by the Secretary of State. The Secretary of State as Administrator may delegate all or part of the authority under this Chapter to the Deputy Securities Administrator including, but not limited to, the authority to conduct hearings, and make, execute and issue final agency orders and decisions. The Secretary of State may appoint such clerks and other assistants as may from time to time be needed. The Secretary of State may designate one or more hearing officers for the purpose of conducting administrative hearings.

(b) It is unlawful for the Administrator or any of his officers or employees to use for personal benefit any information which is filed with or obtained by the Administrator and which is not made public. No provision of this Chapter authorizes the Administrator or any of his officers or employees to disclose any such information except among themselves or when necessary or appropriate in a proceeding or investigation under this Chapter. No provision of this

Chapter either creates or derogates from any privilege which exists at common law or otherwise when documentary or other evidence is sought under a subpoena directed to the Administrator or any of his officers or employees.

(c) All fees provided for under this Chapter shall be collected by the Administrator and shall be paid over to the State Treasurer to go into the General Fund. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 2001-126, s. 10.)

§ 78C-27. Investigations and subpoenas.

(a) The Administrator in his discretion:

(1) May make any investigation within or outside of this State as the Administrator deems necessary to determine whether any person has violated or is about to violate any provision of this Chapter or any rule or order hereunder, or to aid in the enforcement of this Chapter or in the prescribing of rules and forms hereunder;

(2) May require or permit any person to file a statement in writing, under oath or otherwise as the Administrator determines, as to all the facts and circumstances concerning the matter to be investigated; and

(3) May publish information concerning any violation of this Chapter or any rule or order hereunder.

(b) For the purpose of any investigation or proceeding under this Chapter, the Administrator or any officer designated by him may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the Administrator deems relevant or material to the inquiry.

(c) In case of contumacy by, or refusal to obey a subpoena issued to any person, any court of competent jurisdiction, upon application by the Administrator, may issue to the person an order requiring him to appear before the Administrator, or the officer designated by him, there to produce documentary evidence if so ordered or to give evidence touching the matter under investigation or in question. Failure to obey the order of the court may be punished by the court as a contempt of court.

(d) The Administrator may act under subsection (b) of this section or apply under subsection (c) of this section to enforce subpoenas in this State at the request of a securities agency or administrator of any state if the alleged activities constituting a violation for which the information is sought would be a violation of this Chapter or any rule hereunder if the alleged activities had occurred in this State. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-462, s. 8.)

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G.S. 78A-46 and subsection (c) of this section are the equivalent of grand jury proceedings. So long as the exercise of these powers does not result in action on a registration without an opportunity to be heard under G.S. 78A-39, it is not a function to which Chapter 150B has any application. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

§ 78C-28. Injunctions; cease and desist orders; civil penalties.

(a) Whenever it appears to the Administrator that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may in his discretion bring an action in any court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with this Chapter or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. In addition to any other remedies provided by this Chapter, the Administrator may apply to the court hearing this matter for an order of restitution whereby the defendant in such action shall be ordered to make restitution of those sums shown by the Administrator to have been obtained by him in violation of any of the provisions of this Chapter. Such restitution shall be payable, in the discretion of the court, to the Administrator or receiver appointed pursuant to this section for the benefit of those persons whose assets were obtained in violation of this Chapter, or directly to those persons. The court may not require the Administrator to post a bond.

(b)(1) If the Administrator determines after giving notice of an opportunity for a hearing, that any person has engaged in, or is about to engage in, any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may order such person to cease and desist from such unlawful act or practice and take such affirmative action as in the judgment of the Administrator will carry out the purposes of this Chapter.

(2) If the Administrator makes written findings of fact that the public interest will be irreparably harmed by delay in issuing an order under G.S. 78C-28(b)(1), the Administrator may issue a temporary cease and desist order. Upon the entry of a temporary cease and desist order, the Administrator shall promptly notify in writing the person subject to the order that such order has been entered, the reasons therefor, and that within 20 days after the receipt of a written request from such person the matter shall be scheduled for hearing in accordance with Chapter 150B of the General Statutes to determine whether or not the order shall become permanent and final. If no request for a hearing, other responsive pleading, or submission is received by the Administrator within 30 business days of receipt of service of notice of the order upon the person subject to the order and no hearing is ordered by the Administrator, the order shall become final and remain in effect unless it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after giving notice of an opportunity for a hearing to the person subject to the order, shall by written findings of fact and conclusion of law, vacate, modify, or make permanent the order.

(3) No order under subsection (b) of this section, except an order issued pursuant to G.S. 78C-28(b)(2), may be entered without prior notice or an opportunity for hearing. The Administrator may vacate or modify an order under subsection (b) of this section upon his finding that the conditions which required such an order have changed and that it is in the public interest to so vacate or modify.

(4) A final order issued pursuant to the provisions of subsection (b) of this section shall be subject to review as provided in G.S. 78C-29.

(c) The Administrator may issue an order against an applicant, registered person, or other person who willfully violates this Chapter or a rule or order of the Administrator under this Chapter:

(1) Imposing a civil penalty of up to two thousand five hundred dollars ($2,500) for a single violation or of up to twenty-five thousand dollars ($25,000) for multiple violations in a single proceeding or a series of related proceedings; and

(2) Requiring reimbursement of the costs of investigation.

The clear proceeds of civil penalties imposed under this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S.

115C-457.2. Any reimbursement imposed under this subsection shall be paid into the General Fund. No order authorized by this subsection may be entered without prior notice of an opportunity for a hearing conducted pursuant to Article 3 of Chapter 150B of the General Statutes. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1991, c. 456, s. 7; 1997-462, s. 9; 1998-215, s. 121; 2001-126, s. 6.)

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Statutory Standards Are Public Health, Safety or Welfare Criteria. — The statutory standards embodied in G.S. 78A-39(a) and 78A-29(a) and subsection (b) of this section are the public health, safety or welfare criteria which must be considered prior to and upon which a summary suspension must be founded. G.S. 78A-39(c) requires the summary suspension order to include the reasons for its entry. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

§ 78C-29. Judicial review of orders.

(a) Any person aggrieved by a final order of the Administrator may obtain a review of the order in the Superior Court of Wake County by filing in court, within 30 days after a written copy of the decision is served upon the person by personal service or by registered or certified mail, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition shall be forthwith served upon the Administrator, and thereupon the Administrator shall certify and file in court a copy of the filing and evidence upon which the order was entered. When these have been filed, the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in whole or in part. The findings of the Administrator as to the facts, if supported by competent, material and substantial evidence, are conclusive. If either party applies to the court for leave to adduce additional material evidence, and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearings before the Administrator, the court may order the additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such conditions as the court considers proper. The Administrator may modify his findings and order by reason of the additional evidence and shall file in court the additional evidence together with any modified or new findings or order. The judgment of the court is final, subject to review by the Court of Appeals.

(b) The commencement of proceedings under subsection (a) of this section does not, unless specifically ordered by the court, operate as a stay of the Administrator's order. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

§ 78C-30. Rules, forms, orders, and hearings.

(a) The Administrator may from time to time make, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of this Chapter, including rules and forms governing registration, applications, and reports, and defining any terms, whether or not used in this Chapter, insofar as the definitions are not inconsistent with the provisions of this Chapter. For the purpose of rules and forms the Administrator may classify persons, and matters within his jurisdiction, and prescribe different requirements for different classes.

(b) No rule, form, or order may be made, amended, or rescinded unless the Administrator finds that the action is necessary or appropriate in the public interest or for the protection of investors and clients and consistent with the purposes fairly intended by the policy and provisions of this Chapter. In prescribing rules and forms the Administrator may cooperate with the securities administrators of the other states and the Securities and Exchange Commission with a view to effectuating the policy of this statute to achieve maximum uniformity in the form and content of registrations, applications, and reports wherever practicable.

(c) The Administrator may by rule or order prescribe (i) the form and content of financial statements required under this Chapter, (ii) the circumstances under which consolidated financial statements shall be filed, and (iii) whether any required financial statements shall be certified by independent or certified public accountants. All financial statements required to be filed with the Administrator shall be audited and shall be prepared in accordance with generally accepted accounting principles, except where the Administrator shall by rule or order provide otherwise.

(d) The Administrator may by rule or order require the filing of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, including clients or prospective clients of an investment adviser.

(e) All rules and forms of the Administrator shall be published.

(f) No provision of this Chapter imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form, or order of the Administrator, notwithstanding that the rule, form, or order may later be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(g) Every hearing in an administrative proceeding shall be public unless the Administrator in his discretion grants a request joined in by all the respondents that the hearing be conducted privately. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 2003-413, s. 20.)

§ 78C-31. Administrative files and opinions.

(a) A document is filed when it is received by the Administrator.

(b) The Administrator shall keep a register of all applications for registration which are or have been effective under this Chapter and all denial, suspension, or revocation orders or similar orders which have been entered under this Chapter. The register shall be open for public inspection.

(c) The information contained in or filed with any registration, application, or report may be made available to the public under such rules as the Administrator prescribes.

(c1) The files and records of the Administrator relating to criminal investigations and enforcement proceedings undertaken pursuant to this Chapter are subject to the provisions of G.S. 132-1.4.

(c2) The files and records of the Administrator relating to noncriminal investigations and enforcement proceedings undertaken pursuant to this Chapter shall not be subject to inspection and examination pursuant to G.S. 132-6 until the investigations and proceedings are completed and cease to be active.

(c3) Any information obtained by the Administrator from any law enforcement agency, administrative agency, or regulatory organization on a confidential or otherwise restricted basis in the course of an investigation or proceeding undertaken pursuant to this Chapter shall be confidential and exempt from G.S. 132-6 to the same extent that it is confidential in the possession of the providing agency or organization.

(d) Upon request and at such reasonable charges as the Administrator prescribes, the Administrator shall furnish to any person photostatic or other copies (certified under the seal of office if requested) of any entry in the register or any document which is a matter of public record. In any proceeding or prosecution under this Chapter, any copy so certified is prima facie evidence of the contents of the entry or document certified.

(e) The Administrator may honor requests from interested persons for interpretative opinions upon the payment of a fee of one hundred fifty dollars ($150.00). (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-462, s. 10.)

§§ 78C-32 through 78C-37: Reserved for future codification purposes.

ARTICLE 5.

Civil Liabilities and Criminal Penalties.

§ 78C-38. Civil liabilities.

(a) Any person who:

(1) Engages in the business of advising others, for compensation, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities, in violation of G.S. 78C-8(b), G.S. 78C-16(a), (a1), or (b) (an action pursuant to a violation of G.S. 78C-16(b) may not be maintained except by those persons who directly received advice from the unregistered investment adviser representative), G.S. 78C-10(b), or of any rule or order under G.S. 78C-30(d) which requires the affirmative approval of sales literature before it is used, or

(2) Receives, directly or indirectly, any consideration from another person for advice as to the value of securities or their purchase or sale, whether through the issuance of analyses, reports or otherwise and employs any device, scheme, or artifice to defraud such other person or engages in any act, practice or course of business which operates or would operate as a fraud or deceit on such other person, in violation of G.S. 78C-8(a)(1) or (2),

is liable to any person who is given such advice in such violation, who may sue either at law or in equity to recover (i) the consideration paid for such advice together with interest thereon at the legal rate as provided in G.S. 24-1 from the date of payment of the consideration, plus (ii) the actual damages to such person proximately caused by such violation, plus (iii) costs of the action and reasonable attorneys' fees. An action based on violation of G.S. 78C-8(b) may not prevail where the person accused of the violation sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known of the existence of the facts by reason of which the liability is alleged to exist.

(b)(1) Every person who directly or indirectly controls a person liable under subsection (a) of this section, including every partner, officer, or director of the person, every person occupying a similar status or performing similar functions, and every dealer or salesman who materially aids in the conduct giving rise to the liability is liable jointly and severally with and to the same extent as the person, unless able to sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

(2) Unless liable under subdivision (1) of this subsection, every employee or associate of a person liable under subsection (a) of this section who materially aids in the conduct giving rise to the liability and every

other person who materially aids in the conduct giving rise to the liability is liable jointly and severally with and to the same extent as the person if the employee or associate or other person actually knew of the existence of the facts by reason of which the liability is alleged to exist.

(3) There is contribution among the several persons liable under subdivisions (1) and (2) of this subsection as provided among tort-feasors pursuant to Chapter 1B of the General Statutes.

(c) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(d) No person may sue under this section more than three years after the rendering of investment advice in violation of G.S. 78C-16.

No person may sue under this section for any other violation of this Chapter more than three years after the person discovers facts constituting the violation, but in any case no later than five years after the rendering of investment advice, except that if a person who may be liable under this section engages in any fraudulent or deceitful act that conceals the violation or induces the person to forgo or postpone commencing an action based upon the violation, the suit may be commenced not later than three years after the person discovers or should have discovered that the act was fraudulent or deceitful.

(e) No person who has made or engaged in the performance of any contract in violation of any provision of this Chapter or any rule or order hereunder, or who has acquired any purported right under such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(f) Any condition, stipulation, or provision binding any person receiving any investment advice to waive compliance with any provision of this Chapter or any rule or order hereunder is void.

(g) The rights and remedies provided by this Chapter are in addition to any other rights or remedies that may exist at law or in equity, but this Chapter does not create any cause of action not specified in this section or G.S. 78C-17(e). If the requirements of Chapter 1D of the General Statutes are met, punitive damages are available to the extent provided in that Chapter. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1991, c. 456, s. 8; 2003-413, ss. 21-24.)

§ 78C-39. Criminal penalties.

(a) Any person who willfully violates any provision of this Chapter except G.S. 78C-8(a)(1), 78C-8(a)(2), 78C-8(b), or 78C-9 is guilty of a Class I felony.

(a1) Any person who willfully violates any rule or order under this Chapter is guilty of a Class I felony. No person may be imprisoned for the violation of any rule if the person proves that the person had no knowledge of the rule. It is an affirmative defense to a charge of violating an order under this Chapter that the person had no knowledge of the order.

(a2) Any person who willfully violates G.S. 78C-8(a)(1), 78C-8(a)(2), or 78C-8(b) is guilty of a felony. If the losses caused, directly or indirectly, by the violator for a single act or for a series of related acts in a common scheme or plan is one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony. If the losses caused, directly or indirectly, by the violator for a single act or for a series of related acts in a common scheme or plan is less than one hundred thousand dollars ($100,000), the person is guilty of a Class H felony.

(a3) Any person who willfully violates G.S. 78C-9 knowing the statement made to be false or misleading in any material respect is guilty of a Class H felony. Any other willful violation of G.S. 78C-9 constitutes a Class 2 misdemeanor.

(a4) A person is guilty of a Class H felony if the person willfully does any of the following for the purpose of interfering with the performance of any audit, examination, or investigation by the Administrator under this Chapter:

(1) Makes or causes to be made to the Administrator or the Administrator's designated representative any false or misleading oral or written statement.

(2) Creates, causes to be made, or delivers any record, report, or document knowing that it is false or misleading in any material respect.

(3) Destroys or alters any record, report, or document.

(4) Conceals or secretes any record, report, or document.

(b) The Administrator may refer such evidence as is available concerning violations of this Chapter or of any rule or order hereunder to the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter. Upon receipt of a reference, the district attorney may request that a duly employed attorney of the Administrator prosecute or assist in the prosecution of the violation or violations on behalf of the State. Upon approval of the Administrator, the employee may be appointed a special prosecutor for the district attorney to prosecute or assist in the prosecution of the violations without receiving compensation from the district attorney. Such a special prosecutor shall have all the powers and duties prescribed by law for district attorneys and such other powers and duties as are lawfully delegated to the special prosecutor by the district attorney for violations of this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1991, c. 456, s. 9; 2003-413, s. 25.)

§ 78C-40. Burden of proof.

In a civil or administrative proceeding brought under this Chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it. In a criminal proceeding brought under this Chapter, the State has no initial burden of producing evidence to show that the defendant's actions do not fall within the exemption or exceptions; however, once the defendant introduces evidence to show that his conduct is within the exemption or exception, the burden of persuading the trier of fact that the exemption or exception does not apply falls upon the State. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

§§ 78C-41 through 78C-45: Reserved for future codification purposes.

Article 6.

Miscellaneous Provisions.

§ 78C-46. Scope of the Chapter; service of process.

(a) G.S. 78C-8, 78C-16(a) and (b), 78C-10, and 78C-38 apply when any act instrumental in effecting prohibited conduct is done in this State, whether or not either party is then present in this State.

(b) Every applicant for registration under this Chapter shall file with the Administrator, in such form as he by rule prescribes, an irrevocable consent appointing the Administrator or his successor in office to be his attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against him or his successor, executor or administrator which arises under this Chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. A person who has filed such a consent in connection with a previous registration or notice filing need not file another. Service may be made by leaving a copy of the process in the office of the Administrator, but it is not effective unless (i) the plaintiff, who may be the Administrator in a suit, action, or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at his last address on file with the Administrator, and (ii) the plaintiff's affidavit of compliance with the subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(c) When any person, including any nonresident of this State, engages in conduct prohibited or made actionable by this Chapter or any rule or order hereunder, and he has not filed a consent to service of process under subsection (b) of this section and personal jurisdiction over him cannot otherwise be obtained in this State, that conduct shall be considered equivalent to his appointment of the Administrator or his successor in office to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor, executor or administrator which grows out of that conduct and which is brought under this Chapter or any rule or order hereunder with the same force and validity as if served on him personally. Service may be made by leaving a copy of the process in the office of the Administrator, and it is not effective unless (i) the plaintiff, who may be the Administrator in a suit, action, or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at his last known address or takes other steps which are reasonably calculated to give actual notice, and (ii) the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(d) When process is served under this section, the court, or the Administrator in a proceeding before him, shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-419, s. 19.)

§ 78C-47. Statutory policy.

This Chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this Chapter with the related federal regulation. Nothing in this Chapter shall be construed to limit or preclude the applicability of any provision of Chapters 78A or 150B of the General Statutes. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

§ 78C-48. Severability of provisions.

If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

§§ 78C-49 through 78C-59: Reserved for future codification purposes.

ARTICLE 7.

Sports Agents.

§§ 78C-60 through 78C-62: Expired.

Editor's Note. — This Article expired, by the terms of G.S. 78C-62, on July 1, 1989. Session Laws 1989, c. 770, s. 12(d) purported to amend expired G.S. 78C-60, effective August 12, 1989.

§§ 78C-63 through 78C-70: Reserved for future codification purposes.

ARTICLE 8.

Regulation of Athlete Agents.

§§ 78C-71 through 78C-81: Repealed by Session Laws 2003-375, s. 1, effective August 1, 2003.

Cross References. — As to present similar provisions, see G.S. 78C-85 et seq.

§§ 78C-82 through 78C-84: Reserved for future codification purposes.

ARTICLE 9.

Uniform Athlete Agents Act.

§ 78C-85. Title.

This Article may be cited as the "Uniform Athlete Agents Act". (2003-375, s. 2.)

§ 78C-86. Definitions.

The following definitions apply in this Article:

(1) Agency contract. — An agreement in which a student-athlete authorizes a person to negotiate or solicit on behalf of the student-athlete a professional-sports-services contract or an endorsement contract.

(2) Athlete agent. — An individual who enters into an agency contract with a student-athlete or, directly or indirectly, recruits or solicits a student-athlete to enter into an agency contract. The term includes an individual who represents to the public that the individual is an athlete agent. The term does not include a spouse, parent, sibling, or guardian of the student-athlete or an individual acting solely on behalf of a professional sports team or professional sports organization.

(3) Athletic director. — An individual responsible for administering the overall athletic program of an educational institution or, if an educational institution has separately administered athletic programs for male students and female students, the athletic program for males or the athletic program for females, as appropriate.

(4) Contact. — A communication, direct or indirect, between an athlete agent and a student-athlete to recruit or solicit the student-athlete to enter into an agency contract.

(5) Endorsement contract. — An agreement under which a student-athlete is employed or receives consideration to use on behalf of the other party any value that the student-athlete may have because of publicity, reputation, following, or fame obtained because of athletic ability or performance.

(6) Intercollegiate sport. — A sport played at the collegiate level for which eligibility requirements for participation by a student-athlete are established by a national association for the promotion or regulation of collegiate athletics.

(7) Person. — An individual, company, corporation, partnership, association, or any other legal or commercial entity.

(8) Professional-sports-services contract. — An agreement under which an individual is employed or agrees to render services as a player on a professional sports team, with a professional sports organization, or as a professional athlete.

(9) Record. — Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(10) Registration. — A certificate issued by the Secretary of State evidencing that a person has satisfied the requirements of an athlete agent pursuant to this Article.

(11) Student-athlete. — An individual who engages in, is eligible to engage in, or may be eligible in the future to engage in any intercollegiate sport. If an individual is permanently ineligible to participate in a particular intercollegiate sport, the individual is not a student-athlete for purposes of that sport. (2003-375, s. 2.)

§ 78C-87. Service of process; subpoenas.

(a) By acting as an athlete agent in this State, a nonresident individual appoints the Secretary of State as the individual's agent for service of process in any civil action in this State related to the individual's acting as an athlete agent in this State.

(b) The Secretary of State may issue subpoenas for any material that is relevant to the administration of this Article. (2003-375, s. 2.)

§ 78C-88. Athlete agents; registration required; exceptions; void contracts.

(a) Except as otherwise provided in this section, an individual may not act as an athlete agent in this State without holding a certificate of registration under G.S. 78C-90 or G.S. 78C-92.

(b) Before being issued a certificate of registration, an individual may act as an athlete agent in this State for all purposes except signing an agency contract if: (i) a student-athlete or another person acting on behalf of the student-athlete initiates communication with the individual; and (ii) within seven days after an initial act as an athlete agent, the individual submits an application for registration as an athlete agent in this State.

(c) A North Carolina licensed and resident attorney may act as an athlete agent in this State for all purposes without registering pursuant to this section if the attorney neither advertises directly for, nor solicits, any student-athlete by representing to any person that the attorney has special experience or qualifications with regard to representing student-athletes and represents no more than two student-athletes.

(d) An agency contract resulting from conduct in violation of this section is void, and the athlete agent shall return any consideration received under the contract. (2003-375, s. 2.)

§ 78C-89. Registration as athlete agent; form; requirements.

(a) An individual seeking registration as an athlete agent shall submit an application for registration to the Secretary of State in a form prescribed by the Secretary of State. The application must be in the name of an individual and, except as otherwise provided in subsection (b) of this section, signed or otherwise authenticated by the applicant under penalty of perjury and must state or contain the following:

(1) The name of the applicant and the address of the applicant's principal place of business.
(2) The name of the applicant's business or employer, if applicable.
(3) Any business or occupation engaged in by the applicant for the five years immediately preceding the date of submission of the application.
(4) A description of the applicant's:
  a. Formal training as an athlete agent.
  b. Practical experience as an athlete agent.
  c. Educational background relating to the applicant's activities as an athlete agent.
(5) The names and addresses of three individuals not related to the applicant who are willing to serve as references.
(6) The name, sport, and last known team for each individual for whom the applicant acted as an athlete agent during the five years immediately preceding the date of submission of the application.
(7) The names and addresses of all persons who are:
  a. With respect to the athlete agent's business if it is not a corporation, the partners, members, officers, managers, associates, or profit-sharers of the business.
  b. With respect to a corporation employing the athlete agent, the officers, directors, and any shareholder of the corporation having an interest of five percent (5%) or greater.
(8) Whether the applicant or any person named under subdivision (7) of this subsection has been convicted of a crime that, if committed in this State, would be a crime involving moral turpitude or a felony and identify the crime.
(9) Whether there has been any administrative or judicial determination that the applicant or any person named under subdivision (7) of this subsection has made a false, misleading, deceptive, or fraudulent representation.
(10) Any instance in which the conduct of the applicant or any person named under subdivision (7) of this subsection resulted in the imposition of a sanction, suspension, or declaration of ineligibility to participate in an interscholastic or intercollegiate athletic event on a student-athlete or educational institution.
(11) Any sanction, suspension, or disciplinary action taken against the applicant or any person named under subdivision (7) of this subsection arising out of occupational or professional conduct.
(12) Whether there has been any denial of an application for, suspension or revocation of, or refusal to renew the registration or licensure of the applicant or any person named under subdivision (7) of this subsection as an athlete agent in any state.

(b) An individual who has submitted an application for registration or licensure as an athlete agent in another state or who holds a certificate of registration or licensure as an athlete agent in another state may submit a copy of the application and certificate in lieu of submitting an application in the form prescribed pursuant to subsection (a) of this section. The Secretary of State shall accept the application and the certificate from the other state as an application for registration in this State if the application to the other state satisfied all of the following criteria:

(1) Was submitted in the other state within six months immediately preceding the submission of the application in this State and the applicant certifies that the information contained in the application is current.

(2) Contains information substantially similar to or more comprehensive than that required in an application submitted in this State.

(3) Was signed by the applicant under penalty of perjury.

(c) An application filed under this section is a "public record" within the meaning of Chapter 132 of the General Statutes. (2003-375, s. 2.)

§ 78C-90. Certificate of registration; issuance or denial; renewal.

(a) Except as otherwise provided in subsection (b) of this section, the Secretary of State shall issue a certificate of registration to an individual who complies with G.S. 78C-89(a) or whose application has been accepted under G.S. 78C-89(b).

(b) The Secretary of State may refuse to issue a certificate of registration if the Secretary of State determines that the applicant has engaged in conduct that has a significant adverse effect on the applicant's fitness to act as an athlete agent. In making the determination, the Secretary of State may consider whether the applicant has:

(1) Been convicted of a crime that, if committed in this State, would be a crime involving moral turpitude or a felony.

(2) Made a materially false, misleading, deceptive, or fraudulent representation in the application or as an athlete agent.

(3) Engaged in conduct that would disqualify the applicant from serving in a fiduciary capacity.

(4) Engaged in conduct prohibited by G.S. 78C-98.

(5) Had a registration or licensure as an athlete agent suspended, revoked, or denied or been refused renewal of registration or licensure as an athlete agent in any state.

(6) Engaged in conduct the consequence of which was that a sanction, suspension, or declaration of ineligibility to participate in an interscholastic or intercollegiate athletic event was imposed on a student-athlete or educational institution.

(7) Engaged in conduct that significantly adversely reflects on the applicant's credibility, honesty, or integrity.

(c) In making a determination under subsection (b) of this section, the Secretary of State shall consider: (i) how recently the conduct occurred; (ii) the nature of the conduct and the context in which it occurred; and (iii) any other relevant conduct of the applicant.

(d) An athlete agent may apply to renew a registration by submitting an application for renewal in a form prescribed by the Secretary of State. The application for renewal must be signed by the applicant under penalty of perjury and must contain current information on all matters required in an original registration.

(e) An individual who has submitted an application for renewal of registration or licensure in another state, in lieu of submitting an application for renewal in the form prescribed pursuant to subsection (d) of this section, may file a copy of the application for renewal and a valid certificate of registration or licensure from the other state. The Secretary of State shall accept the application for renewal from the other state as an application for renewal in this State if the application to the other state satisfied the following:

(1) Was submitted in the other state within six months immediately preceding the filing in this State and the applicant certifies the information contained in the application for renewal is current.
(2) Contains information substantially similar to or more comprehensive than that required in an application for renewal submitted in this State.
(3) Was signed by the applicant under penalty of perjury.

(f) A certificate of registration or a renewal of a registration is valid for one year.

(g) An application filed under this section is a "public record" within the meaning of Chapter 132 of the General Statutes. (2003-375, s. 2.)

§ 78C-91. Suspension; revocation; refusal to renew registration.

(a) The Secretary of State may suspend, revoke, or refuse to renew a registration for conduct that would have justified denial of registration under G.S. 78C-90(b).

(b) The Secretary of State may deny, suspend, revoke, or refuse to renew a certificate of registration or licensure only after proper notice and an opportunity for a hearing in accordance with the Administrative Procedures Act pursuant to Article 3 of Chapter 150B of the General Statutes. (2003-375, s. 2.)

§ 78C-92. Temporary registration.

The Secretary of State may issue a temporary certificate of registration while an application for registration or renewal of registration is pending. (2003-375, s. 2.)

§ 78C-93. Registration; renewal of fees.

An application for registration or renewal of registration must be accompanied by a fee in the following amount:

(1) Application for registration	$200.00
(2) Application for registration based upon a certificate of registration or licensure issued by another state	200.00
(3) Application for renewal of registration	200.00
(4) Application for renewal of registration based upon an application for renewal of registration or licensure submitted in another state	200.00.

(2003-375, s. 2.)

§ 78C-94. Required form of contract.

(a) An agency contract must be in a record, signed or otherwise authenticated by the parties.

(b) An agency contract must state or contain the following:

(1) The amount and method of calculating the consideration to be paid by the student-athlete for services to be provided by the athlete agent under the contract and any other consideration the athlete agent has received or will receive from any other source for entering into the contract or for providing the services.

(2) The name of any person not listed in the application for registration or renewal of registration who will be compensated because the student-athlete signed the agency contract.
(3) A description of any expenses that the student-athlete agrees to reimburse.
(4) A description of the services to be provided to the student-athlete.
(5) The duration of the contract.
(6) The date of execution.

(c) An agency contract must contain, in close proximity to the signature of the student-athlete, a conspicuous notice in boldface type in capital letters stating:

WARNING TO STUDENT-ATHLETE

IF YOU SIGN THIS CONTRACT:

(1) YOU SHALL LOSE YOUR ELIGIBILITY TO COMPETE AS A STUDENT-ATHLETE IN YOUR SPORT;

(2) IF YOU HAVE AN ATHLETIC DIRECTOR, WITHIN 72 HOURS AFTER ENTERING INTO THIS CONTRACT, BOTH YOU AND YOUR ATHLETE AGENT MUST NOTIFY YOUR ATHLETIC DIRECTOR;

(3) YOU WAIVE YOUR ATTORNEY-CLIENT PRIVILEGE WITH RESPECT TO THIS CONTRACT AND CERTAIN INFORMATION RELATED TO IT; AND

(4) YOU MAY CANCEL THIS CONTRACT WITHIN 14 DAYS AFTER SIGNING IT. CANCELLATION OF THIS CONTRACT SHALL NOT REINSTATE YOUR ELIGIBILITY.

(d) An agency contract that does not conform to this section is voidable by the student-athlete. If a student-athlete voids an agency contract, the student-athlete is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract.

(e) The athlete agent shall give a record of the signed or otherwise authenticated agency contract to the student-athlete at the time of execution.

(f) The waiver of attorney-client privilege does not affect those privileges between client and attorney when the attorney is not an athlete agent. (2003-375, s. 2.)

§ 78C-95. Notice to educational institution.

(a) Within 72 hours after entering into an agency contract or before the next scheduled athletic event in which the student-athlete may participate, whichever occurs first, the athlete agent shall give notice in a record of the existence of the contract to the athletic director of the educational institution at which the student-athlete is enrolled or the athlete agent has reasonable grounds to believe the student-athlete intends to enroll.

(b) Within 72 hours after entering into an agency contract or before the next athletic event in which the student-athlete may participate, whichever occurs first, the student-athlete shall inform the athletic director of the educational institution at which the student-athlete is enrolled that he or she has entered into an agency contract. (2003-375, s. 2.)

§ 78C-96. Student-athlete's right to cancel.

(a) A student-athlete may cancel an agency contract by giving notice of the cancellation to the athlete agent in a record within 14 days after the contract is signed.

(b) A student-athlete may not waive the right to cancel an agency contract.

(c) If a student-athlete cancels an agency contract, the student-athlete is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract. (2003-375, s. 2.)

§ 78C-97. Required records; waiver of attorney-client privilege.

(a) An athlete agent shall retain the following records for a period of five years:

(1) The name and address of each individual represented by the athlete agent.

(2) Any agency contract entered into by the athlete agent.

(3) Any direct costs incurred by the athlete agent in the recruitment or solicitation of a student-athlete to enter into an agency contract.

(b) Records required to be retained by subsection (a) of this section are open to inspection by the Secretary of State during normal business hours.

(c) Where a student-athlete enters into an agency contract regulated under this Article, the student-athlete will be deemed to waive the attorney-client privilege with respect to records required to be retained by subsection (a) of this section, subject to G.S. 78C-94(f). (2003-375, s. 2.)

§ 78C-98. Prohibited conduct.

(a) An athlete agent, with the intent to induce a student-athlete to enter into an agency contract, shall not:

(1) Give any materially false or misleading information or make a materially false promise or representation.

(2) Furnish anything of value to a student-athlete before the student-athlete enters into the agency contract.

(3) Furnish anything of value to any individual other than the student-athlete or another registered athlete agent.

(b) An athlete agent shall not intentionally:

(1) Initiate contact with a student-athlete unless the athlete agent is registered under this Article.

(2) Refuse or fail to retain or permit inspection of the records required to be retained by G.S. 78C-97.

(3) Fail to register as required by G.S. 78C-88.

(4) Provide materially false or misleading information in an application for registration or renewal of registration.

(5) Predate or postdate an agency contract.

(6) Fail to notify a student-athlete before the student-athlete signs or otherwise authenticates an agency contract for a particular sport that the signing or authentication shall make the student-athlete ineligible to participate as a student-athlete in that sport. (2003-375, s. 2.)

§ 78C-99. Criminal penalties.

An athlete agent who violates any provision under G.S. 78C-98(a) is guilty of a Class I felony. (2003-375, s. 2.)

§ 78C-100. Civil remedies.

(a) An educational institution has a right of action against an athlete agent or a former student-athlete for damages caused by a violation of this Article. In an action under this section, the court may award costs and reasonable attorneys' fees to the prevailing party.

(b) Damages suffered by an educational institution under subsection (a) of this section include losses and expenses incurred because, as a result of the conduct of an athlete agent or former student-athlete, the educational institution was injured by a violation of this Article or was penalized, disqualified, or suspended from participation in athletics by: (i) a national association for the promotion and regulation of athletics; (ii) an athletic conference; or (iii) reasonable self-imposed disciplinary action taken to mitigate sanctions likely to be imposed by an athletic organization.

(c) A right of action under this section does not accrue until the educational institution discovers, or by the exercise of reasonable diligence would have discovered, the violation by the athlete agent or former student-athlete.

(d) Any liability of the athlete agent or the former student-athlete under this section is several and not joint.

(e) This Article does not restrict rights, remedies, or defenses of any person under law or equity. (2003-375, s. 2.)

§ 78C-101. Administrative penalty.

The Secretary of State may assess a civil penalty against an athlete agent not to exceed twenty-five thousand dollars ($25,000) for a violation of this Article. (2003-375, s. 2.)

§ 78C-102. Uniformity of application and construction.

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. (2003-375, s. 2.)

§ 78C-103. Electronic Signatures in Global and National Commerce Act.

The provisions of this Article governing the legal effect, validity, or enforceability of electronic records or signatures, and of contracts formed or performed with the use of those records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, Pub. L. 106-229, 114 Stat. 464 (2000), and supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act. (2003-375, s. 2.)

§ 78C-104. Severability.

If any provision of this Article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable. (2003-375, s. 2.)

§ 78C-105. Rules.

The Secretary of State may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out the provisions of this Article. (2003-375, s. 2.)

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ARTICLE 1.
Scope.

§ 78D-1. Definitions.

(1) "Administrator" means the Secretary of State.

(2) "Board of Trade" means any person or group of persons engaged in buying or selling any commodity or receiving the same for sale on consignment, whether such person or group of persons is characterized as a board of trade, exchange or other form of marketplace.

(3) "CFTC Rule" means any rule, regulation or order of the Commodity Futures Trading Commission in effect on October 1, 1989, and all subsequent amendments, additions or other revisions thereto, unless the Administrator, within 10 days following the effective date of any such amendment, addition or revision, disallows the application thereof to this Part or to any provision thereof by rule, regulation or order.

(4) "Commodity" means, except as otherwise specified by the Administrator by rule, regulation or order, any agricultural, grain or livestock product or by-product, any metal or mineral (including a precious metal set forth in subdivision (13) of this section), any gem or gemstone (whether characterized as precious, semi-precious or otherwise), any fuel (whether liquid, gaseous or otherwise), any foreign currency, and all other goods, articles, products or items of any kind; provided that the term commodity shall not include (i) a numismatic coin whose fair market value is at least fifteen percent (15%) higher than the value of the metal it contains, (ii) real property or any timber, agricultural or livestock product grown or raised on real property and offered or sold by the owner or lessee of such real property or (iii) any work of art offered or sold by art dealers, at public auction or offered or sold through a private sale by the owner thereof.

(5) "Commodity Contract" means any account, agreement or contract for the purchase or sale, primarily for speculation or investment purposes

and not for use or consumption by the offeree or purchaser, of one or more commodities, whether for immediate or subsequent delivery or whether delivery is intended by the parties, and whether characterized as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures contract, installment or margin contract, leverage contract or otherwise. Any commodity contract offered or sold shall, in the absence of evidence to the contrary, be presumed to be offered or sold for speculation or investment purposes. A commodity contract shall not include any contract or agreement which requires, and under which the purchaser receives, within 28 calendar days from the payment in good funds of any portion of the purchase price, physical delivery of the total amount of each commodity to be purchased under the contract or agreement.

(6) "Commodity Exchange Act" means the act of Congress known as the Commodity Exchange Act, as amended to October 1, 1989, codified at 7 U.S.C. §1, et seq. and all subsequent amendments, additions or other revisions thereto, unless the Administrator, within 10 days following the effective date of any such amendment, addition or revision, disallows the application thereof to this Part or to any provision thereof by rule, regulation or order.

(7) "Commodity Futures Trading Commission" means the independent regulatory agency established by Congress to administer the Commodity Exchange Act.

(8) "Commodity Merchant" means any of the following as defined or described in the Commodity Exchange Act or by CFTC Rule:
a. Futures commission merchant;
b. Commodity pool operator;
c. Commodity trading advisor;
d. Introducing broker;
e. Leverage transaction merchant;
f. An associated person of any of the foregoing;
g. Floor broker; and
h. Any other person (other than a futures association) required to register with the Commodity Futures Trading Commission.

(9) "Commodity Option" means any account, agreement or contract giving a party thereto the right but not the obligation to purchase or sell one or more commodities and/or one or more commodity contracts, whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty or otherwise, but shall not include an option traded on a national securities exchange registered with the United States Securities and Exchange Commission.

(10) "Financial Institution" means a bank, savings institution or trust company organized under, or supervised pursuant to, the laws of the United States or of any state.

(11) "Offer" includes every offer to sell, offer to purchase, or offer to enter into a commodity contract or commodity option.

(12) "Person" means an individual, a corporation, a partnership, association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government, but shall not include a contract market designated by the Commodity Futures Trading Commission or any clearinghouse thereof or a national securities exchange registered with the Securities and Exchange Commission (or any employee, officer or director of such contract market, clearinghouse or exchange acting solely in that capacity).

(13) "Precious Metal" means the following in either coin, bullion or other form:
  a. Silver;
  b. Gold;
  c. Platinum;
  d. Palladium;
  e. Copper; and
  f. Such other items as the Administrator may specify by rule.

(14) "Sale" or "sell" includes every sale, contract of sale, contract to sell, or disposition, for value. (1989, c. 634, s. 1.)

§ 78D-2. Unlawful commodity transactions.

Except as otherwise provided in G.S. 78D-3 or G.S. 78D-4, no person shall sell or purchase or offer to sell or purchase any commodity under any commodity contract or under any commodity option or offer to enter into or enter into as seller or purchaser any commodity contract or any commodity option. (1989, c. 634, s. 1.)

§ 78D-3. Exempt person transactions.

The prohibitions in G.S. 78D-2 shall not apply to any transaction offered by and in which any of the following persons (or any employee, officer or director thereof acting solely in that capacity) is the purchaser or seller:

(1) A person registered with the Commodity Futures Trading Commission as a futures commission merchant or as a leverage transaction merchant whose activities require such registration;

(2) A person registered with the Securities and Exchange Commission as a broker-dealer whose activities require such registration;

(3) A person affiliated with, and whose obligations and liabilities under the transaction are guaranteed by, a person referred to in subdivisions (1) or (2) of this section;

(4) A person who is a member of a contract market designated by the Commodity Futures Trading Commission (or any clearinghouse thereof);

(5) A financial institution; or

(6) A person registered under the laws of this State as a securities broker-dealer whose activities require such registration.

The exemption provided by this section shall not apply to any transaction or activity which is prohibited by the Commodity Exchange Act or CFTC Rule. (1989, c. 634, s. 1.)

§ 78D-4. Exempt transactions.

(a) The prohibitions in G.S. 78D-2 shall not apply to the following:

(1) An account, agreement or transaction within the exclusive jurisdiction of the Commodity Futures Trading Commission as granted under the Commodity Exchange Act;

(2) A commodity contract for the purchase of one or more precious metals which requires, and under which the purchaser receives, within 28 calendar days from the payment in good funds of any portion of the purchase price, physical delivery of the quantity of the precious metals purchased by such payment, provided that, for purposes of this paragraph, physical delivery shall be deemed to have occurred if, within such twenty-eight-day period, such quantity of precious metals purchased by such payment is delivered (whether in specifically

segregated or fungible bulk form) into the possession of a depository (other than the seller) which is either (i) a financial institution, (ii) a depository the warehouse receipts of which are recognized for delivery purposes for any commodity on a contract market designated by the Commodity Futures Trading Commission, (iii) a storage facility licensed or regulated by the United States or any agency thereof, or (iv) a depository designated by the Administrator, and such depository (or other person which itself qualifies as a depository as aforesaid) or a qualified seller issues and the purchaser receives, a certificate, document of title, confirmation or other instrument evidencing that such quantity of precious metals has been delivered to the depository and is being and will continue to be held by the depository on the purchaser's behalf, free and clear of all liens and encumbrances, other than liens of the purchaser, tax liens, liens agreed to by the purchaser, or liens of the depository for fees and expenses, which have previously been disclosed to the purchaser;

(3) A commodity contract solely between persons engaged in producing, processing, using commercially or handling as merchants, each commodity subject thereto, or any by-product thereof; or

(4) A commodity contract under which the offeree or the purchaser is a person referred to in G.S. 78D-3 of this Chapter, an insurance company, an investment company as defined in the Investment Company Act of 1940, or an employee pension and profit sharing or benefit plan (other than a self-employed individual retirement plan, or individual retirement account).

(b) For the purposes of G.S. 78D-4(a)(2), a qualified seller is a person who:

(1) Is a seller of precious metals and has a tangible net worth of at least $5,000,000 (or has an affiliate who has unconditionally guaranteed the obligations and liabilities of the seller and the affiliate has a tangible net worth of at least $5,000,000);

(2) Has stored precious metals with one or more depositories on behalf of customers for at least the previous three years;

(3) Prior to any offer, and annually thereafter, files with the Administrator a sworn notice of intent to act as a qualified seller under G.S. 78D-4(a)(2), containing:

a. The seller's name and address, names of its directors, officers, controlling shareholders, partners, principals, and other controlling persons;

b. The address of its principal place of business, state and date of incorporation or organization, and the name and address of seller's registered agent in this State;

c. A statement that the seller (or a person affiliated with the seller who has guaranteed the obligations and liabilities of the seller) has a tangible net worth of at least $5,000,000;

d. Depository information including:

1. The name and address of the depository or depositories that the seller intends to use;

2. The name and address of each and every depository where the seller has stored precious metals on behalf of customers for the previous three years; and

3. Independent verification from each and every depository named in (3)d2 of this section that the seller has in fact stored precious metals on behalf of the seller's customers for the previous three years and a statement of total deposits made during this period.

e. Financial statements for the seller (or the person affiliated with the seller who has guaranteed the obligations and liabilities of the seller) for the past three years, audited by an independent certified public accountant, together with the accountant's report;

f. A statement describing the details of all civil, criminal, or administrative proceedings currently pending or adversely resolved against the seller or its directors, officers, controlling shareholders, partners, principals, or other controlling persons during the past 10 years including: (i) civil litigation and administrative proceedings involving securities or commodities violations, or fraud, (ii) criminal proceedings, (iii) denials, suspensions or revocations of securities or commodities licenses or registrations, and (iv) suspensions or expulsions from membership in, or associations with, self-regulatory organizations registered under the Securities Exchange Act of 1934, or the Commodity Exchange Act; or (v) a statement that there were no such proceedings.

(4) Notifies the Administrator within 15 days of any material changes in the information provided in the notice of intent; and

(5) Annually furnishes to each purchaser for whom the seller is then storing precious metals, and to the Administrator, a report by an independent certified public accountant of the accountant's examination of the seller's precious metals storage program that includes a reconciliation of the total amount of depository confirmations issued by all depositories where the seller has stored precious metals to the total amount of all confirmations issued to customers by the seller.

(c) The Administrator may, upon request by the seller, waive any of the exemption requirements in G.S. 78D-4(b), conditionally or unconditionally.

(d) The Administrator may, by order, deny, suspend, revoke or place limitations on the authority to engage in business as a qualified seller under G.S. 78D-4(a)(2) if the Administrator finds that the order is in the public interest and that the person, the person's officers, directors, partners, agents, servants or employees, any person occupying a similar status or performing similar functions, any person who directly or indirectly controls or is controlled by the seller, or any of them, the seller's affiliates or subsidiaries:

(1) Has filed a notice of intention under G.S. 78D-4(c) with the Administrator or the designee of the Administrator which was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;

(2) Has, within the last 10 years, pled guilty or nolo contendere to, or been convicted of any crime indicating a lack of fitness to engage in the investment commodity business;

(3) Has been permanently or temporarily enjoined by any court of competent jurisdiction from engaging in, or continuing, any conduct or practice which injunction indicates a lack of fitness to engage in the investment commodities business;

(4) Is the subject of an order of the Administrator denying, suspending, or revoking the person's license as a securities broker-dealer, sales representative, or investment adviser;

(5) Is the subject of any of the following orders which are currently effective and which were issued within the last five years:

a. An order by the securities agency or Administrator of another state, Canadian province or territory, the Securities and Exchange Commission, or the Commodity Futures Trading Commission, entered after notice and opportunity for hearing, denying, suspending, or revoking the person's registration as a futures commission merchant, leverage transaction merchant, introducing broker, commodity trading adviser, commodity pool operator, securities broker-dealer, sales representative, or investment adviser, or the substantial equivalent of those terms;

b. Suspension or expulsion from membership in, or association with, a self-regulatory organization registered under the Securities Exchange Act of 1934 or the Commodity Exchange Act;

c. A United States Postal Service fraud order;

d. A cease and desist order entered after notice and opportunity of hearing by the Administrator or the securities agency or Administrator of any other state, Canadian province or territory, the Securities and Exchange Commission, or the Commodity Futures Trading Commission;

e. An order entered by the Commodity Futures Trading Commission denying, suspending or revoking registration under the Commodity Exchange Act.

(6) Has engaged in an unethical or dishonest act or practice in the investment commodities or securities business; or

(7) Has failed reasonably to supervise sales representatives or employees.

(e) If the public interest or the protection of investors so requires, the Administrator may, by order, summarily deny or suspend the exemption for a qualified seller. Upon the entry of the order, the Administrator shall promptly notify the person claiming said status that an order has been entered and the reasons therefor and that within 20 days after the receipt of a written request the matter will be scheduled for hearing. The provisions of G.S. 78D-30 shall apply with respect to all subsequent proceedings.

(f) If the Administrator finds that any applicant or qualified seller is no longer in existence or has ceased to do business or is subject to an adjudication of mental incompetence or to the control of a committee, conservator, or guardian, or cannot be located after reasonable search, the Administrator may, by order, deny or revoke the exemption for a qualified seller.

(g) The Administrator may issue rules or orders prescribing the terms and conditions of all transactions and contracts covered by the provisions of this Chapter which are not within the exclusive jurisdiction of the Commodity Futures Trading Commission as granted by the Commodity Exchange Act, exempting any person or transaction from any provision of this Chapter conditionally or unconditionally and otherwise implementing the provisions of this Chapter for the protection of purchasers and sellers of commodities. (1989, c. 634, s. 1; 2001-126, s. 7.)

§ 78D-5. Unlawful commodity activities.

(a) No person shall engage in a trade or business or otherwise act as a commodity merchant unless such person (i) is registered or temporarily licensed with the Commodity Futures Trading Commission for each activity constituting such person as a commodity merchant and such registration or temporary license shall not have expired, nor been suspended nor revoked; or (ii) is exempt from such registration by virtue of the Commodity Exchange Act or of a CFTC rule.

(b) No board of trade shall trade, or provide a place for the trading of, any commodity contract or commodity option required to be traded on or subject to the rules of a contract market designated by the Commodity Futures Trading Commission unless such board of trade has been so designated for such commodity contract or commodity option and such designation shall not have been vacated, nor suspended nor revoked. (1989, c. 634, s. 1.)

§ 78D-6. Fraudulent conduct.

No person, shall directly or indirectly:

(1) Cheat or defraud, or attempt to cheat or defraud, any other person or employ any device, scheme or artifice to defraud any other person;

(2) Make any false report, enter any false record, or make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;

(3) Engage in any transaction, act, practice or course of business, including, without limitation, any form of advertising or solicitation, which operates or would operate as a fraud or deceit upon any person; or

(4) Misappropriate or convert the funds, security or property of any other person;

in or in connection with the purchase or sale of, the offer to sell, the offer to purchase, the offer to enter into, or the entry into of, any commodity contract or commodity option subject to the provisions of G.S. 78D-2, 78D-3, 78D-4(a)(2) or G.S. 78D-4(a)(4) of this Chapter. (1989, c. 634, s. 1.)

§ 78D-7. Liability of principals, controlling persons and others.

(a) The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

(b) Every person who directly or indirectly controls another person liable under any provision of this Chapter, every partner, officer, or director of such other person, every person occupying a similar status or performing similar functions, every employee of such other person who materially aids in the violation is also liable jointly and severally with and to the same extent as such other person, unless the person who is also liable by virtue of this provision sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. (1989, c. 634, s. 1.)

§ 78D-8. Securities and laws unaffected.

Nothing in this Chapter shall impair, derogate or otherwise affect the authority or powers of the Administrator under Chapters 78A or 78C of the General Statutes or the application of any provision thereof to any person or transaction subject thereto. (1989, c. 634, s. 1.)

§ 78D-9. Purpose.

This Chapter may be construed and implemented to effectuate its general purpose to protect investors, to prevent and prosecute illegal and fraudulent schemes involving commodity contracts and to maximize coordination with federal and other states' laws and the administration and enforcement thereof. This Chapter is not intended to create any rights or remedies upon which actions may be brought by private persons against persons who violate the provisions of this Chapter. (1989, c. 634, s. 1.)

§§ 78D-10 through 78D-20: Reserved for future codification purposes.

ARTICLE 2.

Administration and Enforcement.

§ 78D-21. Investigations.

(a) The Administrator may make investigations, within or without this State, as it finds necessary or appropriate to:

(1) Determine whether any person has violated, or is about to violate, any provision of this Chapter or any rule or order of the Administrator; or

(2) Aid in enforcement of this Chapter.

(b) The Administrator may publish information concerning any violation of this Chapter or any rule or order of the Administrator.

(c) For purposes of any investigation or proceeding under this Chapter, the Administrator or any officer or employee designated by rule or order, may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the Administrator finds to be relevant or material to the inquiry.

(d)(1) If a person does not give testimony or produce the documents required by the Administrator or a designated employee pursuant to an administrative subpoena, the Administrator or designated employee may apply for a court order compelling compliance with the subpoena or the giving of the required testimony.

(2) The request for order of compliance may be addressed to either:

a. The Superior Court of Wake County where service may be obtained on the person refusing to testify or produce, if the person is within this State; or

b. The appropriate court of the State having jurisdiction over the person refusing to testify or produce, if the person is outside this State.

(e) The Administrator in his discretion may appoint commodities law enforcement agents and other enforcement personnel.

(1) Subject Matter Jurisdiction. — The responsibility of an agent shall be enforcement of this Chapter.

(2) Territorial Jurisdiction. — A commodities law enforcement agent is a State officer with jurisdiction throughout the State.

(3) Service of Orders of the Administrator. — Commodities law enforcement agents may serve and execute notices, orders, or demands issued by the Administrator for the surrender of registrations or relating to any administrative proceeding. While serving and executing such notices, orders, or demands, commodities law enforcement agents shall have all the power and authority possessed by law enforcement officers when executing an arrest warrant. (1989, c. 634, s. 1.)

§ 78D-22. Enforcement of Chapter.

(a) If the Administrator believes, whether or not based upon an investigation conducted under G.S. 78D-21 that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, the Administrator may:

(1) Issue a cease and desist order;

(2) Issue an order imposing a civil penalty in an amount which may not exceed twenty-five thousand dollars ($25,000) for any single violation

or five hundred thousand dollars ($500,000) for multiple violations in a single proceeding or a series of related proceedings;

(3) Issue an order requiring reimbursement of the costs of investigation; or

(4) Initiate any of the actions specified in subsection (b) of this section.

The clear proceeds of civil penalties imposed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Any reimbursement of costs imposed by this subsection shall be paid to the General Fund.

(b) The Administrator may institute any of the following actions in the appropriate courts of this State, or in the appropriate courts of another state, in addition to any legal or equitable remedies otherwise available:

(1) A declaratory judgment;

(2) An action for a prohibitory or mandatory injunction to enjoin the violation and to ensure compliance with this Chapter or any rule or order of the Administrator;

(3) An action for disgorgement; or

(4) An action for appointment of a receiver or conservator for the defendant or the defendant's assets. (1989, c. 634, s. 1; 1998-215, s. 123.)

§ 78D-23. Power of court to grant relief.

(a)(1) Upon a proper showing by the Administrator that a person has violated, or is about to violate, any provision of this Chapter or any rule or order of the Administrator, any court of competent jurisdiction may grant appropriate legal or equitable remedies.

(2) Upon showing of violation of this Chapter or a rule or order of the Administrator, the court, in addition to traditional legal and equitable remedies, including temporary restraining orders, permanent or temporary prohibitory or mandatory injunctions, and writs of prohibition or mandamus, may grant the following special remedies:

a. Imposition of a civil penalty in an amount which may not exceed twenty-five thousand dollars ($25,000) for any single violation or five hundred thousand dollars ($500,000) for multiple violations in a single proceeding or a series of related proceedings;

b. Disgorgement;

c. Declaratory judgment;

d. Restitution to investors wishing restitution; and

e. Appointment of a receiver or conservator for the defendant or the defendant's assets.

(3) Appropriate remedies when the defendant is shown only about to violate this Chapter or a rule or order of the Administrator shall be limited to:

a. A temporary restraining order;

b. A temporary or permanent injunction;

c. A writ of prohibition or mandamus; or

d. An order appointing a receiver or conservator for the defendant or the defendant's assets.

The clear proceeds of civil penalties imposed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) The court shall not require the Administrator to post a bond in any official action under this Chapter.

(c)(1) Upon a proper showing by the administrator or securities or commodity agency of another state that a person (other than a government or governmental agency or instrumentality) has violated, or is about to violate, any provision of the commodity code of that state or any rule or order of the administrator or securities or commodity agency of that state, the Superior Court of Wake County may grant appropriate legal and equitable remedies.

(2) Upon showing of a violation of the securities or commodity act of the foreign state or a rule or order of the administrator or securities or commodity agency of the foreign state, the court, in addition to traditional legal or equitable remedies including temporary restraining orders, permanent or temporary prohibitory or mandatory injunctions and writs of prohibition or mandamus, may grant the following special remedies:

a. Disgorgement; and

b. Appointment of a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this State.

(3) Appropriate remedies when the defendant is shown only about to violate the securities or commodity act of the foreign state or a rule or order of the administrator or securities or commodity agency of the foreign state shall be limited to:

a. A temporary restraining order;

b. A temporary or permanent injunction;

c. A writ of prohibition or mandamus; or

d. An order appointing a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this State. (1989, c. 634, s. 1; 1998-215, s. 124.)

§ 78D-24. Criminal penalties.

(a) Any person who willfully violates any provision of this Chapter is guilty of a felony. If the losses caused by the violation or violations are one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony. If the losses caused by the violation or violations are less than one hundred thousand dollars ($100,000), the person is guilty of a Class H felony.

(b) Any person convicted of violating a rule or order under this Chapter may be fined, but may not be imprisoned, if the person proves he had no knowledge of the rule or order.

(c) In lieu of a fine otherwise authorized by law, a person who has been convicted of or who has pleaded guilty or no contest to having engaged in conduct in violation of the provisions of this Chapter may be sentenced to pay a fine that does not exceed the greater of three times the gross value gained or three times the gross loss caused by such conduct, plus court costs and the costs of investigation and prosecution, reasonably incurred.

(d) The Administrator may refer such evidence as is available concerning violations of this Chapter or any rule or order of the Administrator to the Attorney General or the proper district attorney, who may, with or without such a reference from the Administrator, institute the appropriate criminal proceedings under this Chapter. Upon receipt of such reference, the Attorney General or the district attorney may request that a duly employed attorney of the Administrator prosecute or assist in the prosecution of such violation or violations on behalf of the State. Upon approval of the Administrator, such employee shall be appointed a special prosecutor for the Attorney General or the district attorney to serve without compensation from the Attorney General or district attorney. Such special prosecutor shall have all the powers and duties prescribed by law for Assistant Attorneys General or district attorneys and such other powers and duties as are lawfully delegated to such special prosecutor by the Attorney General or the district attorney.

(e) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law. (1989, c. 634, s. 1; 2003-413, s. 26.)

§ 78D-25. Administration of Chapter.

(a) This Chapter shall be administered by the Secretary of State. The Secretary of State as Administrator may delegate all or part of the authority under this Chapter to the Deputy Securities Administrator including, but not limited to, the authority to conduct hearings, make, execute and issue final agency orders and decisions. The Secretary of State may appoint such clerks and other assistants as may from time to time be needed. The Secretary of State may designate one or more hearing officers for the purpose of conducting administrative hearings.

(b) Neither the Administrator nor any employees of the Administrator shall use any information which is filed with or obtained by the Administrator which is not public information for personal gain or benefit, nor shall the Administrator nor any employees of the Administrator conduct any securities or commodity dealings whatsoever based upon any such information, even though public, if there has not been a sufficient period of time for the securities or commodity markets to assimilate such information.

(c)(1) Except as provided in subdivision (2) of this subsection, all information collected, assembled or maintained by the Administrator is public information and is available for the examination of the public as provided by Chapter 132 of the General Statutes.

(2) The following are exceptions to subdivision (1) which are deemed to be confidential:
- a. Information obtained in private investigations pursuant to G.S. 78D-21 of this Chapter;
- b. Information made confidential by the provisions of Chapter 132 of the General Statutes;
- c. Information obtained from federal agencies which may not be disclosed under federal law.

(3) The Administrator in his discretion may disclose any information made confidential under subsection (2)a. to persons identified in G.S. 78D-26(a).

(4) No provision of this Chapter either creates or derogates any privilege which exists at common law, by statute or otherwise when any documentary or other evidence is sought under subpoena directed to the Administrator or any employee of the Administrator. (1989, c. 634, s. 1; 2001-126, s. 11.)

§ 78D-26. Cooperation with other agencies.

(a) To encourage uniform application and interpretation of this Chapter and securities regulation and enforcement in general, the Administrator and the employees of the Administrator may cooperate, including bearing the expense of the cooperation, with the securities agencies or administrator of another jurisdiction, Canadian province or territory or such other agencies administering this Chapter, the Commodity Futures Trading Commission, the Securities and Exchange Commission, any self-regulatory organization established under the Commodity Exchange Act or the Securities Exchange Act of 1934, any national or international organization of commodities or securities officials or agencies, and any governmental law enforcement agency.

(b) The cooperation authorized by subsection (a) shall include, but need not be limited to, the following:

(1) Making joint examinations or investigations;
(2) Holding joint administrative hearings;
(3) Filing and prosecuting joint litigation;
(4) Sharing and exchanging personnel;
(5) Sharing and exchanging information and documents;
(6) Formulating and adopting mutual regulations, statements of policy, guidelines, proposed statutory changes and releases; and
(7) Issuing and enforcing subpoenas at the request of the agency administering this Chapter in another jurisdiction, the securities agency of another jurisdiction, the Commodity Futures Trading Commission or the Securities and Exchange Commission if the information sought would also be subject to lawful subpoena for conduct occurring in this State. (1989, c. 634, s. 1.)

§ 78D-27. General authority to adopt rules, forms, and orders.

(a) In addition to specific authority granted elsewhere in this Chapter, the Administrator may make, amend, and rescind rules, forms, and orders as are necessary to carry out the provisions of this Chapter. Such rules or forms shall include, but need not be limited to, the following:
(1) Rules defining any terms, whether or not used in this Chapter, insofar as the definitions are not inconsistent with the provisions of this Chapter. For the purpose of rules or forms, the Administrator may classify commodities and commodity contracts, persons, and matters within the Administrator's jurisdiction.
(2) Reserved.

(b) Unless specifically provided in this Chapter, no rule, form, or order may be adopted, amended or rescinded unless the Administrator finds that the action is:
(1) Necessary or appropriate in the public interest or for the protection of investors; and
(2) Consistent with the purposes fairly intended by the policy and provisions of this Chapter.

(c) All rules and forms of the Administrator shall be published.

(d) No provision of this Chapter imposing any liability applies to any act done or omitted in good faith in conformity with a rule, order, or form adopted by the Administrator, notwithstanding that the rule, order, or form may later be amended, or rescinded, or be determined by judicial or other authority to be invalid for any reason. (1989, c. 634, s. 1.)

§ 78D-28. Consent to service of process.

When a person, including a nonresident of this State, engages in conduct prohibited or made actionable by the Chapter or any rule or order of the Administrator, the engaging in the conduct shall constitute the appointment of the Administrator as the person's attorney to receive service of any lawful process in a noncriminal proceeding against the person, a successor, or personal representative, which grows out of that conduct and which is brought under the Chapter or any rule or order of the Administrator with the same force and validity as if served personally. (1989, c. 634, s. 1.)

§ 78D-29. Scope of the Chapter.

(a) G.S. 78D-2, 78D-5 and 78D-6 apply to persons who sell or offer to sell when:

(1) An offer to sell is made in this State, or
(2) An offer to buy is made and accepted in this State.

(b) G.S. 78D-2, 78D-5 and 78D-6 apply to persons who buy or offer to buy when:

(1) An offer to buy is made in this State, or
(2) An offer to sell is made and accepted in this State.

(c) For the purpose of this section, an offer to sell or to buy is made in this State, whether or not either party is then present in this State, when the offer:

(1) Originates from this State, or
(2) Is directed by the offeror to this State and received at the place to which it is directed (or at any post office in this State in the case of a mailed offer).

(d) For the purpose of this section, an offer to buy or to sell is accepted in this State when acceptance:

(1) Is communicated to the offeror in this State, and
(2) Has not previously been communicated to the offeror, orally or in writing, outside this State; and acceptance is communicated to the offeror in this State, whether or not either party is then present in this State, when the offeree directs it to the offeror in this State, reasonably believing the offeror to be in this State and it is received at the place to which it is directed (or at any post office in this State in the case of a mailed acceptance).

(e) An offer to sell or to buy is not made in this State when:

(1) The publisher circulates or there is circulated on his behalf in this State any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this State, or which is published in this State but has had more than two-thirds of its circulation outside this State during the past 12 months, or
(2) A radio or television program originating outside this State is received in this State. (1989, c. 634, s. 1.)

§ 78D-30. Procedure for entry of an order.

(a) The Administrator shall commence an administrative proceeding under this Chapter, by entering either a notice of intent to do a contemplated act or a summary order. The notice of intent or summary order may be entered without notice, without opportunity for hearing, and need not be supported by findings of fact or conclusions of law, but must be in writing.

(b) Upon entry of a notice of intent or summary order, the Administrator shall promptly notify all interested parties that the notice or summary order has been entered and the reasons therefor. If the proceeding is pursuant to a notice of intent, the Administrator shall inform all interested parties of the dates, time, and place set for the hearing on the notice. If the proceeding is pursuant to a summary order, the Administrator shall inform all interested parties that they have 30 business days from the entry of the order to file a written request for a hearing on the matter with the Administrator and that the hearing will be scheduled within 20 days after the receipt of the written request.

(c) If the proceeding is pursuant to a summary order, the Administrator, whether or not a written request for a hearing is received from any interested party, may schedule the matter for hearing on the Administrator's own motion.

(d) If no request for a hearing, other responsive pleading, or submission is received by the Administrator within 30 business days of receipt of service of notice of summary order under subsection (b) of this section and no hearing is ordered by the Administrator, the summary order will automatically become a final order after 30 business days from the date service of the notice of summary order was received.

(e) If a hearing is requested or ordered, the Administrator, after notice of, and opportunity for, hearing to all interested persons, may modify or vacate the order or extend it until final determination.

(f) No final order or order after hearing may be returned without:

(1) Appropriate notice to all interested persons;
(2) Opportunity for hearing by all interested persons; and
(3) Entry of written findings of fact and conclusions of law.

Every hearing in an administrative proceeding under this Chapter shall be public unless the Administrator grants a request joined in by all the respondents that the hearing be conducted privately. (1989, c. 634, s. 1; 1998-196, s. 1; 2001-126, s. 8.)

§ 78D-31. Judicial review of orders.

(a) Any person aggrieved by a final order of the Administrator may obtain a review of the order in the Superior Court of Wake County by filing in court, within 30 days after a written copy of the decision is served upon the person by personal service or by registered or certified mail, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition shall be forthwith served upon the Administrator, and thereupon the Administrator shall certify and file in court a copy of the filing and evidence upon which the order was entered. When these have been filed, the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in whole or in part. The findings of the Administrator as to the facts, if supported by competent, material and substantial evidence, are conclusive. If either party applies to the court for leave to adduce additional material evidence, and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearing before the Administrator, the court may order the additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such conditions as the court considers proper. The Administrator may modify his findings and order by reason of the additional evidence and shall file in court the additional evidence together with any modified or new findings or order. The judgment of the court is final, subject to review by the Court of Appeals.

(b) The commencement of proceedings under subsection (a) does not, unless specifically ordered by the court, operate as a stay of the Administrator's order. (1989, c. 634, s. 1.)

§ 78D-32. Pleading exemptions.

It shall not be necessary to negative any of the exemptions of this Chapter in any complaint, information or indictment, or any writ or proceeding brought under this chapter; and the burden of proof of any such exemption shall be upon the party claiming the same. (1989, c. 634, s. 1.)

§ 78D-33. Affirmative defense.

It shall be a defense in any complaint, information, indictment, any writ or proceeding brought under this Chapter alleging a violation of G.S. 78D-2 based solely on the failure in an individual case to make physical delivery within the applicable time period under G.S. 78D-1(5) or G.S. 78D-4(a)(2) if the party asserting the defense sustains the burden of proof that:

(1) Failure to make physical delivery was due solely to factors beyond the control of the seller, the seller's officers, directors, partners, agents, servants or employees, every person occupying a similar status or performing similar functions, every person who directly or indirectly

controls or is controlled by the seller, or any of them, the seller's affiliates, subsidiaries or successors; and

(2) Physical delivery was completed within a reasonable time under the applicable circumstances. (1989, c. 634, s. 1.)

Chapter 79.

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§§ 79-1 through 79-4: Repealed by Session Laws 1991, c. 472, s. 1.

Cross References. — For current law regarding the taking up of stray livestock, see G.S. 68-17, 68-18.1, 68-20.

Chapter 80.

Trademarks, Brands, etc.

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ARTICLE 1.

Trademark Registration Act.

§ 80-1. Definitions.

(a) The term "applicant" as used herein means the person filing an application for registration of a trademark under this Article, the person's legal representatives, successors or assigns.

(b) The term "mark" as used herein includes any trademark or service mark entitled to registration under this Article whether registered or not.

(c) The term "person" as used herein means any individual, firm, partnership, corporation, association, union or other organization.

(d) The term "registrant" as used herein means the person to whom the registration of a trademark under this Article is issued, the person's legal representatives, successors or assigns.

(d1) The term "Secretary" as used herein means the Secretary of State or the designee of the Secretary charged with the administration of this Article.

(e) The term "service mark" as used herein means a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others.

(f) The term "trademark" as used herein means any word, name, symbol, or device or any combination thereof adopted and used by a person to identify goods made, sold, or distributed by him and to distinguish them from goods made, sold, or distributed by others.

(g) The term "use" means the bona fide use of a mark in the State of North Carolina in the ordinary course of trade, and not merely the reservation of a right to a mark. For the purposes of this Article, a mark shall be deemed to be "used" in this State (i) on goods when it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes placement impractical, then on documents associated with the goods, and the goods are currently sold or otherwise distributed in the State, and (ii) on services when it is used or displayed in the sale or advertising of services and the services are currently being rendered in this State, or are being offered and are available to be rendered in this State.

(h) A mark shall be deemed to be "abandoned" when either of the following occurs:

(1) When its use has been discontinued with intent not to resume its use. Intent not to resume may be inferred from circumstances. Nonuse for three consecutive years shall constitute prima facie evidence of abandonment.

(2) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to lose its significance as a mark. (1903, c. 271; Rev., s. 3012; C.S., s. 3971; 1941, c. 255, s. 1; 1967, c. 1007, s. 1; 1991, c. 626, s. 1; 1997-476, s. 1.)

Editor's Note. — Session Laws 1997-476, s. 13, provides: "This act takes precedence over all statutes that are inconsistent with this act or that contradict this act, effective October 1, 1997. The Secretary of State shall advise the General Statutes Commission of any statutes that should be amended or repealed to conform to this act."

Legal Periodicals. — For note on the law of unfair competition in North Carolina, see 46 N.C.L. Rev. 856 (1968).

For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Editor's Note. — *Most of the cases cited below were decided under this Article as it existed prior to its revision by Session Laws 1967, c. 1007, s. 1.*

Theory Underlying Trademark Law. — The law pertaining to trademarks is based upon the dual purpose of protecting the public from inferior products and protecting the reputation and profits of the inventor for the skill given to the invention of the product. Blackwell v. Wright, 73 N.C. 310 (1875), aff'd on rehearing, 74 N.C. 733 (1876).

Common Law Not Abrogated. — State statutes providing for registration of trademarks are in affirmance of the common law. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962), aff'd, 323 F.2d 29 (4th Cir. 1963).

Chapter Does Not Deal with Trade Names. — This chapter deals with trademarks and service marks and not trade names. Hot Shoppes, Inc. v. Hot Shoppe, Inc., 203 F. Supp. 777 (M.D.N.C. 1962).

Remedies Are Either Declaratory or Cumulative. — The remedies given by statutes providing for registration of trademarks are either declaratory or are cumulative and additional to those recognized and applied by the common law. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962), aff'd, 323 F.2d 29 (4th Cir. 1963).

Intangible ideas are not protectable under federal copyright or trademark law or North Carolina's trademark statute. Bank Travel Bank v. McCoy, 802 F. Supp. 1358 (E.D.N.C. 1992), aff'd sub nom., Amariglio-Dunn v. McCoy, 4 F.3d 984 (4th Cir. 1993).

Name of Town or Locality. — It seems that the name of a town or locality cannot be exclusively appropriated as a trademark. Blackwell Durham Tobacco Co. v. McElwee, 94 N.C. 425 (1886).

Use of Surname. — As a rule, a trademark cannot be taken in a surname, and any one named Bingham could start a school called the "Bingham School," in the absence of proof of intent to injure, or fraudulently attract the benefit of the good name and reputation acquired by a previously existing "Bingham School." And certainly there could be no confusion between a Bingham School at Asheville and a school even of the identically same name at Mebane, N.C. Bingham School v. Gray, 122 N.C. 699, 30 S.E. 304, 41 L.R.A. 243 (1898).

It is beyond the scope of the powers of the State legislature to establish a monopoly in a family name or to confer a patent right in its use. Bingham School v. Gray, 122 N.C. 699, 30 S.E. 304, 41 L.R.A. 243 (1898).

But one may, by contract, conclude himself from the use of his own name in a given business, and the agreement will be enforced by the courts. Zagier v. Zagier, 167 N.C. 616, 83 S.E. 913 (1914).

For a case denying a federal injunction staying a state trademark infringement case pending resolution of federal complaint alleging violations of the Sherman Antitrust Act, see W.W. Enter., Inc. v. Charlotte Motor Speedway, Inc., 753 F. Supp. 1326 (W.D.N.C. 1990).

§ 80-1.1. Purpose.

The purpose of this Article is to provide a system of State trademark registration and protection substantially consistent with the federal system of trademark registration and protection under the Trademark Act of 1946, 15 U.S.C. § 1051, et seq., as amended. The construction given the federal act should be examined as persuasive authority for interpreting and construing this Article. (1997-476, s. 2.)

Editor's Note. — Session Laws 1997-476, s. 13, provides: "This act takes precedence over all statutes that are inconsistent with this act or that contradict this act, effective October 1, 1997. The Secretary of State shall advise the General Statutes Commission of any statutes that should be amended or repealed to conform to this act."

§ 80-2. Registrability.

A mark by which the goods or services of any applicant for registration may be distinguished from the goods or services of others shall not be registered if it

(1) Consists of or comprises immoral, deceptive or scandalous matter; or
(2) Consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or
(3) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any state or municipality, or of any foreign nation, or any simulation thereof; or
(4) Consists of or comprises the name, signature or portrait of any living individual, except with his written consent; or

(5) Consists of a mark which (i) when applied to the goods or services of the applicant, is merely descriptive of them or merely describes one or more of the characteristics, or is deceptively misdescriptive of them, or falsely describes the nature, function, capacity, or characteristics of them, or (ii) when applied to the goods or services of the applicant, is primarily geographically descriptive or deceptively misdescriptive of them, or (iii) is primarily merely a surname; provided, however, that nothing in this subdivision (5) shall prevent the registration of a mark used in this State by the applicant which has become distinctive of the applicant's goods or services. The Secretary may accept as evidence that the mark has become distinctive, as applied to the applicant's goods or services, proof of continuous use thereof as a mark by the applicant in this State for the five years preceding the date on which the claim of distinctiveness is made; or

(6) Consists of or comprises a mark which so resembles a mark registered in this State or a mark or trade name previously used in this State by another and not abandoned, as to be likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive. (1903, c. 271; Rev., ss. 3012, 3017; C.S., ss. 3971, 3976; 1941, c. 255, s. 1; 1967, c. 1007, s. 1; 1991, c. 626, s. 2; 1997-476, s. 3.)

Editor's Note. — Session Laws 1997-476, s. 13, provides: "This act takes precedence over all statutes that are inconsistent with this act or that contradict this act, effective October 1, 1997. The Secretary of State shall advise the General Statutes Commission of any statutes that should be amended or repealed to conform to this act."

§ 80-3. Application for registration.

(a) Subject to the limitations set forth in this Article, any person who uses a mark, or any person who controls the nature and quality of the goods or services in connection with which a mark is used by another, in this State may file in the office of the Secretary in a format to be prescribed by the Secretary, an application for registration of that mark setting forth, but not limited to, the following information:

(1) The name and business address of the person applying for registration; and, if a corporation, the state of incorporation. If the application for registration relates to a mark used in connection with goods, the applicant shall list either the address of the applicant's principal place of business in North Carolina or a place of distribution and usage of the goods in this State. If the application for registration relates to a mark used in connection with services, the applicant shall list a physical location at which the services are being rendered or offered in this State;

(2) The goods or services in connection with which the mark is used and the mode or manner in which the mark is used in connection with the goods or services and the class in which the goods or services fall;

(3) The date when the mark was first used anywhere and the date when it was first used in this State by the applicant, the applicant's predecessor in business or by another under the control of the applicant; and

(4) A statement that the applicant is the owner of the mark, that the mark is in use, and that to the best of the knowledge of the person verifying the application, no other person has registered in this State, or has the right to use the mark in this State either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to the goods or services of the other person, to cause confusion, or to cause mistake, or to deceive.

(b) The application shall be signed and verified by the applicant, by a partner, by a member of the firm, or an officer of the corporation or association applying for registration. In states in which a notary is not required by law to obtain a notary's stamp or seal, an original certificate of authority of the notary issued by the appropriate State agency shall be submitted with the application. If the application is signed by a person acting pursuant to a power of attorney from the applicant, an original power of attorney or a certified copy of the power of attorney shall accompany the application.

The application shall be accompanied by three specimens of the mark as currently used and by a filing fee of seventy-five dollars ($75.00), payable to the Secretary.

(c) The Secretary may require a statement as to whether an application to register the mark, or portions or a component of the mark, has been filed by the applicant or a predecessor in interest in the United States Patent and Trademark Office and, if so, the applicant shall provide any relevant information required by the Secretary, including the filing date and serial number of the application and the status of the application. If any application was finally refused registration or has otherwise not resulted in a registration, the Secretary may require the applicant to provide in the statement the reason the application was not registered. The Secretary may also require that a drawing of the mark accompany the application in a form specified by the Secretary. (1903, c. 271, s. 3; Rev., s. 3014; C.S., s. 3973; 1935, c. 60; 1941, c. 255, s. 2; 1967, c. 1007, s. 1; 1983, c. 713, s. 49; 1991, c. 626, s. 3; 1997-476, s. 4; 2002-126, s. 29A.36.)

Editor's Note. — Session Laws 1997-476, s. 13, provides: "This act takes precedence over all statutes that are inconsistent with this act or that contradict this act, effective October 1, 1997. The Secretary of State shall advise the General Statutes Commission of any statutes that should be amended or repealed to conform to this act."

§ 80-3.1. Examination of application.

(a) Upon filing an application for registration and payment of the application fee, the Secretary may cause the application to be examined for conformity with this Article.

(b) The applicant shall provide any additional relevant information requested by the Secretary, including a description of a design mark, and may make, or authorize the Secretary to make, any amendments to the application reasonably requested by the Secretary or deemed by the applicant to be advisable to respond to a rejection or objection.

(c) The Secretary may require the applicant to disclaim an unregisterable component of a mark otherwise registrable, and an applicant may voluntarily disclaim a component of a mark requested to be registered. No disclaimer shall prejudice or affect the applicant's or registrant's rights then existing or thereafter arising in the disclaimed matter, or the applicant's or registrant's rights of registration on another application if the disclaimed matter is distinctive of the applicant's or registrant's goods or services.

(d) The Secretary may (i) amend the application submitted by the applicant, if the applicant consents, or (ii) require a new application be submitted.

(e) If the Secretary finds that the applicant is not entitled to registration, the Secretary shall advise the applicant of the reasons the applicant is not entitled to registration. The applicant shall have a reasonable period of time, specified by the Secretary, in which to reply or to amend the application. If the applicant replies and amends the application, the Secretary shall reexamine the application. This procedure may be repeated until (i) the Secretary finally refuses registration of the mark, or (ii) the applicant fails to reply or to amend the application within the specified period. If the applicant fails to reply or to amend the application, the application shall be deemed to have been abandoned.

(f) If the Secretary finally refuses registration of the mark, the applicant may seek a writ of mandamus to compel registration. The writ may be granted, without costs to the Secretary, on proof that all the statements in the application are true and that the mark is entitled to registration.

(g) When the Secretary receives more than one application seeking registration of the same or confusingly similar marks for the same or related goods or services and processes those applications concurrently, the Secretary shall grant priority to the applications in order of filing. If a previously filed application is granted a registration, any other application shall then be rejected. A rejected applicant may bring an action for cancellation of the registration on grounds of prior or superior rights to the mark, in accordance with the provisions of this Article. (1997-476, s. 5.)

Editor's Note. — Session Laws 1997-476, s. 13, provides: "This act takes precedence over all statutes that are inconsistent with this act or that contradict this act, effective October 1, 1997. The Secretary of State shall advise the General Statutes Commission of any statutes that should be amended or repealed to conform to this act."

§ 80-4. Certificate of registration.

Upon compliance by the applicant with the requirements of this Article, the Secretary shall cause a certificate of registration to be issued and delivered to the applicant. The certificate of registration shall be issued under the signature of the Secretary and the seal of the State, and it shall show the name and business address and, if a corporation, the state of incorporation, of the person claiming ownership of the mark, the date claimed for the first use of the mark anywhere and the date claimed for the first use of the mark in this State, the class of goods or services and a description of the goods or services on which the mark is used, a reproduction of the mark, the registration date, the registration number and the term of the registration.

Any certificate of registration issued by the Secretary under the provisions hereof or a copy thereof duly certified by the Secretary shall be admissible in evidence as competent and sufficient proof of the registration of the mark in any action or judicial proceedings in any court of this State. (1903, c. 271, s. 4; Rev., s. 3015; C.S., s. 3974; 1967, c. 1007, s. 1; 1991, c. 626, s. 4; 1997-476, s. 6.)

Editor's Note. — Session Laws 1997-476, s. 13, provides: "This act takes precedence over all statutes that are inconsistent with this act or that contradict this act, effective October 1, 1997. The Secretary of State shall advise the General Statutes Commission of any statutes that should be amended or repealed to conform to this act."

§ 80-5. Duration and renewal.

Registration of a mark hereunder shall be effective for a term of 10 years from the date of registration and shall be renewable for successive terms of 10 years upon application filed within six months prior to the expiration of any term. A renewal fee of thirty-five dollars ($35.00), payable to the Secretary, shall accompany the application for renewal of the registration. Within six months following the expiration of a term of five years from the date of registration, or the last renewal of registration of the mark, the applicant shall submit a specimen showing evidence of current use of the mark and a signed statement verifying the use of such mark on a form to be furnished by the Secretary of State. Use of the form furnished by the Secretary of State is mandatory. Failure to submit this verification and specimen showing evidence of current use shall be grounds for cancellation of the registration of the mark by the Secretary of State.

The Secretary of State shall notify registrants of marks hereunder of the necessity of renewal within the year next preceding the expiration of the 10 years from the date of registration, by writing to the last known address of the registrants.

The Secretary of State shall notify registrants of marks hereunder of the necessity of submitting evidence of current use of the mark after five years from the date of registration or of the last renewal of registration of the mark, by writing to the last known address of the registrants within the year preceding the due date for such submission.

Registration of marks applied for under previous acts shall be continued in force for the full 10-year term without the necessity of submitting evidence of current use of the mark during the term.

All applications for renewals under this Article, whether of registrations made under this Article or of registrations effected under any prior act, shall be filed with the Secretary in a format prescribed by the Secretary specifying the information called for by G.S. 80-3 and shall include a statement that the mark is still in use in this State, setting forth those goods or services recited in the registration in connection with which the mark is still in use. The registration shall be renewed only as to the goods and services. (1967, c. 1007, s. 1; 1991, c. 626, s. 5; 1997-476, s. 7.)

Editor's Note. — Session Laws 1997-476, s. 13, provides: "This act takes precedence over all statutes that are inconsistent with this act or that contradict this act, effective October 1, 1997. The Secretary of State shall advise the General Statutes Commission of any statutes that should be amended or repealed to conform to this act."

§ 80-6. Assignment.

(a) Any mark and its registration hereunder shall be assignable with the goodwill of the business in which the mark is used, or with that part of the goodwill of the business connected with the use of and symbolized by the mark. Assignment shall be by instruments in writing duly executed and may be recorded with the Secretary upon the payment of a fee of twenty-five dollars ($25.00), payable to the Secretary who, upon recording of the assignment, shall issue in the name of the assignee a new certificate for the remainder of the term of the registration or of the last renewal thereof. An assignment of any registration under this Article shall be void as against any subsequent purchaser for valuable consideration without notice, unless it is recorded with the Secretary within three months after the date thereof or prior to subsequent purchase.

(b) Any registrant or applicant effecting a change of the name of the person to whom the mark was issued or for whom an application was filed may record a certificate of change of name of the registrant or applicant with the Secretary upon payment of the recording fee required under G.S. 80-7. The Secretary may issue a certificate of registration of an assigned application in the name of the assignee. The Secretary may issue in the name of the assignee a new certificate for the remainder of the term of the registration or for the last renewal of the registration.

(c) Other instruments that relate to a mark registered or application pending pursuant to this Article, including licenses, security interests, and mortgages, may be recorded in the discretion of the Secretary, upon payment of the recording fee required under G.S. 80-7. Instruments authorized under this subsection shall be in writing and duly executed.

(d) Acknowledgment shall be prima facie evidence of the execution of an assignment or other instrument and, when recorded by the Secretary, the record shall be prima facie evidence of execution.

(e) A photocopy of any instrument referenced in subsection (a), (b), or (c) of this section shall be accepted for recording if it is certified by any party to the instrument, or the party's successor, to be a true and correct copy of the original. (Rev., s. 3016; C.S., s. 3975; 1967, c. 1007, s. 1; 1991, c. 626, s. 6; 1997-476, s. 8.)

Editor's Note. — Session Laws 1997-476, s. 13, provides: "This act takes precedence over all statutes that are inconsistent with this act or that contradict this act, effective October 1, 1997. The Secretary of State shall advise the General Statutes Commission of any statutes that should be amended or repealed to conform to this act."

§ 80-7. Records.

The Secretary shall keep for public examination all assignments recorded under G.S. 80-6 and a record of all marks registered or renewed under this Article. The Secretary shall collect the following fees for copying, comparing, and certifying a copy of any filed document relating to a trademark or service mark:

(1) Five dollars ($5.00) for the certificate, and
(2) One dollar ($1.00) per page for copying or comparing a copy to the original.

The Secretary shall collect a recording fee of ten dollars ($10.00) for recording name changes of corporate registrants and for recording transfers of the registration of any mark by merger or consolidation if the articles of merger or consolidation are records not on file in the Corporate Division of the Department of the Secretary of State. (1967, c. 1007, s. 1; 1991, c. 626, s. 7; 1997-476, s. 9.)

Editor's Note. — Session Laws 1997-476, s. 13, provides: "This act takes precedence over all statutes that are inconsistent with this act or that contradict this act, effective October 1, 1997. The Secretary of State shall advise the General Statutes Commission of any statutes that should be amended or repealed to conform to this act."

§ 80-8. Cancellation.

The Secretary shall cancel from the register, in whole or in part:

(1) Repealed by Session Laws 1991, c. 626, s. 8.
(2) Any registration concerning which the Secretary shall receive a voluntary request for cancellation thereof from the registrant or the assignee of record.
(3) All registrations granted under this Article and not renewed in accordance with the provisions hereof.
(4) Any registration concerning which a court of competent jurisdiction shall find:
    a. That the registered mark has been abandoned or has become incapable of serving as a mark;
    b. That the registrant is not the owner of the mark;
    c. That the registration was granted improperly;
    d. That the registration was obtained fraudulently;
    e. That the registration is for a mark that is or has become the generic name for the goods or services for which it has been registered or for a portion of the goods or services for which it has been registered;

f. That the registration was obtained by means of materially false statements in the application for registration; or

g. That the registration is so similar to another mark used in the State as to be likely to cause confusion or mistake or to deceive if (i) the other mark was registered by another person in the United States Patent and Trademark Office prior to the date of the applicant's first use of the mark that is the subject of the application for registration, and (ii) the other mark has not been abandoned. However, if the registrant proves that the registrant is the owner of a concurrent registration of a mark in the United States Patent and Trademark Office covering an area including the entire State, the registration shall not be cancelled.

(5) Any registration when a court of competent jurisdiction shall order cancellation thereof.

(6), (7) Repealed by Session Laws 1997-476, s. 10. (1967, c. 1007, s. 1; 1991, c. 626, s. 8; 1997-476, s. 10.)

Editor's Note. — Session Laws 1997-476, s. 13, provides: "This act takes precedence over all statutes that are inconsistent with this act or that contradict this act, effective October 1, 1997. The Secretary of State shall advise the General Statutes Commission of any statutes that should be amended or repealed to conform to this act."

§ 80-9. Classification.

The Secretary shall establish a classification of goods and services for convenience of administration of this Article, but not to limit or extend the applicant's or registrant's rights, and a single application for registration of a mark may include any or all goods upon which, or services for which, the mark is actually being used indicating the appropriate class or classes of goods or services. When a single application includes goods or services that fall within multiple classes, the Secretary may require payment of a fee for each class. The Secretary may amend the classes herein established to conform them to the classification established for the United States Patent and Trademark Office as from time to time amended. (1967, c. 1007, s. 1; 1991, c. 626, s. 9; 1997-476, s. 11.)

Editor's Note. — Session Laws 1997-476, s. 13, provides: "This act takes precedence over all statutes that are inconsistent with this act or that contradict this act, effective October 1, 1997. The Secretary of State shall advise the General Statutes Commission of any statutes that should be amended or repealed to conform to this act."

§ 80-10. Fraudulent registration.

Any person who shall for himself, or on behalf of any other person, procure the filing or registration of any mark in the office of the Secretary under the provisions hereof, by knowingly making any false or fraudulent representation or declaration, verbally or in writing, or by any other fraudulent means, shall be liable to pay all damages sustained in consequence of filing or registration, to be recovered by or on behalf of the party injured thereby in any court of competent jurisdiction. (1903, c. 271, s. 5; Rev., s. 3018; C.S., s. 3977; 1967, c. 1007, s. 1; 1997-476, s. 12.)

Editor's Note. — Session Laws 1997-476, s. 13, provides: "This act takes precedence over all statutes that are inconsistent with this act or that contradict this act, effective October 1, 1997. The Secretary of State shall advise the General Statutes Commission of any statutes that should be amended or repealed to conform to this act."

§ 80-11. Infringement.

Subject to the provisions of G.S. 80-13, any person who shall

(1) Use in this State without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of a mark registered under this Article in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source of origin of such goods or services; or

(2) Reproduce, counterfeit, copy or colorably imitate any such mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in conjunction with the sale or other distribution in this State of such goods or services;

shall be liable to a civil action by the owner of such registered mark for any or all of the remedies provided in G.S. 80-12, except that under subdivision (2) hereof the registrant shall not be entitled to recover profits or damages or any penalty unless the acts have been committed with knowledge that such mark is intended to be used to cause confusion or mistake or to deceive. (1903, c. 271, s. 6; Rev., s. 3019; C.S., s. 3978; 1967, c. 1007, s. 1.)

§ 80-11.1. Criminal use of counterfeit trademark.

(a) For purposes of this section:

(1) "Counterfeit mark" means a mark that is used in connection with the sale or offering for sale of goods or services that are identical to or substantially indistinguishable from the goods or services with which the mark is used or registered, and the use of which is likely to cause confusion, mistake, or deception, with the use occurring without authorization of the:

a. Owner of the registered mark, and is identical to or substantially indistinguishable from a mark that is registered on the principal register of the United States Patent and Trademark Office or with the Trademark Division of the Department of the Secretary of State; or

b. Owner of the unregistered mark and is identical to or substantially indistinguishable from symbols, signs, emblems, insignias, trademarks, trade names, or words protected by section 110 of the Amateur Sports Act of 1978 (Title 36, U.S.C. § 380).

(2) "Retail sales value" means the value computed by multiplying the number of items having a counterfeit mark used thereon or in connection therewith, by the retail price at which a similar item having a mark used thereon or in connection therewith, the use of which is authorized by the owner, is offered for sale to the public.

(b) Any person who knowingly and willfully (i) uses or causes to be used a counterfeit mark on or in connection with goods or services intended for sale or (ii) has possession, custody, or control of goods having a counterfeit mark used thereon or in connection therewith, that are intended for sale, shall be punished as follows:

(1) If the goods or services having a counterfeit mark used thereon or in connection therewith, or on or in connection with which the person intends to use a counterfeit mark, have a retail sales value not exceeding three thousand dollars ($3,000), the person is guilty of a Class 2 misdemeanor;

(2) If the goods or services having a counterfeit mark used thereon or in connection therewith, or on or in connection with which the person

intends to use a counterfeit mark, have a retail sales value exceeding three thousand dollars ($3,000) but not exceeding ten thousand dollars ($10,000), the person is guilty of a Class I felony; and

(3) If the goods or services having a counterfeit mark used thereon or in connection therewith, or on or in connection with which the person intends to use a counterfeit mark, have a retail sales value exceeding ten thousand dollars ($10,000), the person is guilty of a Class H felony.

The possession, custody, or control of more than 25 items having a counterfeit mark used thereon or in connection therewith creates a presumption that the person having possession, custody, or control of the items intended to sell those items.

(c) Any person who knowingly (i) uses any object, tool, machine, or other device to produce or reproduce a counterfeit mark or (ii) has possession, custody, or control of any object, tool, machine, or device with intent to produce or reproduce a counterfeit mark, is guilty of a Class H felony.

(d) Any personal property, including any item, object, tool, machine, device, or vehicle of any kind, employed as an instrumentality in the commission of, or in aiding or abetting in the commission of a violation of subsection (b) or (c) of this section, is subject to seizure and forfeiture and shall be disposed of in accordance with the provisions of Article 2 of Chapter 15 of the General Statutes.

(e) For purposes of enforcing this section, the Department of the Secretary of State's law enforcement agents have statewide jurisdiction. These law enforcement agents may assist local law enforcement agencies in their investigations and may initiate and carry out, in coordination with local law enforcement agencies, investigations of violations of this section. These law enforcement agents have all of the powers and authority of law enforcement officers when executing arrest warrants. These agents shall be authorized to have fictitious licenses, license tags, and registrations, pursuant to G.S. 20-39(h) or G.S. 14-250, for the purpose of conducting criminal investigations.

(f) The Secretary of State may refer any available evidence concerning violations of this section to the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings.

The attorneys employed by the Secretary of State shall be available to prosecute or assist in the prosecution of criminal cases when requested to do so by a district attorney and the Secretary of State approves.

(g) Pursuant to an agreement between the departments, the Secretary of State may refer any available evidence concerning violations of this section to the Secretary of Revenue for purposes of determining the obligations of the violators of this section to the State under the provisions of Chapter 105 of the General Statutes. (1995, c. 436, s. 1.)

§ 80-12. Violation a deceptive or unfair trade practice.

A violation of G.S. 80-10 or G.S. 80-11 constitutes a violation of G.S. 75-1.1. (1903, c. 271, s. 8; Rev., s. 3021; C.S., s. 3980; 1941, c. 255, s. 3; 1967, c. 1007, s. 1; 1995, c. 436, s. 2.)

CASE NOTES

When Relief Granted. — Before the owner of a trademark can call upon the courts for relief, he must show not only that he has a clear legal right to the trademark, but that there has been a plain violation of it; and where a violation is alleged, the true inquiry is, whether the mark of the defendant is so assimilated to that of the plaintiff as to deceive purchasers. And it will make no difference whether the party designed to mislead the public or whether the symbol adopted was calculated to deceive. Blackwell v. Wright, 73 N.C. 310 (1875), aff'd on rehearing, 74 N.C. 733 (1876).

If it appears that the trademark alleged to be an imitation, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. An imitation is colorable, and will be enjoined, which requires a careful inspection to distinguish its mark and appearance from that of the manufacture imitated. Blackwell v. Wright, 73 N.C. 310 (1875), aff'd on rehearing, 74 N.C. 733 (1876).

Cited in Lyons Partnership, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 2001 U.S. App. LEXIS 3985 (4th Cir. 2001).

§ 80-13. Common-law rights.

Nothing herein shall adversely affect the rights or the enforcement of rights in marks acquired in good faith at any time at common law. (1967, c. 1007, s. 1.)

§ 80-14. Severability of Article.

If any provision hereof, or the application of such provision to any person or circumstance is held invalid, the remainder of this Article shall not be affected thereby. (1967, c. 1007, s. 1.)

ARTICLE 2.

Timber Marks.

§ 80-15. Timber dealers may adopt.

Any person dealing in timber in any form shall be known as a timber dealer and as such may adopt a trademark, in the manner and with the effect in this Article provided. (1903, c. 261, s. 1; Rev., s. 3023; C.S., s. 3985.)

§ 80-16. How adopted, registered and published.

Every such dealer desiring to adopt a trademark may do so by the execution of a writing in form and effect as follows:

Notice is hereby given that I (or we, etc., as the case may be) have adopted the following trademark, to be used in my (or our, etc.) business as timber dealer (or dealers), to wit: (Here insert the words, letters, figures, etc., constituting the trademark, or if it be any device other than words, letters or figures, insert a facsimile thereof).

Dated this ________ day of ________, ________ A ________ B ________

Such writing shall be acknowledged or proved for record in the same manner as deeds are acknowledged or proved, and shall be registered in the office of the register of deeds of the county in which the principal office or place of business of such timber dealer may be, in a book to be kept for that purpose marked Registry of Timber Marks, also in office of Secretary of State, and a copy thereof shall be published at least once in each week for four successive weeks in some newspaper printed in such county, or if there be no such newspaper printed therein, then in some newspaper of general circulation in such county. (1889, c. 142; 1903, c. 261, s. 2; Rev., s. 3024; C.S., s. 3986; 1999, c. 456, s. 59.)

§ 80-17. Property in and use of trademarks.

Every trademark so adopted shall, from the date thereof, be the exclusive property of the person adopting the same. The proprietor of such trademark shall, in using the same, cause it to be plainly stamped, branded or otherwise impressed upon each piece of timber upon which the same is placed. (1889, c. 142; 1903, c. 261, ss. 3, 4; Rev., s. 3025; C.S., s. 3987.)

§ 80-18. Effect of branding timber purchased.

When timber is purchased by the proprietor of any such trademark, and the said trademark is placed thereon as hereinbefore provided, such timber shall thenceforth be deemed the property of such purchaser, without any other or further delivery thereof, and such timber shall thereafter be at the risk of the purchaser, unless otherwise provided by contract in writing between the parties. (1889, c. 142; 1903, c. 261, s. 6; Rev., s. 3026; C.S., s. 3988.)

§ 80-19. Trademark on timber evidence of ownership.

In any action, suit or contest in which the title to any timber, upon which any trademark has been placed as aforesaid, shall come in question, it shall be presumed that such timber was the property of the proprietor of such trademark, in the absence of satisfactory proof to the contrary. (1903, c. 261, s. 7; Rev., s. 3027; C.S., s. 3989.)

§ 80-20. Fraudulent use of timber trademark, misdemeanor.

If any person shall use or attempt to use any timber trademark without the written consent of the proprietor thereof, or falsely and fraudulently place any trademark on timber not the property of the owner of such trademark without his written consent, or intentionally and without lawful authority remove, deface or destroy any timber trademark or the imprint thereof on any timber or intentionally put any such timber in such a position or place so remote from the stream from which it was taken or on which it was afloat as to render it inconvenient or unnecessarily expensive to replace the same in such stream, he shall be guilty of a Class 1 misdemeanor. (1903, c. 261, ss. 3-5; Rev., s. 3854; C.S., s. 3990; 1993, c. 539, s. 584; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 80-21. Larceny of branded timber.

If any person shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark is stamped, branded or otherwise impressed, or shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark has been intentionally and without lawful authority removed, defaced or destroyed, he shall be deemed guilty of larceny thereof and punished as in other cases of larceny. (1903, c. 261, s. 5; Rev., s. 3853; C.S., s. 3991.)

§ 80-22. Altering timber trademark crime.

If any person shall willfully change, alter, erase or destroy any registered timber mark or brand put or cut upon any logs, timber, lumber or boards, except by the consent of the owner thereof, with intent to steal the said logs or timber, he shall be guilty of a Class 3 misdemeanor. (1889, c. 142, s. 3; 1903, c. 41; Rev., s. 3855; C.S., s. 3992; 1943, c. 543; 1993, c. 539, s. 585; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 80-23. Possession of branded logs without consent, misdemeanor.

If any person shall knowingly and willfully take up or have in his possession any log, timber, lumber or board upon which a registered timber mark or brand has been put or cut, except by the consent of the owner thereof, he shall be guilty of a Class 3 misdemeanor. (1889, c. 142, s. 4; 1903, c. 42; Rev., s. 3856; C.S., s. 3993; 1993, c. 539, s. 586; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 3.

Mineral Waters and Beverages.

§§ 80-24 through 80-32: Repealed by Session Laws 1987, c. 402.

ARTICLE 4.

Farm Names.

§ 80-33. Registration of farm names authorized.

Any owner of a farm in the State of North Carolina may have the name of his farm, together with a description of his lands to which said name applies, recorded in a register kept for that purpose in the office of the register of deeds of the county in which the farm is located, and the register of deeds shall furnish to such landowner a proper certificate setting forth the name and description of the lands. (1915, c. 108, s. 1; C.S., s. 4004.)

Local Modification. — Sampson, Stokes, Surry: C.S., G.S. 4011.

§ 80-34. After registry, similar name not registered.

When any name has been recorded as the name of any farm in such county, the name, or one so nearly like it as to produce confusion, shall not be recorded as the name of any other farm in the same county. (1915, c. 108, s. 1; C.S., s. 4005.)

§ 80-35. Distinctive name required.

No name shall be registered as the name of a farm where such proposed name or one so nearly like it as to produce confusion has been so used in connection with another farm in the same county as to become generally known prior to March 5, 1915, unless the name used has also prior to March 5, 1915, become well known as the name of the farm proposed to be registered; and in this event two or more farms in the same county may be registered with the same name with some prefix or suffix added to distinguish them. (1915, c. 108, s. 2; C.S., s. 4006.)

§ 80-36. Application for registry; publication and hearing.

Before a name shall be registered the clerk shall have publication made at least once a week for four weeks in some secular newspaper published in the county, if one is so published, and if one is not so published, then one having a general circulation in the county, giving the name of the applicant, the proposed name of registration and a sufficient description to identify the farm and the time of the return; and if the owner or clerk knows of another farm in the county of the same or very similar name, a summons shall be served on the owner thereof at least 10 days before the return day. On the return day any person, firm or corporation may file claim to the name, and the clerk may pass upon the claim and award the name to any party, with the right to appeal by the aggrieved party to the superior court within 10 days, as in other cases, and on such appeal the judge shall decide the matters unless a jury be demanded by some party. (1915, c. 108, s. 2; C.S., s. 4007.)

§ 80-37. Fees for registration.

Any person having the name of his farm recorded as provided in this Article shall first pay to the register of deeds a fee of one dollar ($1.00), which fee shall be paid to the county treasurer as other fees are to be paid to the county treasurer by such register of deeds: Provided, that in counties where the fee system obtains, the fees herein mentioned shall go to the register of deeds of such counties. (1915, c. 108, s. 3; C.S., s. 4008.)

§ 80-38. When transfer of farm carries name.

When any owner of a farm, the name of which has been recorded as provided in this Article, transfers by deed or otherwise the whole of such farm, such transfer may include the registered name thereof; but if the owner shall transfer only a portion of such farm, then, in the event, the registered name thereof shall not be transferred to the purchaser unless so stated in the deed or conveyance. (1915, c. 108, s. 4; C.S., s. 4009.)

§ 80-39. Cancellation of registry; fee.

When any owner of a registered farm desires to cancel the registered name thereof, he shall state on the margin of the record of the register of such name the following: "This name is canceled and I hereby release all rights thereunder," which shall be signed by the person canceling such name, and attested by the register of deeds. For such latter service the register of deeds shall charge a fee of twenty-five cents (25¢), which shall be paid to the county treasurer as other fees are paid to the county treasurer by him. (1915, c. 108, s. 5; C.S., s. 4010.)

ARTICLE 5.

Stamping of Gold and Silver Articles.

§ 80-40. Marking gold articles regulated.

It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of gold or any alloy of gold, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark indicating or designed to indicate that the gold, or alloy of gold, therein is of a greater degree of fineness than its actual fineness, unless the actual fineness, in the case of flatware and watchcases, is not less by more than three one-thousandths parts, and in the case of all other articles is not less by more than one-half karat than the fineness indicated, according to the standards and subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of gold or alloy in the articles, according to the required standards, the part of the gold or alloy taken for the test, analysis or assay shall be a part not containing or having attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of the articles. In addition to the foregoing tests and standards, the actual fineness of the entire quantity of gold and of its alloys contained in any article mentioned in this section (except watchcases), including all solder or alloy of inferior metal used for brazing or uniting the parts (all such gold, alloys, and solder being assayed as one piece), shall not be less by more than one karat than the fineness indicated by the mark used as above indicated. Violation of this section is a Class 1 misdemeanor. (1907, c. 331, s. 1; C.S., s. 4012; 1993, c. 539, s. 587; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 80-41. Marking silver articles regulated.

It shall be unlawful to make for sale or sell or offer to sell or dispose of or have in possession with intent to sell or dispose of —

(1) Any article of merchandise made in whole or in part of silver of any alloy of silver, and having marked, stamped, branded or engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words "sterling silver" or "sterling" or any colorable imitation thereof, unless nine hundred and twenty-five one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standard.

(2) Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having marked, stamped, branded, engraved or imprinted thereon, or upon any card, tag or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words "coin" or "coin silver," or any colorable imitation thereof, unless nine hundred one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standards.

(3) Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark or word (other than the word "sterling" or the word "coin") indicating, or designed to indicate, that the silver or alloy of silver in the article is of a greater degree of fineness than its actual fineness, unless the actual fineness is not less by more than four one-thousandths parts than the actual fineness indicated by the use of such mark or word, subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of the articles mentioned in this section, according to the foregoing standards, the part taken for test, analysis or assays shall be a part not containing or having attached thereto any solder or alloy of inferior metal used for brazing or uniting the parts of such article. In addition to the foregoing test and standards, the actual fineness of the entire quantity of metal purporting to be silver contained in any article mentioned in this section, including all solder or alloy of inferior fineness used for brazing or uniting the parts (all such silver, alloy or solder being assayed as one piece), shall not be less by more than ten one-thousandths parts than the fineness indicated according to the foregoing standards, by the mark employed as above indicated. Violation of this section is a Class 1 misdemeanor. (1907, c. 331, s. 2; C.S., s. 4013; 1993, c. 539, s. 588; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 80-42. Marking articles of gold plate regulated.

It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto a plate, plating, covering or sheet of gold, or of any alloy of gold, which article is known in the market as "rolled gold plate," "gold plate," "gold-filled," or "gold electroplate," or by any similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any word or mark usually employed to indicate the fineness of gold, unless such word be accompanied by other words plainly indicating that such article or some part thereof is made of rolled gold plate, or gold plate, or gold electroplate, or is gold-filled, as the case may be. Violation of this section is a Class 1 misdemeanor. (1907, c. 331, s. 3; C.S., s. 4014; 1993, c. 539, s. 589; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 80-43. Marking articles of silver plate regulated.

It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto, a plate, plating, covering or sheet of silver or of any alloy of silver, which article is known in the market as "silver plate" or "silver electroplate," or by any similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the word "sterling" or the word "coin," either alone or in conjunction with any other words or marks. Violation of this section is a Class 1 misdemeanor. (1907, c. 331, s. 4; C.S., s. 4015; 1993, c. 539, s. 590; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 80-44. Violation of Article misdemeanor.

Every person, firm, corporation or association guilty of a violation of any one of the preceding sections of this Article, and every officer, manager, director or managing agent of any such person, firm, corporation or association directly participating in such violation or consenting thereto, shall be guilty of a Class 1 misdemeanor: Provided, that if the person charged with violation of this Article shall prove that the article concerning which the charge was made was manufactured prior to June 13, 1907, then the charge shall be dismissed. (1907, c. 331, s. 5; C.S., s. 4016; 1993, c. 539, s. 591; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 6.

Cattle Brands.

§ 80-45. Owners of stock to register brand or marks.

Every person who has any horses, cattle, hogs or sheep may have an earmark or brand different from the earmark or brand of all other persons, which he shall record with the clerk of the board of commissioners of the county where his horses, cattle, hogs or sheep are; and he may brand all horses 18 months old and upwards with the said brand, and earmark all his hogs and sheep six months old and upwards with the said earmark; and earmark or brand all his cattle 12 months old and upwards; and if any dispute shall arise about any earmark or brand, the same shall be decided by the record thereof. (R.C., c. 17, s. 1; Code, s. 2317; Rev., s. 3028; C.S., s. 4017.)

ARTICLE 7.

Recording of Cattle Brands and Marks with Commissioner of Agriculture.

§§ 80-46 through 80-56: Repealed by Session Laws 1975, c. 261, s. 1.

ARTICLE 8.

Registration and Protection of Livestock Brands.

§ 80-57. Purpose.

The purpose of this Article is to discourage livestock theft by allowing for the voluntary individual registration of brand marks for certain livestock. (1975, c. 261, s. 1.)

Editor's Note. — The act which added this Article repealed Article 7, entitled "Recording of Cattle Brands and Marks with Commissioner of Agriculture." Where former provisions were similar to the new provisions, the historical citations to the repealed sections have been added to the new sections.

§ 80-58. Definitions.

(a) "Board". — The term "Board" means the North Carolina Board of Agriculture.

(b) "Brand". — The term "brand" means an identification mark permanently affixed into the hide of livestock by a hot iron or an extremely cold brand known as a "freeze brand."

(c) "Commissioner". — The term "Commissioner" means the Commissioner of Agriculture of the State of North Carolina.

(d) "Livestock". — The term "livestock" means cattle, horses, ponies, mules, and asses.

(e) "Person". — The term "person" means an individual, firm, company, association, partnership or corporation. (1935, c. 232, s. 1; 1975, c. 261, s. 1.)

Cross References. — As to the intent of the General Assembly that llamas be treated as domesticated livestock in order to promote the development and improvement of the llama industry in the State, see G.S. 106-22.4.

§ 80-59. Responsibility and authority of Commissioner of Agriculture; application for registration; transfer of ownership of brand.

The Commissioner shall record livestock brands and maintain a record of such brands pursuant to this Article. Such records shall be public and shall be prima facie evidence of ownership of livestock which is properly branded under this Article. The Commissioner shall authorize such agents within the North Carolina Department of Agriculture and Consumer Services as he deems necessary to implement this Article.

Any person desiring the exclusive use of a brand shall make application to the Commissioner on forms prescribed by the Board. The transfer of ownership of a brand registration may be done only at the written request of the brand registrant of record. The Commissioner shall receive a fee of ten dollars ($10.00) for recording such transfer. (1935, c. 232, ss. 3-5; 1975, c. 261, s. 1; 1997-261, s. 109.)

§ 80-60. No brands duplicated.

No brand shall be registered that is a reasonable facsimile of another registered brand or that will likely be confused with another brand registered under this Article. (1975, c. 261, s. 1.)

§ 80-61. Rules and regulations.

The Board shall have authority to promulgate reasonable rules and regulations for implementation of this Article which shall include, but not be limited to, the location of and the size of brand marks. (1975, c. 261, s. 1.)

§ 80-62. Fees for recording.

The Commissioner is authorized to collect a fee of twenty-five dollars ($25.00) for the recording of each new brand, or for rerecording of each brand, and shall issue one certified copy of each brand recording to the holder of said brand. Duplicate certificates of registration may be issued by the Commissioner upon payment of a fee of two dollars ($2.00). Revenues collected pursuant to this Article shall be deposited with the State Treasurer to the account of the North Carolina Department of Agriculture and Consumer Services. (1935, c. 232, ss. 5, 6; 1975, c. 261, s. 1; 1997-261, s. 109.)

§ 80-63. Records to be kept of sales and slaughter.

Persons or agents selling or bartering or exchanging branded livestock in the State of North Carolina shall provide the purchaser or new owner with a bill of sale showing a reasonable facsimile of the brand on any and all livestock having a brand as defined in this Article. Such bills of sale shall be prima facie evidence of transfer of ownership of branded livestock. Slaughter facilities in the State of North Carolina shall affix to their normal records of receipt of livestock a reasonable facsimile of the brand on any branded livestock received by them. Such records shall be maintained for at least 12 months. (1935, c. 232, ss. 8, 9; 1975, c. 261, s. 1.)

§ 80-64. Defacing of brands prohibited.

No person may change, conceal, deface, disfigure or obliterate any brand previously branded, impressed, or marked on any livestock, or put his or any other brand upon or over any part of any brand previously branded or marked upon any livestock, and no person shall make or use any counterfeit of any brand of any other person. (1935, c. 232, s. 10; 1975, c. 261, s. 1.)

§ 80-65. Rerecording.

Every brand recorded under this Article, in order to remain effective, must be rerecorded with the Commissioner during the tenth year from its next previous recordation. Each person having a brand registered in the State of North Carolina shall be notified in writing by the Commissioner that said brand must be rerecorded to prohibit its disenrollment from the record of such brand maintained by the Commissioner. (1975, c. 261, s. 1.)

§ 80-66. Violation a misdemeanor.

Any person who violates any provision of this Article or any rule or regulation of the Board promulgated hereunder shall be guilty of a Class 2 misdemeanor. (1935, c. 232, s. 11; 1975, c. 261, s. 1; 1993, c. 539, s. 592; 1994, Ex. Sess., c. 24, s. 14(c).)

Chapter 81.

Weights and Measures.

§§ 81-1 through 81-82: Recodified as G.S. 81A-1 to 81A-88.

Chapter 81.

Weights and Measures.

§§ 81-1 through 81-52: Recodified as G.S. 81A-1 to 81A-89.

Chapter 81A.

Weights and Measures Act of 1975.

Article 1.

Administration of Chapter.

Sec.
81A-1. Weights and measures program provided for.
81A-2. Administration of these Articles.
81A-3. Systems of weights and measures.
81A-4. Board of Agriculture authorized to establish standards of weights and measures for commodities having none.
81A-5. Employment of Director of Weights and Measures and authorized agents.
81A-6. Salaries and expenses.
81A-7. Local inspection of weights and measures.
81A-8. Standards of weights and measures.
81A-9. Definitions.
81A-10. Reimbursement of expenses.
81A-11. [Repealed.]
81A-12. Fee schedule.
81A-13 through 81A-14. [Reserved.]

Article 2.

Powers and Duties of Commissioner.

81A-15. General duties.
81A-16. Police powers.
81A-17 through 81A-21. [Reserved.]

Article 3.

Violations.

81A-22. Misrepresentation of quantity.
81A-23. Misrepresentation of pricing.
81A-24. Commodities to be sold by weight, measure or numerical count.
81A-25. Unlawful for package to mislead purchaser.
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Article 6.

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81A-70. Purpose of Article.
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81A-72. Registration; certificate of registration; annual renewal.
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Article 1.

Administration of Chapter.

§ 81A-1. Weights and measures program provided for.

In order to protect the purchasers or sellers of any commodity, and to provide uniform standards of weight and uniform standards of measure throughout the State, which must be in conformity with the standards of weight and the standards of measure established by Congress, the Commissioner is hereby authorized to establish and maintain a weights and measures program as is hereinafter provided. (1927, c. 261, s. 1; 1945, c. 280, s. 1; 1975, c. 544.)

Editor's Note. — This Chapter is Chapter 81 as rewritten by Session Laws 1975, c. 544, effective July 1, 1976, and recodified. Where appropriate, historical citations to the sections of the former Chapter have been added to corresponding sections of the new Chapter.

CASE NOTES

Cited in State v. Diaz, 88 N.C. App. 699, 365 S.E.2d 7 (1988).

§ 81A-2. Administration of these Articles.

The provisions of this Chapter shall be administered by the Commissioner or his authorized agent. For the purpose of administering and giving effect to the provisions of this Chapter, the provisions of Handbook 44 as adopted by the National Conference on Weights and Measures, are hereby adopted except insofar as modified or rejected by the North Carolina Board of Agriculture. The North Carolina Board of Agriculture is empowered to make such further rules and regulations as may be necessary to make effective the purposes and provisions of this Chapter. Except as otherwise provided in G.S. 81A-30.1, all fees or moneys received by the Commissioner pursuant to this Chapter shall be placed in the Department of Agriculture and Consumer Services fund for the purpose of enforcing this Chapter. (1927, c. 261, s. 2; 1931, c. 150; 1943, c. 762, s. 1; 1949, c. 984; 1975, c. 544; 1997-261, s. 109; 1998-215, s. 4(b).)

§ 81A-3. Systems of weights and measures.

The system of weights and measures in customary use in the United States and the metric system of weights and measures are jointly recognized, and either one or both of these systems shall be used for all commercial purposes in the State. The definitions of basic units of weight and measure, the tables of weight and measure, and weights and measures equivalents as published by the National Bureau of Standards are recognized and shall govern weighing and measuring equipment and transactions in the State. (1975, c. 544.)

§ 81A-4. Board of Agriculture authorized to establish standards of weights and measures for commodities having none.

The Board of Agriculture is authorized and directed and empowered to establish standards of weights and measures for any commodity if no standard has been established by Congress or by the laws of the State of North Carolina; provided, however, that when a standard is established by Congress, or by the laws of the State of North Carolina, such standard shall supersede the standard or standards established by the Board of Agriculture. (1945, c. 280, s. 1; 1949, c. 984; 1975, c. 544.)

§ 81A-5. Employment of Director of Weights and Measures and authorized agents.

The Commissioner may employ a Director of Weights and Measures and such other employees as may be necessary in carrying out the provisions of this Chapter and he may fix and regulate their duties. All authority vested in the Commissioner by virtue of the provisions of this Chapter may with like force and effect, be executed by such authorized agents of the Commissioner as defined in this Chapter. (1927, c. 261, ss. 3, 4; 1949, c. 984; 1975, c. 544.)

§ 81A-6. Salaries and expenses.

The Commissioner shall request sufficient funds for the proper administration of the duties prescribed in this Chapter. (1927, c. 261, s. 5; 1931, c. 150; 1949, c. 984; 1975, c. 544.)

§ 81A-7. Local inspection of weights and measures.

When any city or county appoints a local inspector of weights and measures, the appointment and regulation of his work must be pursuant to the rules and regulations of the Department of Agriculture and Consumer Services and his work shall be subject to the supervision of the Commissioner or his authorized agent. (1927, c. 261, s. 6; 1949, c. 984; 1975, c. 544; 1997-261, s. 109.)

§ 81A-8. Standards of weights and measures.

Weights and measures that are traceable to the U.S. Prototype Standards supplied by the United States, or approved as being satisfactory by the National Institute of Standards and Technology, shall be the State primary standards of weights and measures, and shall be maintained in such calibration as prescribed by the National Institute of Standards and Technology. All secondary standards may be prescribed by the Commissioner and shall be verified upon their initial receipt and as often thereafter as deemed necessary by the Commissioner or his authorized agent. Complete record of the standards belonging to the State shall be maintained by the Commissioner. (1927, c. 261, s. 9; 1943, c. 543; 1949, c. 984; 1975, c. 544; 1991, c. 636, s. 22.)

§ 81A-9. Definitions.

The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) Adjustment. — "Adjustment" is an act involving the tightening or loosening, or lengthening or shortening, or movement, of any part of a weighing or measuring device, or the coordination of mechanical action of parts or electronic components with or upon each other, so as to make the weighing or measuring device give correct indications of applied weight or measure values within legal tolerance, and the correctness of indications shall be determined by test provided for under definition of the term "service" as defined in this Chapter.

(2) Authorized Agent. — An "authorized agent" is any employee of the North Carolina Department of Agriculture and Consumer Services designated by the Commissioner to enforce any provisions of this

Chapter and who is designated by an official identification card issued by the Commissioner.

(3) Barrel. — The term "barrel," when used in connection with beer, ale, porter, and other similar fermented liquor is a unit of 31 liquid gallons; fractional parts of a barrel shall be understood to mean like fractional parts of 31 gallons.

(4) Bulk Sale. — The term "bulk sale" is the sale of commodities when the quantity is determined at the time of sale.

(5) Bushel. — The term "bushel" when used in connection with dry measure and standard containers is a unit of 2150.42 cubic inches, of which the dry quart and dry pint, respectively, are the one-thirty-second and one-sixty-fourth parts.

(6) Commissioner of Agriculture. — "Commissioner" is the Commissioner of Agriculture of the State of North Carolina.

(7) Condemned Equipment. — "Condemned equipment" is equipment that is permanently out of service.

(8) Cord. — "Cord" when used in connection with purchases of wood is a quantity of wood consisting of any number of sticks, bolts or pieces laid parallel and together so as to form a rick or stack occupying a space four feet wide, four feet high and eight feet long, or such other dimensions that will when multiplied together equal 128 cubic feet by volume, construed as being seventy percent (70%) solid and thirty percent (30%) air space or 90 solid cubic feet.

(9) Correct. — "Correct" is conformance to all applicable requirements of this Chapter.

(10) Flour. — "Flour" is any finely ground product of wheat, or other grain, corn, peas, beans, seed or other substance, with or without added ingredients, intended for use as food for man.

(11) Gallon. — "Gallon" when used in connection with liquid measure is a unit of 231 cubic inches, of which the liquid quart, liquid pint and gill are, respectively, the quarter, the one-eighth and the one-thirty-second parts.

(12) Installation. — "Installation" is an act involving the erection, or building, or assembling of parts, or the placing or setting up of a weighing or measuring device so as to give correct indications of applied weight or measure values within legal tolerance when used for the purpose intended, and the correctness of indications shall be determined by test provided for under definition of the term "service" as defined in this Chapter.

(13) Maintenance. — "Maintenance" is an act pursuant to the retention of a weighing or measuring device in such working condition as to give correct applied weight or measure value indications within legal tolerance when used as intended, which may involve either or both adjustment or repair before or after inaccuracy develops in fact, and the correctness of indications shall be determined by test provided for under the term "service" as defined in this Chapter.

(14) Meal. — "Meal" is any product of grain, corn, peas, beans, seed or other substance coarsely ground, with or without added ingredients, either bolted, or unbolted, including grits and hominy, intended for use as food for man.

(15) Package. — "Package" is any commodity put up or packaged in any manner in advance of sale in units suitable for either wholesale or retail sale.

(16) Person. — "Person" is both plural and singular, as the case demands, and includes individuals, partnerships, corporations, companies, firms, societies, and associations.

(17) Pound. — "Pound," used in connection with weight is the avoirdupois pound as declared by act of the United States Congress, except in those cases where it is common practice to use the "troy" pound or "apothecaries" pound, and the "ounce" is one-sixteenth part of an avoirdupois pound.

(18) Primary Standards. — "Primary standards" are the physical standards of the State which serve as the legal reference from which all other standards, weights and measures are derived.

(19) Rejected Equipment. — "Rejected equipment" is equipment that is incorrect, which is considered susceptible of proper repair.

(20) Repair. — "Repair" is an act involving the replacement or mending of a broken or nonadjustable part or parts and the restoration of a weighing or measuring device to such working condition as to give correct indications of applied weight or measure values within legal tolerance when used for the purpose intended, and the correctness of indications shall be determined by test provided for under the term "service" as defined in this Chapter.

(21) Sale or Sell. — "Sale" or "sell" is the ordinary meaning of said words and includes barter and exchange.

(22) Scale Technician. — A "scale technician" is any person who, for hire or award, renders service involving adjustment, installation, repair, or maintenance of a scale or weighing device, either used or intended to be used in determining weight value, or values, by either physical act, instruction, or supervision.

(23) Secondary Standards. — "Secondary standards" are the physical standards which are traceable to the primary standards through comparisons, using acceptable laboratory procedures, and used in the enforcement of weights and measures laws and regulations.

(24) Service. — "Service" is activity involving adjustment, installation, repair, or maintenance or a combination of two or more of these activities with respect to a weighing or measuring device.

(25) Ton. — "Ton" is a unit of 2,000 pounds, avoirdupois weight.

(26) Weight. — "Weight" when used in connection with any commodity is net weight; provided, however, where the label declares that the product is sold by drained weight, weight means net drained weight.

(27) Weight(s) and (or) Measure(s). — "Weight(s) and (or) measure(s)" are all weights and measures of every kind, instruments, and devices for weighing and measuring, and any appliance and accessories associated with any or all such instruments and devices. (1927, c. 261, ss. 20, 21; 1941, c. 237, s. 2; 1945, c. 280, s. 1; 1947, c. 380; 1975, c. 544; 1991, c. 636, s. 23; 1997-261, s. 7.)

§ 81A-10. Reimbursement of expenses.

When any manufacturer requests prototype approval of any commercial weighing or measuring device, said manufacturer shall reimburse the Department of Agriculture and Consumer Services for expenses incurred in the prototype examination of the device before final prototype approval is granted. Travel expenses shall be at the rates established by G.S. 138-6 or any law enacted in substitution therefor. (1981, c. 495, s. 1; 1997-261, s. 109.)

§ 81A-11: Repealed by Session Laws 2005-276, s. 42.1(h), effective September 1, 2005.

§ 81A-12. Fee schedule.

(a) The following fees apply to all weights that are tested and certified to meet tolerances less stringent than the American Society for Testing and

Materials (ASTM) Standard E617 Class 4. This includes the National Institutes of Standards and Technology (NIST) Class F tolerance. If the weight error exceeds three-fourths of the applicable tolerance, adjustment may be required at an additional fee equal to the normal fee. No extra fee shall be charged for the normal adjustment of a weight cart. Even if weights are rejected or condemned, fees shall be assessed for the test performed.

Customary	Fee/Unit	Metric	Fee/Unit
0-10 lb	$ 5.00	0-5 kg	$ 5.00
11-100 lb	$ 10.00	6-50 kg	$ 10.00
101-1000 lb	$ 20.00	51-500 kg	$ 20.00
1001-2500 lb	$ 30.00	501-1000 kg	$ 30.00
2501-6000 lb	$ 50.00	1001-2500 kg	$ 50.00
Weight Carts up to 6000 lb	$ 125.00 (includes adjustment)		

(b) The following fees apply to all weights that are tested and certified to meet ASTM Standard E617 Class 4 or the International Organization of Legal Metrology (IOLM) R111 Class F2 tolerances. If the weight error exceeds three-fourths of the applicable tolerance, adjustment may be required at an additional fee equal to the normal fee. Even if weights are rejected or condemned, fees shall be assessed for the test performed.

Customary	Fee/Unit	Metric	Fee/Unit
0-10 lb	$ 10.00	0-5 kg	$ 10.00
11-100 lb	$ 20.00	6-50 kg	$ 20.00
101-1000 lb	$ 40.00	51-500 kg	$ 40.00
1001-2500 lb	$ 60.00	501-1000 kg	$ 60.00
2501-6000 lb	$ 100.00	1001-2500 kg	$ 100.00

(c) The following fees apply to all weights that are calibrated. Calibration means determining actual mass and conventional mass values with an assigned uncertainty specific to the test. If necessary and considered feasible by the metrologist, adjustments to ASTM Class 1, 2, or 3 tolerances or IOLM Class E2, F1, or F2 tolerances may be made for an additional fee of two times the normal fee. Adjustments to weights of this group shall require a minimum of 10 days for weights to return to environmental equilibrium before a final calibration value can be assigned. Even if weights are rejected or condemned, fees shall be assessed for the test performed.

Customary	Fee/Unit	Metric	Fee/Unit
0-20 lb	$ 20.00	0-10 kg	$ 20.00
21-50 lb	$ 40.00	11-30 kg	$ 40.00
51-1000 lb	$ 70.00	31-500 kg	$ 70.00
1001-2500 lb	$ 130.00	501-1000 kg	$ 130.00
2501-6000 lb	$ 200.00	1001-2500 kg	$ 200.00

(d) The following fees apply to all weights that are calibrated using NIST weighing designs. These weights are tested in groups (typically either a 1, 2, 3, 5 series or a 1, 2, 2, 5 series) and are subject to the minimum per series fee shown. The best uncertainty possible from the North Carolina Standards Laboratory shall be assigned to the mass values of the weights. If necessary and considered feasible by the metrologist, adjustments to ASTM Class 0, 1, 2, or 3 tolerances or IOLM Class E1, E2, F1, or F2 tolerances may be made for an additional fee of two times the normal fee. Adjustments to weights of this group shall require a minimum of 10 days for weights to return to environmental equilibrium before a final calibration value can be assigned.

Weight Range	Fee/Unit or Series
0-1 kg	$30.00 each, with a minimum charge of $90.00 (3 weights) per series
2-30 kg	$50.00 each, with a minimum charge of $150.00 (3 weights) per series
0-2 lb	$30.00 each, with a minimum charge of $90.00 (3 weights) per series
3-50 lb	$50.00 each, with a minimum charge of $150.00 (3 weights) per series

(e) The following fees apply to volumetric standard calibration.

Provers or Test Measures Tested By the Volume Transfer Method

Customary	Fee/Test Point	Metric	Fee/Test Point
0-5 gal	$30.00	0-20 liters	$30.00
Over 5 gal	Add $0.40 per each additional gallon	Over 20 liters	Add $0.10 per each additional liter

Volumetric Flasks, Graduates, Provers, Slicker Plate Standards, or Test Measures
Tested By the Gravimetric Calibration Method

Customary	Fee/Test Point	Metric	Fee/Test Point
0-100 gal set-up fee	$50.00	0-500 liters set-up fee	$50.00
Calibration Fee	Add $2.00 per gallon	Calibration Fee	Add $0.50 per liter

Small Volume Provers (SVPs) Tested By the Gravimetric Calibration Method

Customary	Fee/Test Point	Metric	Fee/Test Point
0-100 gal set-up fee	$100.00	0-500 liters set-up fee	$100.00
Calibration Fee	Add $2.00 per gallon	Calibration Fee	Add $0.50 per liter

(f) The following fees apply to tape measures and rigid rules.

Set-Up Fee	$40.00 per instrument
Calibration Fee	$10.00 per calibration interval

(g) The following fees apply to liquid-in-glass and electronic thermometers.

Set-Up Fee	$40.00 per instrument
Calibration Fee	$20.00 per calibration point
Resistance Thermometry Coefficient Calculation and Report	$100.00 per instrument

(h) Any special tests or weight cleaning shall be billed at the rate of seventy dollars ($70.00) per hour prorated to the nearest tenth of an hour, with a minimum charge of thirty-five dollars ($35.00).

(i) A minimum charge of twenty-five dollars ($25.00) per invoice shall apply.

(j) If travel is required in connection with the performance of any of these services, the Department shall be reimbursed at the rates provided in G.S. 138-6.

(k) The Department may refuse to accept for testing any weight or measure the Department deems unsuited for its intended use.

(*l*) The fee for tests performed on weights or measures that will be used primarily outside of the State of North Carolina shall be twice the amounts set forth in this section. (2005-276, s. 42.1(i).)

§§ **81A-13 through 81A-14:** Reserved for future codification purposes.

Article 2.

Powers and Duties of Commissioner.

§ 81A-15. General duties.

The Commissioner shall:

(1) Have and keep general supervision of commercial weighing and measuring devices offered for sale, sold or used in the State.

(2) Upon written request from any person or educational institution in the State test or cause to be tested, or calibrate, weights, measures and weighing and measuring devices used as standards in the State.

(3) Enforce all the provisions of this Chapter.

(4) Conduct investigations to insure compliance with this Chapter.

(5) Inspect and test weights and measures kept, offered, or exposed for sale.

(6) Inspect, and test to ascertain if they are correct, weights and measures commercially used (i) in determining the weight, measure, or count of commodities or things sold, or offered or exposed for sale, on the basis of weight, measure or count or (ii) in computing the basic charge or payment for services rendered on the basis of weight, measure or count.

(7) Approve for use, and may mark, such weights and measures and weighing and measuring devices as he finds to be correct, and shall reject and mark as rejected such weights and measures as he finds incorrect. Weights and measures and weighing and measuring devices that have been rejected may be seized if not corrected within 10 days, or if used or disposed of in a manner not specifically authorized. Weights and measures found to be incorrect that are not capable of being made correct shall be condemned and may be seized by the Commissioner without any court order or other legal process.

(8) Weigh, measure, or inspect packaged commodities kept, offered, or exposed for sale, sold or in the process of delivery, to determine whether they contain the amounts represented and whether they are kept, offered, or exposed for sale in accordance with this Chapter or regulations promulgated pursuant thereto. In carrying out the provisions of this section, recognized sampling procedures shall be used.

(9) Allow reasonable variations from the stated quantity of contents, which shall include those caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice only after the commodity has entered intrastate commerce.

(10) Delegate to authorized agents any of these responsibilities for the proper administration of this Chapter. (1927, c. 261, s. 10; 1949, c. 984; 1975, c. 544; 1991, c. 636, s. 24.)

§ 81A-16. Police powers.

When necessary for the enforcement of this Chapter or regulations promulgated pursuant thereto the Commissioner or his authorized agent is:

(1) Authorized to enter any commercial premises during normal business hours, except that in the event such premises are not open to the public, he shall first present his credentials and obtain consent before making entry thereto, unless a search warrant has previously been obtained.

(2) Empowered to issue stop-use, hold, and removal orders with respect to any weights and measures commercially used, and stop-sale, hold, and removal orders with respect to any packaged commodities or bulk commodities kept, offered, or exposed for sale.

(3) Empowered to seize, for use as evidence, without warrant or other legal writ, any incorrect or unapproved weight, measure, package, or commodity found to be used, retained, offered, or exposed for sale or sold in violation of the provisions of this Chapter or regulations promulgated pursuant thereto.

(4) Empowered to stop any commercial vehicle wherever found in the State and, after presentment of his credentials, inspect the contents, require that the person in charge of that vehicle produce any documents in his possession concerning the contents, and require him to proceed with the vehicle to some specified place for inspection.

(5) Authorized to arrest, without warrant, any violator of this Chapter. Such authorized agent shall proceed forthwith with such person before a magistrate or other person authorized to issue arrest warrants. (1927, c. 261, ss. 11-13; 1975, c. 544.)

§§ 81A-17 through 81A-21: Reserved for future codification purposes.

ARTICLE 3.

Violations.

§ 81A-22. Misrepresentation of quantity.

No person shall sell, offer or expose for sale less than the quantity he represents. No buyer shall take more than the quantity he represents when he furnishes the weight or measure by means of which the quantity of any commodity, thing or service is determined. (1927, c. 261, s. 19; 1945, c. 280, s. 1; 1949, c. 984; 1975, c. 544.)

§ 81A-23. Misrepresentation of pricing.

No person shall misrepresent the price of any commodity or service sold, offered, exposed, or advertised for sale by weight, measure, or count, nor represent the price in any manner calculated or tending to mislead or in any way deceive a person. (1975, c. 544.)

§ 81A-24. Commodities to be sold by weight, measure or numerical count.

It shall be unlawful to sell, except for immediate consumption by the purchaser, on the premises of the seller, liquid commodities in any other manner than by weight or liquid measure, or commodities not liquid in any other manner than by measure of time, by length, by volume, by weight or by numerical count. When a commodity is sold by numerical count in excess of one unit, the units which constitute said numerical count shall be uniform in size and/or weight, and be so exposed as to be readily observed by the purchaser. (1945, c. 280, s. 1; 1949, c. 973; 1975, c. 544.)

§ 81A-25. Unlawful for package to mislead purchaser.

It shall be unlawful to keep for the purpose of sale, offer or expose for sale, or sell, any commodity in package form when said package is so made, or formed, or filled, or wrapped, or exposed, or marked, or labeled as to mislead or deceive the purchaser as to the quantity of its contents. (1945, c. 280, s. 1; 1975, c. 544.)

§ 81A-26. Sale from bulk.

(a) Whenever the quantity is determined by the seller, bulk sales in excess of twenty dollars ($20.00) and all bulk deliveries of heating fuel shall be accompanied by a delivery ticket containing the following information:

(1) The name and address of the vendor and the name of the purchaser,
(2) The date delivered,
(3) The quantity delivered and the quantity upon which the price is based, if this differs from the delivered quantity,
(4) The identity of the commodity in the most descriptive terms commercially practicable, including any quality representation made in connection with the sale,
(5) The count of individually wrapped packages, if more than one, and
(6) For heating fuels which are liquids and gases, the price per gallon and any other charges associated with the delivery. This subdivision applies only to residential, retail deliveries.

(b) Any invoice corresponding to the delivery ticket required under the preceding subsection (a) shall contain the information set forth in the preceding subdivisions (a)(1) through (6), and shall also state the amount of sales tax, if any, and the grand total. This subsection does not apply to any subsequent billing when the seller has previously complied with the requirements of subsections (a) and (b) of this section.

(c) Whenever a seller quotes a price or other terms and conditions to a potential purchaser under this section, if those terms and conditions include a low, introductory price, other reduced charges, or other special conditions not representative of the prices or terms and conditions that apply to existing customers of the same type or class, the seller shall clearly and conspicuously disclose: (i) those facts, (ii) the price and terms and conditions that would on that date apply to existing customers of the same type or class as the potential purchaser, and (iii) the amount of time that the introductory or unrepresentative price or terms and conditions will remain in effect. (1975, c. 544; 1991, c. 642, s. 1; 1997-456, s. 11.)

§ 81A-27. Information required on packages.

Except as otherwise provided in this Chapter or by regulations promulgated pursuant thereto, any package kept for the purpose of sale or offered or exposed for sale shall bear on the outside of the package a definite, plain, and conspicuous declaration of:

(1) The identity of the commodity in the package, unless the same can easily be identified through the wrapper or container,
(2) The quantity of contents in terms of weight, measure, or count, and
(3) The name and place of business of the manufacturer, packer, or distributor, in the case of any package kept, offered, or exposed for sale, or sold in any place other than on the premises where packed. (1927, c. 261, s. 16; 1945, c. 280, s. 1; 1975, c. 544.)

§ 81A-28. Declarations of unit price on random packages.

In addition to the declarations required by G.S. 81A-27, any package being one of a lot containing random weights of the same commodity and bearing the total selling price of the package shall bear on the outside of the package a plain and conspicuous declaration of the price per single unit of weight at the time it is offered for retail sale. (1975, c. 544.)

§ 81A-29. Offenses and penalties.

Any person who violates any provision of this section or any provision of this Chapter or regulations promulgated pursuant thereto for which a specific penalty has not been prescribed shall be guilty of a Class 2 misdemeanor upon a first conviction. Upon a subsequent conviction thereof, said person shall be guilty of a Class 1 misdemeanor. No person shall:

(1) Use or have in possession for use in commerce any incorrect weight or measure.

(2) Remove any tag, seal, or mark from any weight or measure without specific written authorization from the Commissioner or his authorized agent.

(3) Hinder or obstruct any weights-and-measures official in the performance of his duties.

(4) Impersonate in any way any employee of the North Carolina Department of Agriculture and Consumer Services designated by the Commissioner to enforce any part of this Chapter.

(5) Use in retail trade, except in the preparation of packages put up in advance of sale, a weighing or measuring device which is not so positioned so that its indications may be accurately read and the weighing or measuring operation observed from some position which may be reasonably assumed by a customer.

(6) Manufacture, use or possess a counterfeit seal, tag, mark, certificate, label or decal representing, imitating or copying the same issued by the Commissioner under this Chapter. (1927, c. 261, ss. 14, 15, 19; 1945, c. 280, s. 1; 1949, c. 984; 1975, c. 544; 1981, c. 607, s. 1; 1993, c. 539, s. 593; 1994, Ex. Sess., c. 24, s. 14(c); 1997-261, s. 8.)

§ 81A-30. Injunction.

The Commissioner or his authorized agent is authorized to apply to any court of competent jurisdiction for a temporary restraining order or a preliminary or permanent injunction restraining any person from violating any provision of this Chapter. (1975, c. 544.)

§ 81A-30.1. Civil penalties.

A civil penalty of not more than five thousand dollars ($5,000) for each violation may be assessed by the Commissioner against any person who willfully violates this Chapter. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation. No civil penalty shall be assessed under this section unless the person has been given an opportunity for a hearing pursuant to the Administrative Procedure Act. If not paid within 30 days after the effective date of a final decision by the Commissioner, the penalty may be collected by any lawful manner for the collection of a debt.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1991, c. 642, s. 2; 1998-215, s. 4(a).)

§ 81A-31. Presumptive evidence.

Whenever there shall exist a weight or measure or weighing or measuring device in or about any place in which or from which buying or selling is commonly carried on, there shall be a rebuttable presumption that such weight or measure or weighing or measuring device is regularly used for the business purposes of that place. (1975, c. 544.)

§§ 81A-32 through 81A-36: Reserved for future codification purposes.

ARTICLE 4.

Uniform Weights and Measures.

§§ 81A-37 through 81A-40: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-41: Repealed by Session Laws 1999-44, s. 1.

§ 81A-42. Standard weights and measures.

Whenever any commodity named in this section shall be quoted or sold by the bushel, the bushel shall be the number of pounds stated in this section and whenever quoted or sold in subdivisions of the bushel, the number of pounds shall be the fractional part of the number of pounds as set forth herein for the bushel, and when sold by the barrel shall consist of the number of pounds constituting 3.281 bushels.

Commodity	*Lbs. per bu.*	*Commodity*	*Lbs. per bu.*
Alfalfa	60	Cherries, without stems	64
Apples, dried	24	Clover seed, red and white	60
Apple seed	40	Clover, Burr	8
Barley	48	Clover, German	60
Beans, castor	46	Clover, Japan, Lespedeza	25
Beans, dry lima	60	Coal, stone	80
Beans, green in-pod lima	30	Coke	40
Beans, soy	60	Corn, shelled	56
Beef, net (per bbl.)	200	Corn, Kaffir	50
Beets	50	Corn, pop	70
Blackberries	48	Cotton seed	30
Blackberries, dried	28	Cotton seed, Sea Island	44
Bran	20	Cucumbers	48
Broomcorn	44	Fish	100
Buckwheat	50	Flax seed	56
Cabbage	50	Grapes, with stems	48
Canary seed	60	Grapes, without stems	60
Carrots	50	Gooseberries	48
Cement	80	Grass seed, Bermuda	14
Charcoal	22	Grass seed, blue	14
Cherries, with stems	56	Grass seed, Hungarian	48

Commodity	Lbs. per bu.
Grass seed, Johnson	25
Grass seed, Italian rye	20
Grass seed, orchard	14
Grass seed, tall meadow and fescue	24
Grass seed, all meadow and fescue except tall	14
Grass seed, perennial rye	14
Grass seed, timothy	45
Grass [seed], redtop	14
Grass seed, velvet	7
Hair, plaster	8
Hemp seed	44
Hominy	62
Horseradish	50
Land plaster	100
Lime, unslaked	80
Lime, slaked	40
Meal, corn, whether bolted or unbolted	48
Melon, cantaloupe	50
Millet	50
Mustard	58
Nuts, chestnuts	50
Nuts, hickory, without hulls	50
Nuts, walnut, without hulls	50
Oats, seed	32
Onions, button sets	32
Onions, top buttons	28
Onions, matured	57
Osage orange seed	33
Parsnips	50

Commodity	Lbs. per bu.
Peaches, matured	50
Peaches, dried	25
Peach seed	50
Peanuts, Spanish	30
Peanuts	22
Pears, matured	56
Pears, dried	26
Peas, dried field	60
Peas, green in hull field	30
Pieplant	50
Plums	64
Pork net (per bbl.)	200
Potatoes, Irish	56
Potatoes, sweet green	56
Potatoes, sweet, dry weight	47
Quinces, matured	48
Raspberries	48
Rice, rough	44
Rye seed	56
Sage	4
Salads, mustard, spinach, turnips, and kale	10
Salt	50
Sorghum molasses (per gal.)	12
Sorghum seed	50
Strawberries	48
Sunflower seed	24
Teosinte	59
Tomatoes	56
Turnips	50
Wheat	60

It shall be unlawful to purchase or sell, or barter or exchange, any article named in this section on any other basis than as stated herein; provided, however, that any such articles may be sold by weight. (Code, ss. 3849, 3850; 1885, c. 26; 1905, c. 126; Rev., s. 3066; 1909, c. 555, s. 1; c. 835; 1915, c. 230, s. 1; 1917, c. 34; Ex. Sess. 1921, c. 87; 1931, c. 76; 1933, c. 523, s. 3; 1937, c. 354; 1949, c. 984; 1975, c. 544.)

§ 81A-43: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-44: Repealed by Session Laws 1999-44, s. 2.

§§ 81A-45 through 81A-49: Reserved for future codification purposes.

ARTICLE 5.

Public Weighmasters.

§ 81A-50: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-50.1. Purpose.

This Article licenses and regulates public weighmasters in order to ensure accurate quantities of products upon sale to purchasers. (1981, c. 607, s. 3.)

§ 81A-51. Definitions.

For purposes of this Article, the following words, terms and phrases are defined as follows:

(1) "Board" means North Carolina Board of Agriculture.
(2) "Commissioner" means the North Carolina Commissioner of Agriculture or his designated agent.
(3) "Department" means the North Carolina Department of Agriculture and Consumer Services.
(4) "Product" means any product, commodity or article.
(5) "Public weighmaster" means any person who shall weigh, measure or count, or who shall ascertain from a weighing, measuring or recording device for any other person and declare the weight to be the accurate weight of the product upon which the purchase, sale or exchange is based, and receive compensation for the act.
(6) "Weigh" means weigh, measure, count, read or record.
(7) "Weight" means weight, measure, count, reading or recording. (1939, c. 285, s. 1; 1945, c. 1067; 1971, c. 1085, s. 1; 1975, c. 544; 1981, c. 607, s. 4; 1997-261, s. 9.)

§ 81A-52. License.

All public weighmasters shall be licensed. Any person not less than 18 years of age who wishes to be a public weighmaster shall apply to the Department on a form provided by the Department. A person operating as a public weighmaster outside of this State shall include with the person's application for licensure in this State a copy of the most recent weighing device inspection report performed by the person's local or state weights and measures officials within the 12-month period immediately preceding the date of application. The Board may adopt rules for determining the qualifications of the applicant for a license. Public weighmasters shall be licensed for a period of one year beginning the first day of July and ending on the thirtieth day of June, and a fee of nineteen dollars ($19.00) shall be paid for each person licensed at the time of the filing of the application. (1939, c. 285, s. 2; 1949, c. 983, s. 1; 1975, c. 544; 1981, c. 607, s. 4; 1989, c. 544, s. 20; 2005-276, s. 42.1(f); 2009-87, s. 1.)

Effect of Amendments. — Session Laws 2009-87, s. 1, effective October 1, 2009, and applicable to applicants for licensure on or after that date, added the third sentence.

§ 81A-53. Certificates of weight.

All public weighmasters shall issue certificates of weight, measure, count, reading or recording on forms approved by the Commissioner and shall enforce the provisions of this Chapter and all rules and regulations promulgated thereunder without compensation from the State. Each certificate issued shall indicate the date on which a product is weighed, counted, read or recorded. A certificate issued by a public weighmaster shall be considered the accurate weight of a product at the time the product is put into the natural channels of trade, with the qualification that reasonable variations or tolerances shall be permitted as established by rules and regulations enacted pursuant to this Chapter. If any person questions the accuracy of the weight of any product for which a certificate has been issued, a complaint shall be made to the public weighmaster who issued the certificate or to the Commissioner before the product is moved from the city, town or community where the certificate was issued. The product shall be reweighed by the public weighmaster issuing the certificate or by the Commissioner, if the product is kept in accordance with G.S. 81A-58. If, upon reweighing, a difference in excess of the tolerance allowed by the Chapter is found in the original weight, the cost of reweighing shall be borne by the public weighmaster responsible for issuing the faulty certificate. Otherwise, the cost shall be borne by the complainant. (1939, c. 285, s. 3; 1975, c. 544; 1981, c. 607, s. 4.)

§ 81A-54. Official seal of the public weighmaster.

It shall be the duty of every public weighmaster to obtain from the Department an official seal for the sum of six dollars ($6.00), inscribed with the following words: "North Carolina Public Weighmaster" and any other design or legend the Commissioner considers necessary. The seal shall be stamped or impressed on every certificate issued pursuant to this Article. The weighers of tobacco in leaf tobacco warehouses may use, instead of the seal, their signatures in ink or other indelible substance posted in a conspicuous and accessible place in the warehouse. All seals remain the property of the State and shall be returned to the Commissioner upon termination of duties as a public weighmaster. (1939, c. 285, s. 4; 1941, c. 317, s. 1; 1975, c. 544; 1981, c. 607, s. 4; 1989, c. 544, s. 21.)

§ 81A-55. Violations by public weighmasters; by others; penalties.

(a) Any public weighmaster who refuses to issue a certificate as prescribed by this Article, or who issues a certificate giving a false weight, or who misrepresents the weight to any person, or who otherwise violates any provisions of this Article or the rules and regulations pursuant to this Article, may have his license revoked, suspended or terminated by the Commissioner.

(b) The following acts by other persons are also violations of this Article:
(1) Requesting a public weighmaster to weigh a product inaccurately;
(2) Requesting an inaccurate certificate prescribed by this Article;
(3) Impersonating a public weighmaster;
(4) Erasing, changing or altering any certificate issued by a public weighmaster;
(5) Increasing or decreasing the weight of a product for the purpose of deception; or
(6) Violating any other provision of this Article. (1939, c. 285, s. 5; 1975, c. 544; 1981, c. 607, s. 4.)

§§ 81A-56, 81A-57: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-58. Duty of custodian of product.

If any product is to be offered for sale, or is sold, and is weighed or measured or counted by any public weighmaster and a certificate is issued prior to sale or acceptance of the product by the purchaser, or if any product is offered for sale, sold or delivered pending the weighing, measuring or counting of the product by any public weighmaster and the issuance of a certificate, the person who is in custody of the product shall keep, protect and prevent any increase or decrease in weight in the time intervening between the weighing and the issuance of the certificate and the sale, and the time intervening between the sale and the presentation of the product to the weighmaster for weighing, measuring or counting and the issuance of a certificate. Any loss sustained in the weight of the product while in custody shall be borne by the custodian. (1939, c. 285, s. 8; 1975, c. 544; 1981, c. 607, s. 5.)

§ 81A-59. Weighing tobacco.

All leaf tobacco offered for sale in a leaf tobacco warehouse in North Carolina shall remain in the custody of the warehouse operator from and after the time it is weighed by the public weighmaster until it is sold or the bid is rejected by the owner. (1945, c. 1067; 1975, c. 544; 1981, c. 607, s. 5.)

§ 81A-60: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-61. Approval of devices used.

When making a weight determination, a public weighmaster shall use a weighing device that is of a type suitable for the weighing of the product to be weighed and that has been tested and approved for use by the Commissioner or by the public weighmaster's local or state weights and measures officials within the 12-month period immediately preceding the date of the weighing. (1939, c. 285, s. 10; 1975, c. 544; 1981, c. 607, s. 6; 2009-87, s. 2.)

Effect of Amendments. — Session Laws 2009-87, s. 2, effective October 1, 2009, and applicable to applicants for licensure on or after that date, substituted "or by the public weighmaster's local or state weights and measures officials within the 12-month period" for "within a period of 12 months" near the end.

§§ 81A-62 through 81A-64: Repealed by Session Laws 1981, c. 607, s. 2.

§§ 81A-65 through 81A-69: Reserved for future codification purposes.

Article 6.

Scale Technician.

§ 81A-70. Purpose of Article.

The purpose of this Article shall be to protect the owners and users of scales and weighing devices in their needs for scale repair and service, and to provide for scale technician registration. (1941, c. 237, s. 1; 1947, c. 380; 1975, c. 544; 1983, c. 111, s. 1.)

Legal Periodicals. — For comment on the 1941 act, see 19 N.C.L. Rev. 447 (1941).

§ 81A-71. Prerequisites for scale technician.

It shall be unlawful for any scale technician to render service as a scale technician until after he or she has compiled with the following requirements:

(1) Obtained from the Department of Agriculture and Consumer Services a copy of this Article, a copy of regulations pertinent to said Article, and an application form for registration.

(2) to (4) Repealed by Session Laws 1983, c. 111, s. 2, effective July 1, 1983.
(5) Obtained a registration card or certificate from the Commissioner or his authorized agent and a model form of service certificate.
(6) Obtained from the Department an annual certification of the standards of weight which will be used by the scale technician.

The provisions of this Article shall not apply to a full-time employee who renders service only on a scale or weighing device, or on scales or weighing devices, owned solely by his or her employer unless additional pay or compensation is received for such service. (1941, c. 237, s. 3; 1947, c. 380; 1975, c. 544; 1983, c. 111, s. 2; 1997-261, s. 10.)

§ 81A-72. Registration; certificate of registration; annual renewal.

The Commissioner or his authorized agent shall register any person who has complied with the requirements of this Article by making a record of receipt of application, and the issuing of a certificate or card of registration to applicant, whereupon the applicant becomes a registered scale technician and shall be known thereafter as such. Such registration shall be in effect from date of registration until July 1 next and shall be renewed on the first day of July of each year thereafter. A fee of twenty dollars ($20.00) shall accompany each application for registration and each annual registration renewal. (1941, c. 237, ss. 4, 5; 1943, c. 543; 1947, c. 380; 1975, c. 544; 1983, c. 111, s. 3; 2005-276, s. 42.1(g).)

§ 81A-73. Service certificate.

Whenever any service is rendered on any scale or weighing device used or intended to be used in this State by a scale technician, a certificate shall be issued by such scale technician who rendered said service, which shall be known as a "service certificate." The size and form of said service certificate shall be determined by the Commissioner or his authorized agent. Inclusive of other pertinent information or statements, the said certificate shall bear a statement expressed in ink or other indelible substance naming the kind of service rendered, whether adjustment, installation, repair, or maintenance, and stating that a service test as defined under the term "service" has been made, and that the service rendered is guaranteed to be as represented. The service certificate shall be made out in triplicate, with original going to the owner of such scale of weighing device or his agent, and a duplicate shall be sent to the Commissioner or his authorized agent and the triplicate copy shall be retained by the scale technician issuing such certificate. (1947, c. 380; 1975, c. 544; 1983, c. 111, s. 4.)

§ 81A-74: Repealed by Session Laws 1983, c. 111, s. 5.

§ 81A-75. Scale removal.

When a scale or weighing device is removed from the premises where located by a scale technician, the scale technician or his servant or agent shall issue a receipt for said scale or weighing device, on which shall be written in ink or other indelible substance the name and address of the owner, the name and address of receiving agent, date of receipt, anticipated date of return, name or make of scale, and such other information pertinent to its identification. The form of receipt shall be approved by the Commissioner or his authorized agent. (1947, c. 380; 1975, c. 544.)

§ 81A-76. Control of condemned or rejected scale.

It shall be unlawful for any owner of a scale or weighing device which has been condemned or rejected by the Commissioner or his authorized agent to either use or dispose of same in any manner other than at the direction of the Commissioner or his authorized agent; provided, however, said rejected scale or weighing device may be removed from the premises temporarily for repairs or service only. (1947, c. 380; 1975, c. 544.)

§ 81A-77. Secondhand scale.

It shall be unlawful for any person to sell, or offer for sale, or put into use, a secondhand or rebuilt or reconditioned scale or weighing device unless said scale shall have been tested and approved by the Commissioner or his authorized agent, or shall be accompanied by a service certificate as provided for in this Article. Said service certificate shall be retained by the purchaser or user of said scale until an inspector of weights and measures has tested and approved such secondhand scale. The said certificate shall serve as proof of the accuracy of scale at the time scale was purchased or put into service. A secondhand or rebuilt or reconditioned scale or weighing device as referred to in this section shall be considered as being a scale or weighing device in the channels of trade which does not belong to the previous user. (1947, c. 380; 1975, c. 544.)

§ 81A-78. Scale location.

It shall be unlawful for any scale or weighing device to be installed, set up, put into service, or used on a foundation or support that aids in giving false indication of weight values applied to platter, platform, or other load receiving element. (1947, c. 380; 1975, c. 544.)

§ 81A-79. Exemption.

The provisions of this Article shall not prohibit the user of a scale or weighing device from employing some person other than a scale technician to render service as defined by this Article upon his or her scale or weighing device, nor apply to the person so employed, who does not solicit such employment, provided that said user shall not be relieved of his or her responsibility or liability concerning the accuracy of the scale or weighing device after service has been rendered. (1947, c. 380; 1975, c. 544.)

§ 81A-80. Suspension or revocation of registration; penalty.

(a) The Commissioner may suspend or revoke the registration of any scale technician who violates any provisions of this Article or regulations adopted thereunder or who shall fail to issue a service certificate or who shall issue a service certificate bearing false statements regarding service rendered.

(b) Any person who violates any provision of this Article shall be guilty of a Class 2 misdemeanor. (1941, c. 237, s. 7; 1947, c. 380; 1949, c. 983, s. 2; 1975, c. 544; 1983, c. 111, s. 6; 1993, c. 539, s. 594; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 81A-81 through 81A-85: Reserved for future codification purposes.

Article 7.

General Provisions.

§ 81A-86. Regulations to be unaffected by repeal of prior enabling statute.

The adoption of this Chapter or any of its provisions shall not affect any regulations promulgated pursuant to the authority of any earlier enabling statute unless inconsistent with this Chapter or modified or revoked. (1975, c. 544.)

§ 81A-87. Severability provision.

If any provision of this Chapter is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the Chapter and the applicability thereof to other persons and circumstances shall not be affected thereby. (1975, c. 544.)

§ 81A-88. Repeal of conflicting laws.

All laws and parts of laws contrary to or inconsistent with the provisions of this Chapter are repealed except as to offenses committed, liabilities incurred, and claims made thereunder prior to July 1, 1976. (1975, c. 544.)

Chapter 82.

Wrecks.

§§ 82-1 through 82-18: Repealed by Session Laws 1971, c. 882, s. 5.

Cross References. — As to salvage of abandoned shipwrecks and other underwater archaeological sites, see G.S. 121-22 through 121-28.

Chapter 83.

Architects.

§§ 83-1 through 83-15: Recodified as G.S. 83A-1 through 83A-17.

Editor's Note. — This Chapter was rewritten by Session Laws 1979, c. 871, s. 1, and has been recodified as Chapter 83A.

Chapter 83A.

Architects.

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83A-1. Definitions.
83A-2. North Carolina Board of Architecture; creation; appointment, terms and oath of members; vacancies; officers; bond of treasurer; notice of meetings; quorum.
83A-3. Expenses of Board members; Board finances.
83A-4. Fees.
83A-5. Board records; rosters; seal.
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83A-7. Qualifications and examination requirements.

Sec.
83A-8. Qualification for corporate practice.
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83A-13. Exemptions.
83A-13.1. Architect who volunteers during an emergency or disaster; qualified immunity.
83A-14. Disciplinary action and procedure.
83A-15. Denial, suspension or revocation of license.
83A-16. Violations of Chapter; penalties.
83A-17. Power of Board to seek injunction.

§ 83A-1. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Architect" means a person who is duly licensed to practice architecture.

(2) "Board" means the North Carolina Board of Architecture.

(3) "Corporate certificate" means a certificate of corporate registration issued by the Board recognizing the corporation named in the certificate as meeting the requirements for the corporate practice of architecture.

(4) "Corporate practice of architecture" means "practice" as defined in G.S. 83A-1(7) by a corporation which is organized or domesticated in this State, and which holds a current "corporate certificate" from this Board.

(5) "Good moral character" means such character as tends to assure the faithful discharge of the fiduciary duties of an architect to his client. Evidence of lack of such character shall include the willful commission of an offense justifying discipline under this Chapter, the practice of architecture in violation of this Chapter, or of the laws of another jurisdiction, or the conviction of a felony.

(6) "License" means a certificate of registration issued by the Board recognizing the individual named in the certificate as meeting the requirements for registration under this Chapter.

(7) "Practice of architecture" means performing or offering to perform or holding oneself out as legally qualified to perform professional services in connection with the design, construction, enlargement or alteration of buildings, including consultations, investigations, evaluations, preliminary studies, the preparation of plans, specifications and contract documents, administration of construction contracts and related services or combination of services in connection with the design and construction of buildings, regardless of whether these services are performed in person or as the directing head of an office or organization. (1915, c. 270, s. 9; C.S., s. 4985; 1941, c. 369, s. 3; 1951, c. 1130, s. 1; 1957, c. 794, ss. 1, 2; 1979, c. 871, s. 1.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

Editor's Note. — This Chapter is former Chapter 83, as rewritten by Session Laws 1979, c. 871, s. 1, and recodified. Where appropriate, the historical citations to the sections in the former Chapter have been added to corresponding sections in the Chapter as rewritten and recodified.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

CASE NOTES

Applied in RCDI Constr. v. Spaceplan/Architecture, Planning & Interiors, P.A., 148 F. Supp. 2d 607 (W.D.N.C. 2001).

OPINIONS OF ATTORNEY GENERAL

Preparation of Construction Drawings. — A town may not, under its land use ordinance, require that all construction drawings submitted for approval be prepared and sealed by a licensed professional engineer, to the exclusion of licensed professional architects. Such a restriction would be in excess of the powers granted the town. See opinion of Attorney General to Mr. Michael B. Brough, Carrboro Town Attorney, 59 N.C.A.G. 58 (1989).

§ 83A-2. North Carolina Board of Architecture; creation; appointment, terms and oath of members; vacancies; officers; bond of treasurer; notice of meetings; quorum.

(a) The North Carolina Board of Architecture shall have the power and responsibility to administer the provisions of this Chapter in compliance with the Administrative Procedure Act.

(b) The Board shall consist of seven members appointed by the Governor. Five of the members of the Board shall be licensed architects appointed for five year terms; the terms shall be staggered so that the term of one architect member expires each year. No architect member shall be eligible to serve more than two consecutive terms; if a vacancy occurs during a term, the Governor shall appoint a person to fill the vacancy for the remainder of the unexpired term. Two of the members of the Board shall be persons who are not licensed architects and who represent the interest of the public at large; the Governor shall appoint these members not later than July 1, 1979. The public members shall have full voting powers and shall serve at the pleasure of the Governor. Each Board member shall file with the Secretary of State an oath faithfully to perform duties as a member of the Board, and to uphold the Constitution of North Carolina and the Constitution of the United States.

(c) Officers of the Board shall include a president, vice-president, secretary and treasurer elected at the annual meeting for terms of one year. The treasurer shall give bond in such sum as the Board shall determine, with such security as shall be approved by the Board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. Notice of the annual meeting, and the time and place of the annual meeting shall be given each member by letter at least 10 days prior to such meeting and public notice of annual meetings shall be published at least once each week for two weeks preceding such meetings in one or more newspapers of general circulation in this State. A majority of the members of the Board shall constitute a quorum. (1915, c. 270, ss. 1, 2; C.S., ss. 4986-4988, 4990; 1957, c. 794, ss. 3, 4, 6; 1979, c. 871, s. 1.)

§ 83A-3. Expenses of Board members; Board finances.

(a) Each member of the Board shall be entitled to receive travel and expense reimbursement as authorized by G.S. 93B-5 for similar boards.

(b) All funds received by the Board under the provisions of this Chapter shall be deposited by the treasurer or such other officer or staff employee as the Board may designate in such depository and under such security as the Board may direct. All expenses incurred by the Board shall be paid out of funds derived from examination, licensing, renewal or other fees herein provided and shall be paid by the treasurer upon vouchers drawn by the secretary and approved by the president. The Board shall have the power to determine necessary expenses, and to fix the compensation for board employees and for professional services. The State of North Carolina shall not be liable for the compensation of any Board members or officers. Payment of expenses and salaries pursuant to administration of this Chapter may not exceed available funds of the Board. All Board receipts and disbursements shall be subject to audit and accounting procedures established by the State for similar boards. (1915, c. 270, s. 6; C.S., s. 4994; 1957, c. 794, s. 9; 1979, c. 871, s. 1.)

§ 83A-4. Fees.

All fees and charges by the Board shall be established by Board rule subject to the provisions of the Administrative Procedure Act.

Fees set by the Board shall not exceed the following amounts:

Initial Application	
Individual	
Residents	$50.00
Nonresidents	$50.00
Corporate	$75.00
Reexamination	$25.00
Annual License Renewal	
Individual	$75.00
Corporate	$100.00
Late Renewal Penalty	
Up-to-30 days	$50.00
30 days to 1 year	$50.00
Reciprocal Registration	$150.00

The above fees are provided in addition to any other fees prescribed by law. Reasonable fees for examination materials, certificates, rosters and other published materials shall be established by the Board, but the Board shall not collect any fees not authorized by this Chapter. (1915, c. 270, ss. 3, 6; 1919, c. 336, ss. 1, 2; C.S., ss. 4992, 4994, 4995; 1951, c. 1130, s. 2; 1957, c. 794, ss. 7, 9, 10; 1971, c. 1231, s. 1; 1979, c. 871, s. 1; 1985, c. 364.)

§ 83A-5. Board records; rosters; seal.

(a) The Board shall maintain records of board meetings, of applications for individual or corporate registration and the action taken thereon, of the results of examinations, of all disciplinary proceedings, and of such other information as deemed necessary by the Board or required by the Administrative Procedure Act or other provisions of the General Statutes.

(b) A complete roster showing the name and last known address of all resident and nonresident architects and architectural firms holding current licenses from the Board shall be published by the Board at least once each year, and shall include each registrant's authorization or registration number. Copies of the roster shall be filed with the Secretary of State and the Attorney

General, and other applicable State or local agencies, and upon request, may be distributed or sold to the public.

(c) The Board shall adopt a seal containing the name of the Board for use on its official records and reports. (1915, c. 270, ss. 1, 5; C.S., ss. 4989, 4991; 1957, c. 794, s. 5; 1979, c. 871, s. 1.)

§ 83A-6. Board rules; bylaws; standards of professional conduct.

(a) The Board shall have the power to adopt bylaws, rules, and standards of professional conduct to carry out the purposes of this Chapter, including, but not limited to:

(1) The adoption of bylaws governing its meetings and proceedings;

(2) The establishment of qualification requirements for admission to examinations, and for individual or corporate licensure as provided in G.S. 83A-7 and 83A-8;

(3) The establishment of the types and contents of examinations, their conduct, and the minimum scores or other criteria for passing such examinations;

(4) The adoption of mandatory standards of professional conduct concerning misrepresentations, conflicts of interest, incompetence, disability, violations of law, dishonest conduct, or other unprofessional conduct for those persons or corporations regulated by this Chapter, which standards shall be enforceable under the disciplinary procedures of the Board;

(5) The establishment or approval of requirements for renewal of licenses designed to promote the continued professional development and competence of licensees. Such requirements shall be designed solely to improve the professional knowledge and skills of a licensee directly related to the current and emerging bodies of knowledge and skills of the licensee's profession.

When necessary to protect the public health, safety, or welfare, the Board shall require such evidence as it deems necessary to establish the continuing competency of architects as a condition of renewal of licenses.

(b) The Board shall not adopt any rule or regulation which prohibits advertising.

(c) The adoption, amendment or revocation of rules, regulations, and standards of professional conduct, and the publication and distribution of the same shall be subject to the provisions of the Administrative Procedure Act. (1979, c. 871, s. 1.)

§ 83A-7. Qualifications and examination requirements.

(a) Licensing by Examination. — Any individual who is at least 18 years of age and of good moral character may make written application for examination by completion of a form prescribed by the Board accompanied by the required application fee. Subject to qualification requirements of this section, the applicant shall be entitled to an examination to determine his qualifications for licensure.

(1) The qualification requirements for registration as a duly licensed architect shall be:

   a. Professional education and at least three years practical training and experience as specified by rules of the Board.

   b. The successful completion of a licensure examination in architecture as specified by the rules of the Board.

(2) The Board shall adopt rules to set requirements for professional education, practical training and experience, and examination which

must be met by applicants for licensure and which may be based on the published guidelines of nationally recognized councils or agencies for the accreditation, examination, and licensing for the architectural profession.

(b) Licensing by Reciprocity. — Any individual holding a current license for the practice of architecture from another state or territory, and holding a certificate of qualification issued by the National Council of Architectural Registration Boards, may upon application and within the discretion of the Board be licensed without written examination. The Board may waive the requirement for National Council registration if the qualifications, examination and licensing requirements of the state in which the applicant is licensed are substantially equivalent to those of this State and the applicant otherwise meets the requirements of this Chapter. (1915, c. 270, s. 3; 1919, c. 336, s. 1; C.S., s. 4992; 1957, c. 794, s. 7; 1971, c. 1231, s. 1; 1979, c. 871, s. 1; 1983, c. 47; 1989, c. 62.)

§ 83A-8. Qualification for corporate practice.

(a) Any corporation desiring to practice architecture in this State shall file corporate application on forms provided by the Board, accompanied by the required application fee. To be eligible for a corporate certificate, the corporation must meet all requirements of the Professional Corporation Act.

(b) Architectural corporations of other states may be granted corporate certificates for practice in this State upon filing application with the Board and satisfying the Board that they meet the requirements of subsection (a) above. Such corporations shall designate the individual or individuals licensed to practice architecture in this State who shall be in responsible charge of all architectural work offered or performed by such corporation in this State. Such corporations shall notify the Board of changes in such designation.

(c) All corporations holding corporate certificates from the Board shall be subject to the applicable rules and regulations adopted by the Board, and to all the disciplinary powers applicable to individual licensees who are officers or employees of the corporation. Corporations may perform no acts or things forbidden to officers or employees as licensees. (1979, c. 871, s. 1.)

§ 83A-9. Partnership practice.

This Chapter neither prevents practice of architecture by a partnership nor requires partnership seals or certificates of practice provided that the members of the partnership are duly licensed to practice architecture, and, provided that the partnership files with the Board and keeps current a list of the partners, their license identifications, and the types of services offered by the partnership. (1979, c. 871, s. 1.)

§ 83A-10. Professional seals.

Every licensed architect shall have a seal of a design authorized by the Board, and shall imprint all drawings and sets of specifications prepared for use in this State with an impression of such seal. Licensed architectural corporations shall employ corporate professional seals, of a design approved by the Board, for use in identifying plans, specifications and other professional documents issued by the corporation, but use of such corporate seals shall be in addition to and not in substitution for the requirement that the individual seal of the author of such plans and professional documents be affixed. (1915, c. 270, s. 7; C.S., s. 4997; 1979, c. 871, s. 1.)

§ 83A-11. Expirations and renewals.

Certificates must be renewed on or before the first day of July in each year. No less than 30 days prior to the renewal date, a renewal application shall be mailed to each individual and corporate licensee. The completed application together with the required renewal fee shall be returned to the Board on or before the renewal date. When the Board is satisfied as to the continuing competency of an architect, it shall issue a renewal of the certificate. Upon failure to renew within 30 days after the date set for expiration, the license shall be automatically revoked but such license may be renewed at any time within one year following the expiration date upon proof of continuing competency and payment of the renewal fee plus a late renewal fee. After one year from the date of revocation, reinstatement may be made by the Board, or in its discretion, the application may be treated as new subject to reexamination and qualification requirements as in the case of new applications. (1919, c. 336, s. 2; C.S., s. 4995; 1951, c. 1130, s. 2; 1957, c. 794, s. 10; 1979, c. 871, s. 1.)

§ 83A-12. Prohibited practice.

The purpose of the Chapter is to safeguard life, health and property. It shall be unlawful for any individual, firm or corporation to practice or offer to practice architecture in this State as defined in this Chapter, or to use the title "Architect" or any form thereof, except as provided in Chapter 89A for Landscape Architects, or to display or use any words, letters, figures, titles, sign, card, advertisement, or other device to indicate that such individual or firm practices or offers to practice architecture as herein defined or is an architect or architectural firm qualified to perform architectural work, unless such person holds a current individual or corporate certificate of admission to practice architecture under the provisions of this Chapter. (1915, c. 270, s. 4; C.S., s. 4996; 1941, c. 369, ss. 1, 2; 1951, c. 1130, s. 3; 1957, c. 794, s. 11; 1965, c. 1100; 1969, c. 718, s. 21; 1973, c. 1414, s. 1; 1979, c. 871, s. 1.)

CASE NOTES

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

OPINIONS OF ATTORNEY GENERAL

Preparation of Construction Drawings. — A town may not, under its land use ordinance, require that all construction drawings submitted for approval be prepared and sealed by a licensed professional engineer, to the exclusion of licensed professional architects. Such a restriction would be in excess of the powers granted the town. See opinion of Attorney General to Mr. Michael B. Brough, Carrboro Town Attorney, 59 N.C.A.G. 58 (1989).

§ 83A-13. Exemptions.

(a) Nothing in this Chapter shall be construed to prevent the practice of general contracting under the provisions of Article 1 of Chapter 87, or the practice by any person who is qualified under law as a "registered professional engineer" of such architectural work as is incidental to engineering projects or utilities, or the practice of any other profession under the applicable licensure provisions of the General Statutes.

(b) Nothing in this Chapter shall be construed to prevent a duly licensed general contractor, professional engineer or architect, acting individually or in combination thereof, from participating in a "Design/Build" undertaking including the preparation of plans and/or specifications and entering individual or collective agreements with the owner in order to meet the owner's requirements for pre-determined costs and unified control in the design and construction of a project, and for the method of compensation for the design and construction services rendered; provided, however, that nothing herein shall be construed so as to allow the performance of any such services or any division thereof by one who is not duly licensed to perform such service or services in accordance with applicable licensure provisions of the General Statutes; provided further, that full disclosure is made in writing to the owner as to the duties and responsibilities of each of the participating parties in such agreements; and, provided further, nothing in this Chapter shall prevent the administration by any of the said licensees of construction contracts and related services or combination of services in connection with the construction of buildings.

(c) Nothing in this Chapter shall be construed to require an architectural license for the preparation, sale, or furnishing of plans, specifications and related data, or for the supervision of construction pursuant thereto, where the building, buildings, or project involved is in one of the following categories:

(1) A family residence, up to eight units attached with grade level exit, which is not a part of or physically connected with any other buildings or residential units;

(2) A building upon any farm for the use of any farmer, unless the building is of such nature and intended for such use as to substantially involve the health or safety of the public;

(3) An institutional or commercial building if it does not have a total value exceeding ninety thousand dollars ($90,000);

(4) An institutional or commercial building if the total building area does not exceed 2,500 square feet in gross floor area;

(5) Alteration, remodeling, or renovation of an existing building that is exempt under this section, or alteration, remodeling, or renovation of an existing building or building site that does not alter or affect the structural system of the building; change the building's access or exit pattern; or change the live or dead load on the building's structural system. This subdivision shall not limit or change any other exemptions to this Chapter or to the practice of engineering under Chapter 89C of the General Statutes;

(6) The preparation and use of details and shop drawings, assembly or erection drawings, or graphic descriptions utilized to detail or illustrate a portion of the work required to construct the project in accordance with the plans and specifications prepared or to be prepared under the requirements or exemptions of this Chapter.

(d) Nothing in this Chapter shall be construed to prevent any individual from making plans or data for buildings for himself.

(e) Plans and specifications prepared by persons or corporations under these exemptions shall bear the signature and address of such person or corporate officer. (1979, c. 871, s. 1; 1997-457, s. 1.)

§ 83A-13.1. Architect who volunteers during an emergency or disaster; qualified immunity.

(a) A professional architect who voluntarily, without compensation, provides structural, electrical, mechanical, or other architectural services at the scene of a declared disaster or emergency, declared under federal law or in accordance with the provisions of Article 1 of Chapter 166A of the General Statutes or Article 36A of Chapter 14 of the General Statutes, at the request of a public official, law enforcement official, public safety official, or building inspection official, acting in an official capacity, shall not be liable for any personal injury, wrongful death, property damage, or other loss caused by the professional architect's acts or omissions in the performance of the architectural services.

(b) The immunity provided in subsection (a) of this section applies only to an architectural service:

(1) For any structure, building, piping, or other architectural system, either publicly or privately owned.

(2) That occurs within 45 days after the declaration of the emergency or disaster, unless the 45-day immunity period is extended by an executive order issued by the Governor under the Governor's emergency executive powers.

(c) The immunity provided in subsection (a) of this section does not apply if it is determined that the personal injury, wrongful death, property damage, or other loss was caused by the gross negligence, wanton conduct, or intentional wrongdoing of the professional architect or arose out of the operation of a motor vehicle.

(d) As used in this section:

(1) "Building inspection official" means any appointed or elected federal, State, or local official with overall executive responsibility to coordinate building inspection in the jurisdiction in which the emergency or disaster is declared.

(2) "Law enforcement official" means any appointed or elected federal, State, or local official with overall executive responsibility to coordinate law enforcement in the jurisdiction in which the emergency or disaster is declared.

(3) "Public official" means any federal, State, or locally elected official with overall executive responsibility in the jurisdiction in which the emergency or disaster is declared.

(4) "Public safety official" means any appointed or elected federal, State, or local official with overall executive responsibility to coordinate public safety in the jurisdiction in which the emergency or disaster is declared. (1995, c. 416, s. 2.)

§ 83A-14. Disciplinary action and procedure.

Any person may file with the Board a charge of unprofessional conduct, negligence, incompetence, dishonest practice, or other misconduct or of any violation of this Chapter or of a Board rule adopted and published by the Board. Upon receipt of such charge, or upon its own initiative, the Board may give notice of an administrative hearing under the Administrative Procedure Act, or may dismiss the charge as unfounded or trivial, upon a statement of the reasons therefor which shall be mailed to the architect and the person who filed the charge by registered or certified mail. (1979, c. 871, s. 1.)

§ 83A-15. Denial, suspension or revocation of license.

(a) The Board shall have the power to suspend or revoke a license or certificate of registration, to deny a license or certificate of registration, or to reprimand or levy a civil penalty not in excess of five hundred dollars ($500.00) per violation against any registrant who is found guilty of:

(1) Dishonest conduct, including but not limited to:

a. The commission of any fraud, deceit or misrepresentation in any professional relationship with clients or other persons; or with reference to obtaining or maintaining license, or with reference to qualifications, experience and past or present service; or

b. Using or permitting an individual professional seal to be used by or for others, or otherwise representing registrant as the author of drawings or specifications other than those prepared personally by or under direct supervision of registrant.

(2) Incompetence, including but not limited to:
  a. Gross negligence, recklessness, or excessive errors or omissions or building failures in registrant's record of professional practice; or
  b. Mental or physical disability or addiction to alcohol or drugs so as to endanger health, safety and interest of the public by impairing skill and care in professional services.

(3) Unprofessional conduct, including but not limited to:
  a. Practicing or offering to practice architecture without a current license from this Board;
  b. Knowingly aiding or abetting others to evade or violate the provisions of this Chapter, or the health and safety laws of this or other states;
  c. Knowingly undertaking any activity or having any significant financial or other interest, or accepting any compensation or reward except from registrant's clients, any of which would reasonably appear to compromise registrant's professional judgment in serving the best interest of clients or public;
  d. Willfully violating this Chapter or any rule or standard of conduct published by the Board, or pleading guilty or nolo contendere to a felony or any crime involving moral turpitude.

(b) Actions to recover civil penalties against any registrant may be commenced by the Board pursuant to Chapter 150B of the General Statutes. In determining the amount of any civil penalty, the Board shall consider the degree and extent of harm caused by the violation. The clear proceeds of any civil penalty collected hereunder shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1915, c. 270, s. 5; 1919, c. 336, s. 3; C.S., s. 4993; 1953, c. 1041, s. 1; 1957, c. 794, s. 8; 1973, c. 1331, s. 3; 1979, c. 871, s. 1; 1989, c. 81; 1998-215, s. 128.)

Editor's Note. — The designations of subsections (a) and (b) of this section were assigned by the Revisor of Statutes, the number of subsection (b) in Session Laws 1989, c. 81, having been subdivision (4).

§ 83A-16. Violations of Chapter; penalties.

(a) Any individual or corporation not registered under this Chapter, who shall wrongfully use the title "Architect" or represent himself or herself to the public as an architect, or practice architecture as herein defined, or seek to avoid the provisions of this Chapter by the use of any other designation than "Architect": (i) shall be guilty of a Class 2 misdemeanor; and (ii) be subject to a civil penalty not to exceed five hundred dollars ($500.00) per day of such violation. Each day of such unlawful practice shall constitute a distinct and separate violation. The clear proceeds of any civil penalty collected hereunder shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Actions and prosecutions under this section shall be commenced in the county in which the defendant resides, or has his principal place of business, or in the case of an out-of-state corporation, is conducting business.

(c) Actions to recover civil penalties shall be initiated by the Attorney General. (1915, c. 270, s. 4; C.S., s. 4996; 1941, c. 369, ss. 1, 2; 1951, c. 1130, s. 3; 1957, c. 794, s. 11; 1965, c. 1100; 1969, c. 718, s. 21; 1973, c. 1414, s. 1; 1979, c. 871, s. 1; 1993, c. 539, s. 595; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 129.)

Legal Periodicals. — For case law survey of cases decided under this section, see 44 N.C.L. Rev. 889 (1966).

CASE NOTES

Editor's Note. — *The cases cited under this section were decided under this Chapter as it existed prior to its revision and recodification by Session Laws 1979, c. 871, s. 1.*

A single act of unauthorized practice is sufficient, if shown, to invoke the criminal penalties of this section or the injunctive relief of former G.S. 150-31. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

Buildings for Himself. — The words "buildings for himself" contained in the express statutory exception are broad and comprehensive, and contain no limitation of any kind. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

The statutory exception, "buildings for himself," contemplates possession by the designer of the building for whatever lawful purpose he may choose. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

If the General Assembly had intended the statutory exception, "buildings for himself," to be limited to buildings actually occupied by the designer, and not for lease and use by the public, it could quite easily have said so. The General Assembly in its wisdom and discretion did not so limit the statutory exception. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

The express statutory exception, pertaining to plans for a person's own building, contains no provision preventing defendant from selling an interest in the building for which he made the plans. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

Included Building on Property Held as Tenants by the Entirety. — Taking into consideration that during the existence of the tenancy by the entirety the husband has the absolute and exclusive right to the control, use, possession, rents, income, and profits of the lands held by him and his wife as tenants by the entirety, when defendant made plans for the construction of an automobile sales and service building upon lands composed of several tracts, title to some of the component tracts being in him, and some in him and his wife as tenants by the entirety, it seems clear that he was making plans for a building for himself within the meaning of the specific exception contained in this section. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

But Not a Church of Which Defendant Was a Member. — Where defendant was a member of the church and title to the land upon which the educational building was constructed was held by five trustees of whom he was one, and he executed the mortgage to finance the construction of the educational building, the judge's findings of fact clearly showed that defendant made the "plans" for the building for Salem Baptist Church, and not for himself. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

Right of Unregistered Person to Recover for Work on Plans. — Plaintiff, a builder-designer, but not a licensed architect, who made preliminary studies, consulted with defendants and made changes on plans calling for the construction of a residence originally intended to cost about $18,000, could recover on a quantum meruit basis for the work he performed on the plans up to the time the residence designed did not exceed in value $20,000, but he was not entitled to recover for any work performed after the plans called for a residence of a value in excess of $20,000. Tillman v. Talbert, 244 N.C. 270, 93 S.E.2d 101 (1956).

Cited in Snow v. North Carolina Bd. of Arch., 273 N.C. 559, 160 S.E.2d 719 (1968).

§ 83A-17. Power of Board to seek injunction.

The Board may appear in its own name and apply to courts having jurisdiction for injunctions to prevent violations of this Chapter or of rules issued pursuant thereto, and such courts are empowered to grant such injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of such violation. A single act of unauthorized or illegal practice shall be sufficient, if shown, to invoke the injunctive relief of this section or criminal penalties under G.S. 83A-16. (1979, c. 871, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

Chapter 84.
Attorneys-at-Law.

Article 1.
Qualifications of Attorney; Unauthorized Practice of Law.

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84-1. Oaths taken in open court.
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Article 4.
North Carolina State Bar.

Sec.
84-15. Creation of North Carolina State Bar as an agency of the State.
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84-28. Discipline and disbarment.
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84-33. Annual and special meetings.
84-34. Membership fees and list of members.
84-34.1. Deposits of the North Carolina State Bar.
84-34.2. Specific statutory authority for certain fees.
84-35. Saving as to North Carolina Bar Association.
84-36. Inherent powers of courts unaffected.
84-36.1. Clerks of court to certify orders.
84-37. State Bar may investigate and enjoin unauthorized activities.
84-38. Solicitation of retainer or contract for legal services prohibited; division of fees.

ARTICLE 1.
Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-1. Oaths taken in open court.

Attorneys before they shall be admitted to practice law shall, in open court before a justice or judge of the General Court of Justice, personally appear and take the oath prescribed for attorneys by G.S. 11-11, and also the oaths of allegiance to the State, and to support the Constitution of the United States, prescribed for all public officers by Article VI, Sec. 7 of the North Carolina Constitution and G.S. 11-7, and the same shall be entered on the records of the court; and, upon such qualification had, and oath taken may act as attorneys during their good behavior. (1777, c. 115, s. 8; R.C., c. 9, s. 3; Code, s. 19; Rev., s. 209; C.S., s. 197; 1969, c. 44, s. 58; 1973, c. 108, s. 35; 1995, c. 431, s. 1.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

CASE NOTES

Nonresident Attorneys. — As this section requires the oath of allegiance to the State, it debars a citizen of another state from obtaining a license to practice law, and a nonresident attorney does not acquire the right to practice habitually in this State by having been previously allowed, through the courtesy of the courts, to appear in special cases. Manning v. Roanoke & T.R.R.R., 122 N.C. 824, 28 S.E. 963 (1898).

§ 84-2. Persons disqualified.

No justice, judge, magistrate, full-time district attorney, full-time assistant district attorney, public defender, assistant public defender, clerk, deputy or assistant clerk of the General Court of Justice, register of deeds, deputy or assistant register of deeds, sheriff or deputy sheriff shall engage in the private practice of law. Persons violating this provision shall be guilty of a Class 3 misdemeanor and only fined not less than two hundred dollars ($200.00). (C.C.P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C.S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543; 1965, c. 418, s. 1; 1969, c. 44, s. 59; 1973, c. 47, s. 2; c. 108, s. 36; 1981, c. 788, s. 1; 1993, c. 539, s. 596; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 431, s. 2; 2007-484, s. 28(a).)

Local Modification. — Anson: 1951, c. 7; Burke: 1933, c. 135; Madison: 1935, c. 214; New Hanover: 1959, c. 483.

CASE NOTES

Cited in State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976).

Bankruptcy. — Petition preparer engaged in the unauthorized practice of law under G.S. 84-2.1 by providing a debtor with advice and legal citations necessary to complete the debtor's bankruptcy schedules; thus, he committed an unfair or deceptive act under 11 U.S.C. § 110(i). In re Springs, 358 B.R. 236, 2006 Bankr. LEXIS 4097 (Bankr. M.D.N.C. 2006).

§ 84-2.1. "Practice law" defined.

The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition. The phrase "practice law" does not encompass the writing of memoranda of understanding or other mediation summaries by mediators at community mediation centers authorized by G.S. 7A-38.5 or by mediators of personnel matters for The University of North Carolina or a constituent institution. (C.C.P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C.S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543; 1945, c. 468; 1995, c. 431, s. 3; 1999-354, s. 2; 2004-154, s. 2.)

Legal Periodicals. — For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For note on the unauthorized practice of law by corporations, see 65 N.C.L. Rev. 1422 (1987).

For a comment on ethical and legislative considerations of multidisciplinary practices, see 36 Wake Forest L. Rev. 193 (2001).

For comment, "Sharing Their Piece of the Real Estate Pie: An Analysis of the Necessity of Lawyers at Residential Real Estate Closings in the Context of the Adoption of Recent Opinions of the North Carolina State Bar," see 26 Campbell L. Rev. 59 (2004).

CASE NOTES

What Constitutes Practicing Law. — To constitute the practice of law, within the prohibition of this section, it is necessary that the person charged with its violation shall have customarily or habitually held himself out to the public as a lawyer, or that he has demanded compensation for his services as such. State v. Bryan, 98 N.C. 644, 4 S.E. 522 (1887).

The fact that a person on one occasion acted as an attorney for a party to an action is some evidence for the jury to consider, but is not conclusive of the question. State v. Bryan, 98 N.C. 644, 4 S.E. 522 (1887). See § 84-4.

Section Not Exhaustive. — The last sentence in this section makes it clear that the statute does encompass all the activities that could be considered the practice of law. Toms v. Lawyers Mut. Liab. Ins. Co., 104 N.C. App. 88, 408 S.E.2d 206 (1991), cert. denied, 330 N.C. 618, 412 S.E.2d 95 (1992).

Practice of law embraces the preparation of legal documents and contracts by which legal rights are secured. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962).

Not All Activities Within Definition Are Unlawful for Lay Persons. — It was not the purpose and intent of this section to make unlawful all activities of lay persons which come within the general definition of practicing law. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962). See note to G.S. 84-4.

The key as to whether attorney performed a professional service was not the act, but rather, the capacity in which he undertook the performance of the act. Toms v. Lawyers Mut. Liab. Ins. Co., 104 N.C. App. 88, 408 S.E.2d 206 (1991), cert. denied, 330 N.C. 618, 412 S.E.2d 95 (1992).

Solicitation and Acceptance of Money for Investment. — An attorney from outside the State coming to North Carolina and suggesting to the plaintiff that he be allowed to invest the plaintiff's money is not acting in any legal capacity when he accepts the money from the plaintiff for investment. Smith v. Travelers Indem. Co., 343 F. Supp. 605 (M.D.N.C. 1972).

A licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986).

Law Firm's Liability for Activities of Partner. — In order to determine whether members of a law firm should be held liable for the activities of one of its partners, the court should consider (1) the provisions of the instrument empowering the firm to practice law, such as partnership agreements and articles of incorporation, as well as statutory provisions; (2) the construction which our courts have historically given the questioned activity or related ones; (3) where the partner has acted, or seemed to act, with the firm's authority; this includes his position in the firm, the participation — if any — by the rest of the firm in the disputed activities, and any assurances given the client that this transaction would be handled through the firm; and finally, (4) whether the other members of the firm have assented to or ratified the acts. Shelton v. Fairley, 86 N.C. App. 147, 356 S.E.2d 917, cert. denied, 320 N.C. 634, 360 S.E.2d 94 (1987).

Bankruptcy Petition Preparers. — All of the bankruptcy petition preparer's services fell within G.S. 84-2.1 since it included preparing and filing of petitions for use in court; but under 11 U.S.C.S. § 110, the preparer's services had to be limited to typing the documents as directed by the preparer's customers — therefore, providing documents that contained legal advice, thereby giving the customers the impression that the documents contained all of the information necessary as to whether or not to file bankruptcy and how to complete the forms, was an unfair and deceptive practice. In re Moore, 290 B.R. 287, 2003 Bankr. LEXIS 213 (Bankr. E.D.N.C. 2003).

By taking the information placed in the workbook by the customer and entering it by computer into the official forms, which differed from the workbook, the preparer and the company ceased to be mere scriveners, as allowed by 11 U.S.C.S. § 110, and, instead, engaged in "the preparation ... of petitions for use in any court," which fell within the definition of practice of law contained in G.S. 84-2.1. In re Graham, — Bankr. —, 2004 Bankr. LEXIS 1678 (Bankr. M.D.N.C. Feb. 10, 2004).

Where pro se bankruptcy debtors retained a petition preparer to complete their bankruptcy petition and accompanying schedules and forms, the preparer engaged in the unauthorized practice of law by advising the debtors concerning an unlisted creditor and by maintaining a website which explained legal options and concepts related to bankruptcy. In re Medley, — Bankr. —, 2005 Bankr. LEXIS 2290 (Bankr. M.D.N.C. Nov. 10, 2005).

Workbook Created by Bankruptcy Petition Preparers. — Where bankruptcy petition preparers provided customers with a workbook and guide that contained advice to the customer concerning bankruptcy law and how the blanks in the workbook should be completed, the preparers engaged in the unauthorized practice of law. In re Langford, — Bankr. —, 2005 Bankr. LEXIS 3201 (Bankr. M.D.N.C. Nov. 9, 2005).

Scrivening. — Although the North Carolina courts apparently have not addressed the issue, most courts have concluded that although a non-attorney may not create a document for another person or advise on how the document should be prepared, merely typing or "scrivening" a petition or legal document for another person does not constitute the practice of law. This distinction has been made in dealing with petition preparers under 11 U.S.C.S. § 110. In re Lazarus, — Bankr. —, 2005 Bankr. LEXIS 1093 (Bankr. M.D.N.C. Mar. 14, 2005).

Defendant Not Practicing Law. — Defendant was not engaged in the "practice of law" when defendant sent a letter and accompanying pages to a witness set to testify against a friend defendant made in jail, because defendant did not hold defendant out as an attorney or as having a law degree, and conceded that defendant's information on the law was acquired through 20 years of being in trouble. The letter did not constitute a "legal document," and defendant repeatedly urged the witness not to rely on defendant and seek advice from an attorney. State v. Williams, 186 N.C. App. 233, 650 S.E.2d 607, 2007 N.C. App. LEXIS 2122 (2007).

Cited in In re Gertzman, 115 N.C. App. 634, 446 S.E.2d 130; In re Stroh Brewery Co., 116 N.C. App. 178, 447 S.E.2d 803 (1994); RCDI Constr. v. Spaceplan/Architecture, Planning & Interiors, P.A., 148 F. Supp. 2d 607 (W.D.N.C. 2001).

§ 84-3: Repealed by Session Laws 1973, c. 108, s. 37.

§ 84-4. Persons other than members of State Bar prohibited from practicing law.

Except as otherwise permitted by law, it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body, including the North Carolina Industrial Commission, or the Utilities Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform for or furnish to another legal services, or to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust, or to organize corporations or prepare for another person, firm or corporation, any other legal document. Provided, that nothing herein shall prohibit any person from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney-at-law. The provisions of this section shall be in addition to and not in lieu of any other provisions of this Chapter. Provided, however, this section shall not apply to corporations authorized to practice law under the provisions of Chapter 55B of the General Statutes of North Carolina. (1931, c. 157, s. 1; 1937, c. 155, s. 1; 1955, c. 526, s. 1; 1969, c. 718, s. 19; 1981, c. 762, s. 3; 1995, c. 431, s. 4.)

Cross References. — As to officers disqualified to practice law, see G.S. 84-2.

Legal Periodicals. — For note on unauthorized practice of law by corporations, see 41 N.C.L. Rev. 225 (1963).

For case law survey on unauthorized practice of law, see 41 N.C.L. Rev. 447 (1963).

For note on the unauthorized practice of law by corporations, see 65 N.C.L. Rev. 1422 (1987).

For a comment on ethical and legislative considerations of multidisciplinary practices, see 36 Wake Forest L. Rev. 193 (2001).

For comment, “Sharing Their Piece of the Real Estate Pie: An Analysis of the Necessity of Lawyers at Residential Real Estate Closings in the Context of the Adoption of Recent Opinions of the North Carolina State Bar,” see 26 Campbell L. Rev. 59 (2004).

CASE NOTES

This section is constitutional and valid, the right to practice law being subject to legislative regulation within constitutional restrictions and limitations, and the statute not being in contravention of any provision of the State or federal Constitutions. State ex rel. Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936).

The purpose of this section is for the better security of the people against incompetency and dishonesty in an area of activity affecting general welfare. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

A pleading filed by an attorney who is not authorized to practice law in this State is not a nullity. Theil v. Detering, 68 N.C. App. 754, 315 S.E.2d 789, cert. denied, 312 N.C. 89, 321 S.E.2d 908 (1984).

The right to practice law is personal and may not be exercised by a corporation either directly or indirectly by employing lawyers to practice for it. State ex rel. Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936).

The practice of law is not limited to the conduct of cases in court, but embraces, in its general sense, legal advice and counsel and the preparation of legal documents and contracts by which legal rights are secured, although such matter may or may not be pending in court. State ex rel. Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936).

Services of Motor Clubs Held to Violate Section. — Where defendant corporations, as a part of their services, were engaged in giving legal advice, in employing attorneys for members, in allowing lay members of the incorporated club to write letters on club stationery to persons involved in accidents with members of the club advising that such persons were liable in damages in law for negligence in causing such accidents, and in drawing up receipts stating that a certain sum was received as settlement of such damages when collections were made as a result of such letters, they were held to be engaged in the practice of law in violation of this section. State ex rel. Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936).

Right to Enjoin Unlawful Practice of Law. — A cemetery lot owner could not enjoin a cemetery corporation from practicing law without a license — a criminal offense, since he had an adequate remedy at law by having the corporation indicted and convicted by the State. Mills v. Carolina Cem. Park Corp., 242 N.C. 20, 86 S.E.2d 893 (1955).

Section Does Not Confer Absolute Monopoly in Preparation of Legal Documents. — This section was not enacted for the purpose of conferring upon the legal profession an absolute monopoly in the preparation of legal documents. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

Persons Having Primary Interest in Transaction May Prepare Necessary Papers. — A person, firm or corporation having a primary interest, not merely an incidental interest, in a transaction, may prepare legal documents necessary to the furtherance and completion of the transaction without violating this section. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

Automobile, furniture, and appliance dealers prepare conditional sale contracts. Banks prepare promissory notes, drafts and letters of credit. Many lending institutions prepare deeds of trust and chattel mortgages. Owner-vendors and purchasers of land prepare deeds. All such activities are legal and do not violate the statute so long as the actor has a primary interest in the transaction. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

Corporations. — Although a corporate employee was allowed to prepare legal documents, and a corporation need not have been represented by an attorney in a small claims case, a corporation involved in litigation needed to be represented by a duly admitted and licensed attorney-at-law and was not allowed to proceed pro se unless doing so in accordance with certain specific exceptions; the trial court's decision to allow the corporation's president to file pleadings on behalf of the corporation was reversed. LexisNexis v. TRaviSHan Corp., 155 N.C. App. 205, 573 S.E.2d 547, 2002 N.C. App. LEXIS 1635 (2002).

Preparation of Documents by Employees of Corporations. — A person who, in the course of his employment by a corporation, prepares a legal document in connection with a business transaction in which the corporation has a primary interest, the corporation being authorized by law and its charter to transact such business, does not violate the statute, for his act in so doing is the act of the corporation in the furtherance of its own business. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

Preparation of Bankruptcy Petition. — Where pro se bankruptcy debtors retained a petition preparer to complete their bankruptcy petition and accompanying schedules and forms, the preparer engaged in the unauthorized practice of law by advising the debtors concerning an unlisted creditor and by maintaining a website that explained legal options and concepts related to bankruptcy. In re Medley, — Bankr. —, 2005 Bankr. LEXIS 2290 (Bankr. M.D.N.C. Nov. 10, 2005).

Workbook Created by Bankruptcy Petition Preparers. — Where bankruptcy petition preparers provided customers with a workbook and guide that contained advice to the customer concerning bankruptcy law and how the blanks in the workbook should be completed, the preparers engaged in the unauthorized practice of law. In re Langford, — Bankr. —, 2005 Bankr. LEXIS 3201 (Bankr. M.D.N.C. Nov. 9, 2005).

A deed of trust is a legal document. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

The grantor or the beneficiary in a deed of trust may prepare the instrument with impunity if the latter is extending credit to the former; the named trustee may not do so, for his interest is only incidental. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

Any adult person desiring to do so may prepare his own will. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

A person involved in litigation, though not a lawyer, may represent himself and either defend or prosecute the action or proceeding in a tribunal or court, even in Supreme Court, and may prepare and file pleadings and other papers in connection with the litigation. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

Evidence Insufficient to Support Conviction for Unauthorized Practice of Law. — Letter and accompanying pages defendant sent to a witness set to testify against a friend defendant made in jail did not constitute the unauthorized practice of law, because defendant did not hold defendant out as an attorney or as having a law degree, defendant conceded that defendant's information on the law was acquired through 20 years of being in trouble, the letter did not constitute a "legal document," and defendant repeatedly urged the witness not to rely on defendant and seek advice from an attorney. State v. Williams, 186 N.C. App. 233, 650 S.E.2d 607, 2007 N.C. App. LEXIS 2122 (2007).

Administrator's Wrongful Death Complaint Was Not a Nullity. — Fact that wrongful death complaint was signed by the estate administrator and not by an attorney did not render the complaint a nullity, and the denial of healthcare providers' motion to dismiss the complaint was proper; any defect in the administrator's complaint was cured by the subsequent appearance of a properly licensed and admitted counsel. Reid v. Cole, 187 N.C. App. 261, 652 S.E.2d 718, 2007 N.C. App. LEXIS 2355 (2007).

Applied in Resort Dev. Co. v. Phillips, 9 N.C. App. 158, 175 S.E.2d 782 (1970); In re Graham, — Bankr. —, 2004 Bankr. LEXIS 1678 (Bankr. M.D.N.C. Feb. 10, 2004); In re Lazarus, —

Bankr. —, 2005 Bankr. LEXIS 1093 (Bankr. M.D.N.C. Mar. 14, 2005).

Cited in North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958); In re Stroh Brewery Co., 116 N.C. App. 178, 447 S.E.2d 803 (1994); Beyer v. N.C. Div. of Mental Health, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 16968 (W.D.N.C. Oct. 16, 2001); Olvera v. Edmundson, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 15284 (W.D.N.C. Sept. 21, 2001); Price v. Beck, 153 N.C. App. 763, 571 S.E.2d 247, 2002 N.C. App. LEXIS 1253.

OPINIONS OF ATTORNEY GENERAL

Federal Preemption of North Carolina's Unauthorized Practice of Law Statute. — North Carolina's unauthorized practice of law statutes probably fall under the savings provision set forth in 29 U.S.C. § 1144(b)(4) for "generally applicable" criminal law and are therefore probably not preempted by ERISA, due to the fact that violation of those statutes is a criminal offense; on the other hand, the unauthorized practice of law statutes are preempted by 31 C.F.R. §§ 10.2 and 10.3 to the extent that those statutes would restrict to licensed attorneys the preparation or the aiding in the preparation of documents necessary to establish ERISA plans qualified by the Internal Revenue Service. See opinion of Attorney General to Mr. David Johnson, Committee Counsel, The North Carolina State Bar, Authorized Practice Committee, Pension Plan Subcommittee, 2003 N.C.A.G. 4 (6/20/03).

§ 84-4.1. Limited practice of out-of-state attorneys.

Any attorney domiciled in another state, and regularly admitted to practice in the courts of record of and in good standing in that state, having been retained as attorney for a party to any civil or criminal legal proceeding pending in the General Court of Justice of North Carolina, the North Carolina Utilities Commission, the North Carolina Industrial Commission, the Office of Administrative Hearings of North Carolina, or any administrative agency, may, on motion, be admitted to practice in that forum for the sole purpose of appearing for a client in the proceeding. The motion required under this section shall be signed by the attorney and shall contain or be accompanied by:

(1) The attorney's full name, post-office address, bar membership number, and status as a practicing attorney in another state.

(2) A statement, signed by the client, setting forth the client's address and declaring that the client has retained the attorney to represent the client in the proceeding.

(3) A statement that unless permitted to withdraw sooner by order of the court, the attorney will continue to represent the client in the proceeding until its final determination, and that with reference to all matters incident to the proceeding, the attorney agrees to be subject to the orders and amenable to the disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects as if the attorney were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

(4) A statement that the state in which the attorney is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.

(5) A statement to the effect that the attorney has associated and is personally appearing in the proceeding, with an attorney who is a resident of this State, has agreed to be responsible for filing a registration statement with the North Carolina State Bar, and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with the legal proceedings, or any disciplinary matter, with the same effect as if personally made on the foreign attorney within this State.

(6) A statement accurately disclosing a record of all that attorney's disciplinary history. Discipline shall include (i) public discipline by

any court or lawyer regulatory organization, and (ii) revocation of any pro hac vice admission.

(7) A fee in the amount of two hundred twenty-five dollars ($225.00), of which two hundred dollars ($200.00) shall be remitted to the State Treasurer for support of the General Court of Justice and twenty-five dollars ($25.00) shall be transmitted to the North Carolina State Bar to regulate the practice of out-of-state attorneys as provided in this section.

Compliance with the foregoing requirements does not deprive the court of the discretionary power to allow or reject the application. (1967, c. 1199, s. 1; 1971, c. 550, s. 1; 1975, c. 582, ss. 1, 2; 1977, c. 430; 1985 (Reg. Sess., 1986), c. 1022, s. 8; 1991, c. 210, s. 2; 1995, c. 431, s. 5; 2003-116, s. 1; 2004-186, s. 4.2; 2005-396, s. 1; 2007-200, s. 4; 2007-323, s. 30.8(k).)

Legal Periodicals. — For note on equal protection and residence requirements, see 49 N.C.L. Rev. 753 (1971).

CASE NOTES

Purpose. — The purpose of this section is to afford the courts a means to control out-of-state counsel and to assure compliance with the duties and responsibilities of attorneys practicing in this State. North Carolina Nat'l Bank v. Virginia Carolina Bldrs., Inc., 57 N.C. App. 628, 292 S.E.2d 135, rev'd on other grounds, 307 N.C. 563, 299 S.E.2d 629 (1982).

Conditions in the statute are mandatory; until they have been met, a court has no discretion to admit out-of-state counsel to practice before it. North Carolina Nat'l Bank v. Virginia Carolina Bldrs., Inc., 57 N.C. App. 628, 292 S.E.2d 135, rev'd on other grounds, 307 N.C. 563, 299 S.E.2d 629 (1982).

A pleading filed by an attorney not authorized to practice law in this State is not a nullity. Theil v. Detering, 68 N.C. App. 754, 315 S.E.2d 789, cert. denied, 312 N.C. 89, 321 S.E.2d 908 (1984).

When Attorneys Not Considered as Participating Attorneys. — Where two attorneys purportedly appearing for defendants in appeal from criminal conviction are not members of the North Carolina Bar and are not authorized to appear in a case in compliance with this section, they are not considered as participating attorneys. State v. Daughtry, 8 N.C. App. 318, 174 S.E.2d 76 (1970).

United States Constitution does not protect pro hac vice proceedings. Leonard v. Johns-Manville Sales Corp., 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

Procedural due process is not required in the granting or denial of petitions to practice pro hac vice in the courts of another state. Leonard v. Johns-Manville Sales Corp., 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

It is not a right but a discretionary privilege which allows out-of-state attorneys to appear pro hac vice in a state's courts without meeting the state's bar admission requirements. In re Smith, 301 N.C. 621, 272 S.E.2d 834 (1981).

Admission of counsel in this State pro hac vice is not a right but a discretionary privilege; it is permissive and subject to the sound discretion of the court. Leonard v. Johns-Manville Sales Corp., 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

When Court's Discretionary Power Invoked. — Unless and until an application under this section meets the requirements of the statute, the court's discretionary power is not invoked. Holley v. Burroughs Wellcome Co., 56 N.C. App. 337, 289 S.E.2d 393 (1982).

Proper Care Requires Employment of Licensed Counsel. — To exercise proper care a party must not only pay proper attention to the case himself, he must employ counsel who is licensed or entitled to practice in the court where the case is pending. North Carolina Nat'l Bank v. Virginia Carolina Bldrs., Inc., 57 N.C. App. 628, 292 S.E.2d 135, rev'd on other grounds, 307 N.C. 563, 299 S.E.2d 629 (1982).

Local Custom Does Not Abrogate Section. — The fact that a custom may have grown up among Virginia attorneys practicing near the North Carolina state line to ignore the requirements of this section in no way abrogates or excuses out-of-state counsel from complying with this section. North Carolina Nat'l Bank v. Virginia Carolina Bldrs., Inc., 57 N.C. App. 628, 292 S.E.2d 135, rev'd on other grounds, 307 N.C. 563, 299 S.E.2d 629 (1982).

Party cannot nullify this section merely by responding to actions of noncomplying

out-of-state attorney in the courts of this State. North Carolina Nat'l Bank v. Virginia Carolina Bldrs., Inc., 57 N.C. App. 628, 292 S.E.2d 135, rev'd on other grounds, 307 N.C. 563, 299 S.E.2d 629 (1982).

No Right to Representation by Counsel Not Licensed in State. — Parties do not have a right to be represented in the courts of this State by counsel who are not duly licensed to practice in this State. Leonard v. Johns-Manville Sales Corp., 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

Appellate court found it necessary to strike the second child and wife's brief, as well as their motions to dismiss and for sanctions; their counsel, who was apparently admitted to practice in Florida, was not licensed to practice in North Carolina, counsel failed to comply with G.S. 84-4.1, and no other counsel appeared on their behalf. Hill v. Hill, 181 N.C. App. 69, 638 S.E.2d 601, 2007 N.C. App. LEXIS 65 (2007), appeal dismissed, cert. denied, 361 N.C. 427, 648 S.E.2d 502, 503.

An out-of-state attorney has no absolute right to practice law in another forum. It is permissive and subject to the sound discretion of the court. State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

Prohibition of Habitual Practice in Courts of State by Nonresident Counsel. — This section forbids the courts from allowing nonresident counsel, when citizens of other states and not holding license from the North Carolina Supreme Court, from practicing habitually in our courts, and they cannot acquire the right to do so. State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

Effect of Partial Compliance with Section. — In a criminal prosecution the trial court did not err in permitting the defendant's retained counsel from Alabama to appear before the court in his behalf without complying strictly with the provisions of this section for two reasons. First, the defendant was allowed to have those counsel whom he wanted to defend him. They were retained by him and allowed to practice in the North Carolina courts on his motion. At no time during the proceedings did he express concern regarding their competency, and any such objection was waived. Secondly, the statute was not designed for his protection, and did not vest in him any rights to counsel other than what he would ordinarily possess in the absence of the statute. State v. Scarboro, 38 N.C. App. 105, 247 S.E.2d 273, cert. denied, 295 N.C. 652, 248 S.E.2d 256 (1978); 440 U.S. 938, 99 S. Ct. 1286, 59 L. Ed. 2d 497 (1979).

Conditional Application for Admission for Limited Purpose. — This section does not permit an out-of-state attorney to move for admission for a limited purpose in this State on a conditional basis. The requirement of subdivision (3) of this section calls for a firm commitment from the movant which is contrary in spirit to a conditional application for admission for a limited purpose. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23 (1980), rev'd on other grounds, 301 N.C. 621, 272 S.E.2d 834 (1981).

Sufficiency of Declaration Under Subdivision (1). — A declaration by an applicant that he is a member in good standing of the Bar of another state and is duly licensed and admitted to practice in that state is sufficient to meet the requirements of subdivision (1) of this section. Holley v. Burroughs Wellcome Co., 56 N.C. App. 337, 289 S.E.2d 393 (1982).

Statement of North Carolina Counsel Insufficient Under Subdivision (2). — The requirement under subdivision (2) of this section cannot be met by substituting the statement of North Carolina counsel and the statement must be signed by the client. Holley v. Burroughs Wellcome Co., 56 N.C. App. 337, 289 S.E.2d 393 (1982).

Association with Local Attorney. — Subdivision (5) of this section allows courts to control out-of-state counsel and assure compliance with the duties and responsibilities of an attorney practicing in the courts of this State, and the association of out-of-state counsel with a local attorney satisfies a reasonable interest of the courts in having a member of the Bar of this State responsible for the litigation; thus, this statute is specifically designed to insure that the court has ready jurisdiction over those appearing only occasionally before it by insuring that counsel who appear regularly before it participate in the case. In re Smith, 301 N.C. 621, 272 S.E.2d 834 (1981).

Same — Requirement May Not Be Waived. — A trial judge cannot waive the requirement of subdivision (5) of this section which states that local counsel be associated before an out-of-state attorney is admitted to limited practice in the courts of this State because unless and until subdivisions (1) through (5) are complied with, the court has no discretion whatever. In re Smith, 301 N.C. 621, 272 S.E.2d 834 (1981).

Same — Ineligible Attorney May Not Be Held In Contempt. — An out-of-state attorney could not be held in and punished for willful contempt of court for failure to comply with an order of the trial court that he appear as an attorney in a criminal case where there had been no general appearance by local counsel as required by this section and the out-of-state attorney thus never acquired eligibility to appear in the case and was never an attorney in the case admitted to limited practice in North Carolina. In re Smith, 301 N.C. 621, 272 S.E.2d 834 (1981).

Withdrawal of Out-of-State Counsel Controlled. — It does not seem equitable to allow adequately compensated trial counsel to withdraw after they have exhausted defendant's resources and to cast the burden of court appointment upon new counsel. Conduct in this regard by out-of-state counsel is controllable under subdivision (3) of this section as an initial condition upon which he is allowed to appear for trial. State v. Nickerson, 13 N.C. App. 125, 185 S.E.2d 326 (1971), cert. denied, 280 N.C. 304, 186 S.E.2d 179; 408 U.S. 925, 92 S. Ct. 2503, 33 L. Ed. 2d 336 (1972).

Substantial Right to Representation by Attorney Properly Admitted Under Section. — Plaintiff had a substantial right to have attorney of her choice, who had been properly admitted pro hac vice under this section represent her in her lawsuit, and order removing him as counsel affected a substantial right of the plaintiff and was immediately appealable. Goldston v. AMC, 326 N.C. 723, 392 S.E.2d 735 (1990).

A judge's order removing counsel who was admitted pro hac vice affected a substantial right of plaintiffs and was immediately appealable. Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775, 2000 N.C. App. LEXIS 1391 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001), aff'd, 354 N.C. 212, 552 S.E.2d 139 (2001).

Denial of Motion for Admission Pro Hac Vice Is Interlocutory. — Order denying plaintiff's motion to reconsider order denying attorney's motion for admission pro hac vice is an interlocutory order and is not immediately appealable; it does not come within the statutory appeals in G.S. 1-277(a) or 7A-27(d). Leonard v. Johns-Manville Sales Corp., 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

Prejudicial error not found where the reviewing court was unable to determine from the record whether local counsel appeared with the out-of-state counsel and there was no record of objection from petitioners. In re Bean, 132 N.C. App. 363, 511 S.E.2d 683 (1999).

Summary Revocation of Grant of Admission Allowed. — The express language of G.S. 84-4.2 allows a superior court judge the authority and discretion to summarily revoke an earlier order granting pro hac vice admission pursuant to G.S. 84-4.1. Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775, 2000 N.C. App. LEXIS 1391 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001), aff'd, 354 N.C. 212, 552 S.E.2d 139 (2001).

Revocation of Pro Hac Vice Status Unwarranted. — Conduct of plaintiff's counsel in Kentucky had been found not to violate Kentucky Rules of Professional Conduct, and N.C. Rev. R. Prof. Conduct 8.5 could not be used to revoke counsel's pro hac vice status under G.S. 84-4.1; a finding that counsel violated N.C. R. Prof. Conduct 4.3 was improper under Revised Rule 8.5, and was a misapprehension of law that was material and changed the outcome. Sisk v. Transylvania Cmty. Hosp., — N.C. App. —, 670 S.E.2d 352, 2009 N.C. App. LEXIS 42 (2009).

G.S. 84-4.1 and 84-4.2 do not require the trial court to make any findings of fact or conclusions of law. Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775, 2000 N.C. App. LEXIS 1391 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001), aff'd, 354 N.C. 212, 552 S.E.2d 139 (2001).

Applied in Resort Dev. Co. v. Phillips, 9 N.C. App. 158, 175 S.E.2d 782 (1970); Pope v. Jacobs, 51 N.C. App. 374, 276 S.E.2d 487 (1981).

Cited in North Carolina Nat'l Bank v. Virginia Carolina Bldrs., 307 N.C. 563, 299 S.E.2d 629 (1983); In re Stroh Brewery Co., 116 N.C. App. 178, 447 S.E.2d 803 (1994); In re Stroh Brewery Co., 116 N.C. App. 178, 447 S.E.2d 803 (1994); State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (1996); Smith v. Richmond County Bd. of Educ., 150 N.C. App. 291, 563 S.E.2d 258, 2002 N.C. App. LEXIS 488 (2002).

§ 84-4.2. Summary revocation of permission granted out-of-state attorneys to practice.

Permission granted under G.S. 84-4.1 may be summarily revoked by the General Court of Justice or any agency, including the North Carolina Utilities Commission, on its own motion and in its discretion. (1967, c. 1199, s. 2; 1971, c. 550, s. 2; 1995, c. 431, s. 6.)

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The express language of this section allows a superior court judge the authority and discretion to summarily revoke an earlier order granting pro hac vice admission pursuant to G.S. 84-4.1. Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775, 2000 N.C. App. LEXIS 1391 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001), aff'd, 354 N.C. 212, 552 S.E.2d 139 (2001).

G.S. 84-4.1 and 84-4.2 do not require the trial court to make any findings of fact or conclusions of law. Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775, 2000 N.C. App. LEXIS 1391 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001), aff'd, 354 N.C. 212, 552 S.E.2d 139 (2001).

The application of this section is purely discretionary; thus, this section allows revocation where there was no change in circumstances, no misconduct, and no other evidence to "warrant" the revocation. Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775, 2000 N.C. App. LEXIS 1391 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001), aff'd, 354 N.C. 212, 552 S.E.2d 139 (2001).

§ 84-5. Prohibition as to practice of law by corporation.

(a) It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State, or before any judicial body or the North Carolina Industrial Commission, Utilities Commission, or the Employment Security Commission, or hold itself out to the public or advertise as being entitled to practice law; and no corporation shall organize corporations, or draw agreements, or other legal documents, or draw wills, or practice law, or give legal advice, or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular. The provisions of this section shall be in addition to and not in lieu of any other provisions of Chapter 84. Provided, that nothing in this section shall be construed to prohibit a banking corporation authorized and licensed to act in a fiduciary capacity from performing any clerical, accounting, financial or business acts required of it in the performance of its duties as a fiduciary or from performing ministerial and clerical acts in the preparation and filing of such tax returns as are so required, or from discussing the business and financial aspects of fiduciary relationships. Provided, however, this section shall not apply to corporations authorized to practice law under the provisions of Chapter 55B of the General Statutes of North Carolina.

To further clarify the foregoing provisions of this section as they apply to corporations which are authorized and licensed to act in a fiduciary capacity:

(1) A corporation authorized and licensed to act in a fiduciary capacity shall not:
  a. Draw wills or trust instruments; provided that this shall not be construed to prohibit an employee of such corporation from conferring and cooperating with an attorney who is not a salaried employee of the corporation, at the request of such attorney, in connection with the attorney's performance of services for a client who desires to appoint the corporation executor or trustee or otherwise to utilize the fiduciary services of the corporation.
  b. Give legal advice or legal counsel, orally or written, to any customer or prospective customer or to any person who is considering renunciation of the right to qualify as executor or administrator or who proposes to resign as guardian or trustee, or to any other person, firm or corporation.
  c. Advertise to perform any of the acts prohibited herein; solicit to perform any of the acts prohibited herein; or offer to perform any of the acts prohibited herein.

(2) Except as provided in subsection (b) of this section, when any of the following acts are to be performed in connection with the fiduciary activities of such a corporation, said acts shall be performed for the corporation by a duly licensed attorney, not a salaried employee of the corporation, retained to perform legal services required in connection with the particular estate, trust or other fiduciary matter:
  a. Offering wills for probate.
  b. Preparing and publishing notice of administration to creditors.

c. Handling formal court proceedings.
d. Drafting legal papers or giving legal advice to spouses concerning rights to an elective share under Article 1A of Chapter 30 of the General Statutes.
e. Resolving questions of domicile and residence of a decedent.
f. Handling proceedings involving year's allowances of widows and children.
g. Drafting deeds, notes, deeds of trust, leases, options and other contracts.
h. Drafting instruments releasing deeds of trust.
i. Drafting assignments of rent.
j. Drafting any formal legal document to be used in the discharge of the corporate fiduciary's duty.
k. In matters involving estate and inheritance taxes, gift taxes, and federal and State income taxes:
  1. Preparing and filing protests or claims for refund, except requests for a refund based on mathematical or clerical errors in tax returns filed by it as a fiduciary.
  2. Conferring with tax authorities regarding protests or claims for refund, except those based on mathematical or clerical errors in tax returns filed by it as a fiduciary.
  3. Handling petitions to the tax court.
l. Performing legal services in insolvency proceedings or before a referee in bankruptcy or in court.
m. In connection with the administration of an estate or trust:
  1. Making application for letters testamentary or letters of administration.
  2. Abstracting or passing upon title to property.
  3. Handling litigation relating to claims by or against the estate or trust.
  4. Handling foreclosure proceedings of deeds of trust or other security instruments which are in default.

(3) When any of the following acts are to be performed in connection with the fiduciary activities of such a corporation, the corporation shall comply with the following:
a. The initial opening and inventorying of safe deposit boxes in connection with the administration of an estate for which the corporation is executor or administrator shall be handled by, or with the advice of, an attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services required in connection with that particular estate.
b. The furnishing of a beneficiary with applicable portions of a testator's will relating to such beneficiary shall, if accompanied by any legal advice or opinion, be handled by, or with the advice of, an attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services required in connection with that particular estate or matter.
c. In matters involving estate and inheritance taxes and federal and State income taxes, the corporation shall not execute waivers of statutes of limitations without the advice of an attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services in connection with that particular estate or matter.
d. An attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services required in connection with an estate or trust shall be furnished copies of inventories

and accounts proposed for filing with any court and proposed federal estate and North Carolina inheritance tax returns and, on request, copies of proposed income and intangibles tax returns, and shall be afforded an opportunity to advise and counsel the corporate fiduciary concerning them prior to filing.

(b) Nothing in this section shall prohibit an attorney retained by a corporation, whether or not the attorney is also a salaried employee of the corporation, from representing the corporation or an affiliate, or from representing an officer, director, or employee of the corporation or an affiliate in any matter arising in connection with the course and scope of the employment of the officer, director, or employee. Notwithstanding the provisions of this subsection, the attorney providing such representation shall be governed by and subject to all of the Rules of Professional Conduct of the North Carolina State Bar to the same extent as all other attorneys licensed by this State. (1931, c. 157, s. 2; 1937, c. 155, s. 2; 1955, c. 526, s. 2; 1969, c. 718, s. 20; 1971, c. 747; 1997-203, s. 1; 2000-178, s. 8.)

Cross References. — As to right of elective share, see G.S. 30-3.1 et seq.

Legal Periodicals. — For comment on the 1955 amendment, see 33 N.C.L. Rev. 528 (1952).

For comment on tax and corporate aspects of professional incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

For note on the unauthorized practice of law by corporations, see 65 N.C.L. Rev. 1422 (1987).

For 1997 legislative survey, see 20 Campbell L. Rev. 389 (1998).

For a comment on ethical and legislative considerations of multidisciplinary practices, see 36 Wake Forest L. Rev. 193 (2001).

CASE NOTES

Purpose. — The main purpose of this section is to prohibit corporations from performing legal services for others. Duke Power Co. v. Daniels, 86 N.C. App. 469, 358 S.E.2d 87 (1987).

A licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986).

Signing of Complaint by Employee Was Not Unauthorized Practice of Law. — Electric utility company, by having its lay employee sign a complaint in a small claim action to collect an unpaid power bill, did not practice law in violation of the provisions of this section. Duke Power Co. v. Daniels, 86 N.C. App. 469, 358 S.E.2d 87 (1987).

A private cause of action did not exist for an alleged unauthorized practice of law by a corporation; therefore, decedent's heirs could not recover for an alleged breach of fiduciary duty by a university that had drafted a will for the decedent whereby the decedent transferred her assets to the university. Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 563 (2002).

Cited in In re Stroh Brewery Co., 116 N.C. App. 178, 447 S.E.2d 803 (1994).

§ 84-5.1. Rendering of legal services by certain nonprofit corporations.

(a) Subject to the rules and regulations of the North Carolina State Bar, as approved by the Supreme Court of North Carolina, a nonprofit corporation, tax exempt under 26 U.S.C. § 501(c)(3), organized or authorized under Chapter 55A of the General Statutes of North Carolina and operating as a public interest law firm as defined by the applicable Internal Revenue Service guidelines or for the primary purpose of rendering indigent legal services, may render such services provided by attorneys duly licensed to practice law in North Carolina, for the purposes for which the nonprofit corporation was organized. The nonprofit corporation must have a governing structure that does not permit an individual or group of individuals other than an attorney duly licensed to practice law in North Carolina to control the manner or course of the legal services rendered and must continually satisfy the criteria established by the Internal Revenue Service for 26 U.S.C. § 501(c)(3) status, whether or not any action has been taken to revoke that status.

(b) In no instance may legal services rendered by a nonprofit corporation under subsection (a) of this section be conditioned upon the purchase or payment for any product, good, or service other than the legal service rendered. (1977, c. 841, s. 1; 2009-231, s. 1.)

Effect of Amendments. — Session Laws 2009-231, s. 1, effective June 30, 2009, in the section catchline, deleted "indigent" preceding "legal" and inserted "certain"; designated the previously existing provisions as subsection (a); rewrote subsection (a); and added subsection (b).

§ 84-6. Exacting fee for conducting foreclosures prohibited to all except licensed attorneys.

It shall be unlawful to exact, charge, or receive any attorney's fee for the foreclosure of any mortgage under power of sale, unless the foreclosure is conducted by licensed attorney-at-law of North Carolina, and unless the full amount charged as attorney's fee is actually paid to and received and retained by such attorney, without being directly or indirectly shared with or rebated to anyone else, and it shall be unlawful for any such attorney to make any showing that he has received such a fee unless he has received the same, or to share with or rebate to any other person, firm, or corporation such fee or any part thereof received by him; but such attorney may divide such fee with another licensed attorney-at-law maintaining his own place of business and not an officer or employee of the foreclosing party, if such attorney has assisted in performing the services for which the fee is paid, or resides in a place other than that where the foreclosure proceedings are conducted, and has forwarded the case to the attorney conducting such foreclosure. (1931, c. 157, s. 3.)

§ 84-7. District attorneys, upon application, to bring injunction or criminal proceedings.

The district attorney of any of the superior courts shall, upon the application of any member of the Bar, or of any bar association, of the State of North Carolina, bring such action in the name of the State as may be proper to enjoin any such person, corporation, or association of persons who it is alleged are violating the provisions of G.S. 84-4 to 84-8, and it shall be the duty of the district attorneys of this State to indict any person, corporation, or association of persons upon the receipt of information of the violation of the provisions of G.S. 84-4 to 84-8. (1931, c. 157, s. 4; 1973, c. 47, s. 2.)

Cross References. — As to the power of the North Carolina State Bar to investigate and enjoin unauthorized practice of law, see G.S. 84-37.

CASE NOTES

Cited in North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958); In re Medley, — Bankr. —, 2005 Bankr. LEXIS 2290 (Bankr. M.D.N.C. Nov. 10, 2005).

§ 84-8. Punishment for violations; legal clinics of law schools and certain law students and lawyers excepted.

Any person, corporation, or association of persons violating the provisions of G.S. 84-4 to G.S. 84-7 shall be guilty of a Class 1 misdemeanor. The provisions of G.S. 84-4 to G.S. 84-7 shall not apply to the following:

(1) Any law school conducting a legal clinic and receiving as its clientage only those persons unable financially to compensate for legal advice or services rendered and any law student permitted by the North Carolina State Bar to act as a legal intern in such a legal clinic.

(2) Any law student permitted by the North Carolina State Bar to act as a legal intern for a federal, state, or local government agency.

(3) Any lawyer licensed by another state and permitted by the North Carolina State Bar to represent indigent clients on a pro bono basis under the supervision of active members employed by nonprofit corporations qualified to render legal services pursuant to G.S. 84-5.1. This provision does not apply to a lawyer whose license has been suspended or revoked in any state. (1931, c. 157, s. 5; c. 347; 1993, c. 539, s. 597; 1994, Ex. Sess., c. 24, s. 14(c); 2007-200, s. 3.)

CASE NOTES

Cited in Beyer v. N.C. Div. of Mental Health, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 16968 (W.D.N.C. Oct. 16, 2001); Olvera v. Edmundson, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 15284 (W.D.N.C. Sept. 21, 2001); In re Medley, — Bankr. —, 2005 Bankr. LEXIS 2290 (Bankr. M.D.N.C. Nov. 10, 2005); In re Langford, — Bankr. —, 2005 Bankr. LEXIS 3201 (Bankr. M.D.N.C. Nov. 9, 2005); State v. Williams, 186 N.C. App. 233, 650 S.E.2d 607, 2007 N.C. App. LEXIS 2122 (2007).

§ 84-9. Unlawful for anyone except attorney to appear for creditor in insolvency and certain other proceedings.

It shall be unlawful for any corporation, or any firm or other association of persons other than a law firm, or for any individual other than an attorney duly licensed to practice law, to appear for another in any bankruptcy or insolvency proceeding, or in any action or proceeding for or growing out of the appointment of a receiver, or in any matter involving an assignment for the benefit of creditors, or to present or vote any claim of another, whether under an assignment or transfer of such claim or in any other manner, in any of the actions, proceedings or matters hereinabove set out. (1931, c. 208, s. 2.)

Cross References. — As to unlawful solicitation of claims of creditors in insolvency, etc., proceedings, see G.S. 23-46.

§ 84-10. Violation of G.S. 84-9 a misdemeanor.

Any individual, corporation, or firm or other association of persons violating any provision of G.S. 84-9 shall be guilty of a Class 1 misdemeanor. (1931, c. 208, s. 3; 1993, c. 539, s. 598; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

ARTICLE 2.

Relation to Client.

§ 84-11. Authority filed or produced if requested.

Every attorney who claims to enter an appearance for any person shall, upon being required so to do, produce and file in the clerk's office of the court in which he claims to enter an appearance, a power or authority to that effect signed by the persons or some one of them for whom he is about to enter an appearance, or by some person duly authorized in that behalf, otherwise he shall not be allowed so to do: Provided, that when any attorney claims to enter an appearance by virtue of a letter to him directed (whether such letter purport a general or particular employment), and it is necessary for him to retain the letter in his own possession, he shall, on the production of said letter setting forth such employment, be allowed to enter his appearance, and the clerk shall make a note to that effect upon the docket. (R.C., c. 31, s. 57; Code, s. 29; Rev., s. 213; C.S., s. 200.)

Cross References. — As to appearance by attorney, see G.S. 1-11.

Legal Periodicals. — For essay, "Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy," see 65 N.C.L. Rev. 315 (1987).

CASE NOTES

Sufficiency of Writing. — The power of attorney which a lawyer may be required to file, pursuant to this section, is some writing addressed to him by the client or an agent for the client. Therefore, letters written by the client to third persons expressing gratification because of the employment of a particular attorney will not suffice to supply the want of power. Day v. Adams, 63 N.C. 254 (1869).

A power of attorney, signed by the purchaser of a note, in the name of the payee, is sufficient authority under this section for an attorney-at-law to appear in a cause in court, although the agent has no written authority to make the power. Johnson ex rel. Adams v. Sikes, 49 N.C. 70 (1856).

A power of attorney given by a married woman to dismiss an action need not be registered. Hollingsworth v. Harman, 83 N.C. 153 (1880).

Right to Question Authority of Attorney. — While an attorney who claims to enter an appearance for any party to an action may be required to produce and file a power or authority as provided in this section, once an attorney has entered an appearance and has been recognized by the court as an attorney in the cause, the opposite party may not call in question his authority. Henderson v. Henderson, 232 N.C. 1, 59 S.E.2d 227 (1950).

Time of Demand for Authority. — The defendant has the right, because of this section to demand the authority at the return term of a summons. Reece v. Reece, 66 N.C. 377 (1872).

If the demand for the power of attorney is made at the return term, it is the practice and within the discretion of the judge to extend the time; if, however, such demand is not made at the proper time, and before the right to appear has been recognized, it comes too late, unless there are peculiar circumstances tending to excuse the party for not making it in apt time. Reece v. Reece, 66 N.C. 377 (1872).

After an attorney has entered an appearance and has been recognized by the court as attorney in the cause, no written authority can be required of him at a subsequent time. This means that the opposite party shall not call in question his authority, unless he does so within the time and in accordance with the provision of this section. Day v. Adams, 63 N.C. 254 (1869); City of New Bern v. Jones, 63 N.C. 606 (1869).

When Client Present. — If a written authority is required under this section the attorney must produce the same, even if his client is present at the bar of the court. Day v. Adams, 63 N.C. 254 (1869).

Special Appearance for Nonresident. — Upon special appearance of the attorneys of a husband who was a nonresident and a fugitive from justice, and whose property had been attached by his wife, for the purpose of moving to dismiss the action, the court should, on motion made, have required them to file their written authority under this section. Walton v. Walton, 178 N.C. 73, 100 S.E. 176 (1919).

Cited in Byrd v. Trustees of Watts Hosp., 29 N.C. App. 564, 225 S.E.2d 329 (1976).

§ 84-12. Failure to file complaint, attorney liable for costs.

When a plaintiff is compelled to pay the costs of his suit in consequence of a failure on the part of his attorney to file his complaint in proper time, he may sue such attorney for all the costs by him so paid, and the receipt of the clerk may be given in evidence in support of such claim. (1786, c. 253, s. 6; R.C., c. 9, s. 5; Code, s. 22; Rev., s. 214; C.S., s. 201.)

CASE NOTES

This section is not exhaustive, and the courts have power to order counsel to pay costs of cases in which they have been guilty of gross negligence (even of a kind not included in this section), such conduct being a sort of contempt. Ex parte Robins, 63 N.C. 309 (1869).

§ 84-13. Fraudulent practice, attorney liable in double damages.

If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages. (1743, c. 37; R.C., c. 9, s. 6; Code, s. 23; Rev., s. 215; C. S., s. 202.)

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

CASE NOTES

The elements of fraud are: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. Jordan v. Crew, 125 N.C. App. 712, 482 S.E.2d 735 (1997), cert. denied, 346 N.C. 279, 487 S.E.2d 548 (1997).

Constructive Fraud. — Constructive fraud differs from actual fraud in that the intent to deceive is not an essential element. Jordan v. Crew, 125 N.C. App. 712, 482 S.E.2d 735 (1997), cert. denied, 346 N.C. 279, 487 S.E.2d 548 (1997).

Constructive Fraud Shown. — Trustee had a fiduciary relationship to plaintiffs and in the performance of his obligation to file annual accountings defendant trustee did not act openly, fairly, and honestly, which was tantamount to constructive fraud; thus, the trial court did not err in awarding double damages. Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997), cert. denied, 347 N.C. 398, 494 S.E.2d 410 (1997).

Section Not Limited to Actual Fraud Cases. — This section does not limit its applicability to cases of actual fraud. Booher v. Frue, 98 N.C. App. 570, 394 S.E.2d 816 (1990).

Aliens Prevented from Practicing. — No one should be presented to the public under the panoply of such a license (to practice law), against whom an injured suitor would not have the full benefit of such remedy as the laws of the State provide, in the event of fraudulent or negligent practice. An alien could not be admitted to practice, as actions under this section would be removable to the United States courts. Ex parte Thompson, 10 N.C. 355 (1824).

Presumption of Fraud. — The relation of attorney and client is one of a fiduciary character, and gives rise to a presumption of fraud when the former, in dealing with the latter, obtains an advantage. Egerton v. Logan, 81 N.C. 172 (1879).

Fraud Not Found. — Any damages sustained by plaintiffs due to problems with trademarks they thought they were acquiring did not proximately result from any acts or omissions of defendants attorneys, where two corporate officers of plaintiffs companies were informed before the acquisition by a vice-president of defendant company that the trademarks, which were very similar to and thus conflicted with the marks of another company, were not federally registered and that applications for their registration had been rejected; the knowledge of the president or agent of a corporation is imputed to the corporation itself. Jay Group, Ltd. v. Glasgow, 139 N.C. App. 595, 534 S.E.2d 233, 2000 N.C. App. LEXIS 975 (2000), cert. denied, 353 N.C. 265, 546 S.E.2d 100 (2000).

When an attorney mishandles client funds, there is a presumption of fraud as a matter of law, and this section applies. Ehlenbeck v. Patton, 58 Bankr. 149 (W.D.N.C. 1986).

In a bankruptcy proceeding in which client of bankrupt attorney filed a proof of claim relating to attorney's embezzlement of money delivered to him in trust, the bankruptcy judge did not err in finding client's actual damages, then doubling the damages pursuant to this section, and finding the entire amount nondischargeable. Ehlenbeck v. Patton, 58 Bankr. 149 (W.D.N.C. 1986).

The provision for double damages applies only after a factual determination at trial of fraudulent practice by an attorney and, thus, did not apply where plaintiffs accepted defendant's offer of judgment tendered pursuant to G.S. 1A-1, Rule 68. Estate of Wells v. Toms, 129 N.C. App. 413, 500 S.E.2d 105 (1998).

Double Damages Awarded. — Where defendant was successor trustee and administrator of estate the trial court did not err in applying this section and allowing double compensatory damages against defendant. Melvin v. Home Fed. Sav. & Loan Ass'n, 125 N.C. App. 660, 482 S.E.2d 6 (1997), cert. denied, 346 N.C. 281, 487 S.E.2d 551 (1997).

Attorney breached the attorney's fiduciary duty to the two clients by converting funds, which caused a loss to the two clients. Since the attorney's conversion and breach of fiduciary duty were presumed to be fraudulent, the attorney was shown to have committed a fraudulent practice and the two clients were entitled to an award of compensatory damages and an award of double damages pursuant to G.S. 84-13. N.C. State Bar v. Gilbert, 189 N.C. App. 320, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

Double Damages Not Awarded. — Defendants were entitled to summary judgment as to plaintiff's claim for statutory damages pursuant to G.S. 84-13 arising from legal representation, because without a prima facie showing of actual or constructive fraud or any fraudulent practice, no claim for double damages arose under G.S. 84-13. Wilkins v. Safran, 185 N.C. App. 668, 649 S.E.2d 658, 2007 N.C. App. LEXIS 1952 (2007).

Interest Improper on Punitive Double Damages. — Trial court should not have awarded prejudgment interest and post-judgment interest on both the compensatory and the G.S. 84-13 punitive double damage award in the state bar's action against the attorney for reimbursement of funds paid to the two clients after the attorney breached the attorney's fiduciary duty to them and converted their funds. G.S. 24-5(b) only allowed interest to be awarded for compensatory damages. N.C. State Bar v. Gilbert, 189 N.C. App. 320, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

Applied in Sigmon v. Miller-Sharpe, Inc., 197 Bankr. 810 (W.D.N.C. 1996).

Cited in Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992); State v. Baldwin, 125 N.C. App. 530, 482 S.E.2d 1 (1997); Gilbert v. N.C. State Bar, 363 N.C. 70, 678 S.E.2d 602, 2009 N.C. LEXIS 238 (2009).

ARTICLE 3.

Arguments.

§ 84-14: Recodified as G.S. 7A-97 by Session Laws 1995, c. 431, s. 7.

ARTICLE 4.

North Carolina State Bar.

§ 84-15. Creation of North Carolina State Bar as an agency of the State.

There is hereby created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina State Bar. (1933, c. 210, s. 1.)

Legal Periodicals. — For review of this section and those immediately following, see 11 N.C.L. Rev. 191 (1933).

For article on "The Organized Bar in North Carolina," see 30 N.C.L. Rev. 337 (1952).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

CASE NOTES

The purpose of the statute creating the North Carolina State Bar is to enable the Bar to render more effective service in improving the administration of justice, particularly in dealing with the problem of admission to the Bar, and of disciplining and disbarring attorneys-at-law. Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

Effect of Proceedings Before State Bar. — Where the status of plaintiff's license as an attorney was at issue and was finally adjudicated in proceedings before the State Bar and the Bar Council, and plaintiff did not appeal the Bar's order of disbarment, that judgment was conclusive as to those matters which were at issue and determined in those proceedings, and plaintiff could not relitigate the identical issue considered and finally determined in the proceedings before the State Bar. Vann v. North Carolina State Bar, 79 N.C. App. 166, 339 S.E.2d 95 (1986).

Applied in Gilbert v. N.C. State Bar, 363 N.C. 70, 678 S.E.2d 602, 2009 N.C. LEXIS 238 (2009).

Cited in In re Parker, 209 N.C. 693, 184 S.E. 532 (1936); North Carolina State Bar v. Hall, 293 N.C. 539, 238 S.E.2d 521 (1977); North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983); In re Beasley, 151 N.C. App. 569, 566 S.E.2d 125, 2002 N.C. App. LEXIS 760 (2002).

§ 84-16. Membership and privileges.

The membership of the North Carolina State Bar shall consist of two classes, active and inactive.

The active members shall be all persons who have obtained a license or certificate, entitling them to practice law in the State of North Carolina, who have paid the membership dues specified, and who have satisfied all other obligations of membership. No person other than a member of the North Carolina State Bar shall practice in any court of the State except foreign attorneys as provided by statute and natural persons representing themselves.

Inactive members shall be:

(1) All persons who have obtained a license to practice law in the State but who have been found by the Council to be not engaged in the practice of law and not holding themselves out as practicing attorneys and not occupying any public or private positions in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon, adjudicate, or offer an opinion concerning the legal effect of any act, document, or law.

(2) Persons allowed by the Council solely to represent indigent clients on a pro bono basis under the supervision of an active member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1.

All active members shall be required to pay annual membership fees, and shall have the right to vote in elections held by the district bar in the judicial district in which the member resides. If a member desires to vote with the bar of some district in which the member practices, other than that in which the member resides, the member may do so by filing with the Secretary of the North Carolina State Bar a statement in writing that the member desires to vote in the other district; provided, however, that in no case shall the member be entitled to vote in more than one district. (1933, c. 210, s. 2; 1939, c. 21, s. 1; 1941, c. 344, ss. 1, 2, 3; 1969, c. 44, s. 60; c. 1190, s. 52; 1973, c. 1152, s. 1; 1981, c. 788, s. 2; 1983, c. 589, s. 1; 1985, c. 621; 1995, c. 431, s. 8; 2007-200, s. 1.)

Legal Periodicals. — For comment on the 1939 and 1941 amendments, see 17 N.C.L. Rev. 341 (1939), and 19 N.C.L. Rev. 453 (1941).

§ 84-17. Government.

The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar referred to in this Chapter as the "Council." The Council shall be composed of a variable number of councilors equal to the number of judicial districts plus 16, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar who shall be a councilor for one year from the date of expiration of his term as president. Notwithstanding any other provisions of the law, the North Carolina State Bar may borrow money and may acquire, hold, rent, encumber, alienate, lease, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the borrowing of money and the acquisition, rental, encumbering, leasing and sale of real property. The Council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the borrowing of money, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments to this Chapter, and all other matters. There shall be one councilor from each judicial district and 16 additional councilors. The additional councilors shall be allocated and reallocated by the North Carolina State Bar every six years based on the number of active members of each judicial district bar according to the records of the North Carolina State Bar and in accordance with a formula to be adopted by the North Carolina State Bar, to insure an allocation based on lawyer population of each judicial district bar as it relates to the total number of active members of the State Bar.

A councilor whose seat has been eliminated due to a reallocation shall continue to serve on the Council until expiration of the remainder of the current term. A councilor whose judicial district is altered by the General Assembly during the councilor's term shall continue to serve on the Council until the expiration of the term and shall represent the district wherein the councilor resides or with which the councilor has elected to be affiliated. If before the alteration of the judicial district of the councilor the judicial district included both the place of residence and the place of practice of the councilor, and if after the alteration of the judicial district the councilor's place of residence and place of practice are located in different districts, the councilor must, not later than 10 days from the effective date of the alteration of the district, notify the Secretary of the North Carolina State Bar of an election to affiliate with and represent either the councilor's district of residence or district of practice.

In addition to the councilors, there shall be three public members not licensed to practice law in this or any other state who shall be appointed by the Governor. The public members may vote and participate in all matters before the Council to the same extent as councilors elected or appointed from the various judicial districts. (1933, c. 210, s. 3; 1937, c. 51, s. 1; 1955, c. 651, s. 1; 1961, c. 641; 1973, c. 1152, s. 2; 1977, c. 841, s. 2; 1979, c. 570, ss. 1, 2; 1981, c. 788, s. 3; 1985, c. 60, s. 1; 1987, c. 316, s. 1; 1995, c. 431, s. 9; 2007-200, s. 2; 2009-82, s. 1.)

Effect of Amendments. — Session Laws 2009-82, s. 1, effective June 11, 2009, in the first paragraph, in the third sentence, inserted "borrow money and may", "lease" and "borrowing of money and the," and inserted "the borrowing of money" in the middle of the fourth sentence.

Legal Periodicals. — For article on the criminal defendant who proposes or commits perjury, see 17 N.C. Cent. L.J. 157 (1988).

CASE NOTES

Cited in In re Beasley, 151 N.C. App. 569, 566 S.E.2d 125, 2002 N.C. App. LEXIS 760 (2002).

§ 84-18. Terms, election and appointment of councilors.

(a) Except as set out in this section, the terms of councilors are fixed at three years commencing on the first day of January in the year following their election. A year shall be the calendar year. No councilor may serve more than three successive three-year terms but a councilor may serve an unlimited number of three successive three-year terms provided a three-year period of nonservice intervenes in each instance. Any councilor serving a partial term of 18 months or more is considered to have served a full term and shall be eligible to be elected to only two successive three-year terms in addition to the partial term. Any councilor serving a partial term of less than 18 months is eligible to be elected to three successive three-year terms in addition to the partial term. This paragraph shall not apply to officers of the State Bar.

The secretary of a judicial district bar shall notify the secretary-treasurer of the State Bar in writing of any additions to or deletions from the delegation of councilors representing the district within 90 days of the effective date of the change. No new councilor shall assume a seat until official notice of the election has been given to the secretary-treasurer of the State Bar.

Any active member of the North Carolina State Bar is eligible to serve as a councilor from the judicial district in which the member is eligible to vote.

(b) The Council may promulgate rules to govern the election and appointment of councilors. The election and appointment of councilors shall be as follows:

Each judicial district bar shall elect one eligible North Carolina State Bar member for each Council vacancy in the district. Any vacancy occurring after the election, whether caused by resignation, death, reconfiguration of the district by the General Assembly, or otherwise shall be filled by the judicial district bar in which the vacancy occurs. The appointment shall be for the unexpired portion of the term and shall be certified to the Council by the judicial district bar. Any appointed councilor shall be subject to the terms set forth in subsection (a) of G.S. 84-18.

(c) Public members shall serve three-year terms. No public member shall serve more than two complete consecutive terms. The Secretary of the North Carolina State Bar shall promptly inform the Governor when any seat occupied by a public member becomes vacant. The successor shall serve the remainder of the term. Any public member serving a partial term of 18 months or more is considered to have served a full term and is eligible to be elected to only one additional three-year term in addition to the partial term. Any public member serving a partial term of less than 18 months is eligible to be elected to two successive three-year terms in addition to the partial term. (1933, c. 210, s. 4; 1953, c. 1310, s. 1; 1979, c. 570, s. 3; 1981, c. 788, s. 4; 1985, c. 60, ss. 2, 3; 1987, c. 316, s. 2; 1995, c. 431, s. 10.)

§ 84-18.1. Membership and fees of district bars.

(a) The district bar shall be a subdivision of the North Carolina State Bar subject to the general supervisory authority of the Council and may adopt rules, regulations and bylaws that are not inconsistent with this Article. A copy of any rules, regulations and bylaws that are adopted, along with any subsequent amendments, shall be transmitted to the Secretary-Treasurer of the North Carolina State Bar.

(b) Any district bar may from time to time by a majority vote of the members present at a duly called meeting prescribe an annual membership fee to be paid by its active members as a service charge to promote and maintain its administration, activities and programs. The fee shall be in addition to, but shall not exceed, the amount of the membership fee prescribed by G.S. 84-34 for active members of the North Carolina State Bar. The district bar may also charge a late fee, which shall not exceed fifteen dollars ($15.00), for the failure to pay judicial district bar dues on time. The district bar shall mail a written notice to every active member of the district bar at least 30 days before any meeting at which an election is held to impose or increase mandatory district bar dues. Every active member of a district bar which has prescribed an annual membership fee shall keep its secretary-treasurer notified of his correct mailing address and shall pay the prescribed fee at the time and place set forth in the demand for payment mailed to him by its secretary-treasurer. The name of each active member of a district bar who is more than 12 full calendar months in arrears in the payment of any fee shall be furnished by the secretary-treasurer of the district bar to the Council. In the exercise of its powers as set forth in G.S. 84-23, the Council shall thereupon take disciplinary or other action with reference to the delinquent as it considers necessary and proper. (1969, c. 241; 1983, c. 390, s. 1; 1995, c. 431, s. 11; 2005-396, s. 2.)

OPINIONS OF ATTORNEY GENERAL

The BarCARES Program could be a lawful use of mandatory bar dues imposed by local district bar organizations as long as the program was restricted to attorney members of the bar and was directly related to addressing identifiable problems that were affecting, or that might in the future affect, an attorney's competence to practice law or professional conduct. See opinion of Attorney General to L. Thomas Lunsford, II, Executive Director, North Carolina State Bar, 2001 N.C. AG LEXIS 24 (8/16/01).

§ 84-19. Judicial districts definition.

For purposes of this Article, the term "judicial district" refers to prosecutorial districts established by the General Assembly and the term "district bar" means the bar of a judicial district as defined by this section. (1933, c. 210, s. 5; 1955, c. 651, s. 2; 1979, c. 570, s. 4; 1987, c. 316, s. 3; 1995, c. 431, s. 12.)

§ 84-20. Compensation of councilors.

The members of the Council and members of committees when actually engaged in the performance of their duties, including committees sitting upon disbarment proceedings, shall receive as compensation for the time spent in attending meetings an amount to be determined by the Council, subject to approval of the North Carolina Supreme Court, and shall receive actual expenses of travel and subsistence while engaged in their duties provided that for transportation by use of private automobile the expense of travel shall not exceed the business standard mileage rate set by the Internal Revenue Service per mile of travel. The Council shall determine per diem and mileage to be paid. The allowance fixed by the Council shall be paid by the secretary-treasurer of the North Carolina State Bar upon presentation of appropriate documentation by each member. (1933, c. 210, s. 6; 1935, c. 34; 1953, c. 1310, s. 2; 1971, c. 13, s. 1; 1995, c. 431, s. 13; 2006-66, s. 22.23; 2006-221, s. 24.)

§ 84-21. Organization of Council; publication of rules, regulations and bylaws.

The rules and regulations adopted by the Council under this Article may be amended by the Council from time to time in any manner not inconsistent with this Article. Copies of all rules and regulations and of all amendments adopted by the Council shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by the North Carolina Supreme Court upon its minutes, and published in the next ensuing number of the North Carolina Reports and in the North Carolina Administrative Code: Provided, that the court may decline to have so entered upon its minutes any rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article. (1933, c. 210, s. 7; 1991, c. 418, s. 7; 1995, c. 431, s. 14.)

Legal Periodicals. — For article on the criminal defendant who proposes or commits perjury, see 17 N.C. Cent. L.J. 157 (1988).

CASE NOTES

Promulgation of Rules. — A rule requiring a candidate for the bar exam to have graduated from an ABA-accredited law school was properly adopted, even though it was not promulgated as a rule under the Administrative Procedure Act, as this section gives the State Bar Council specific directions on how to adopt rules, which the Council complied with. Bring v. North Carolina State Bar, 348 N.C. 655, 501 S.E.2d 907 (1998).

North Carolina State Bar could not rely upon the felonious misconduct portion of N.C. St. Bar R. B.0111(e) to avoid dismissal of its claims for relief because that portion of the rule was not properly adopted under G.S. 84-21, the enabling statute governing the state bar's rulemaking authority; moreover, G.S. 84-21 did not contain a provision permitting only substantial compliance with its requirements, in contrast to G.S. 150B-18, and the more specific directions of G.S. 84-21 governed over the general rule-making provision of the North Carolina Administrative Procedures Act. N.C. State Bar v. Brewer, 183 N.C. App. 229, 644 S.E.2d 573, 2007 N.C. App. LEXIS 1040 (2007).

Promulgation May Be Refused. — This section empowers the Chief Justice of the Supreme Court to determine whether rules of the Board of Law Examiners are in compliance with this Article, of which G.S. 84-24 is a part, and to refuse them promulgation if they do not so comply. Keenan v. Board of Law Exmrs., 317 F. Supp. 1350 (E.D.N.C. 1970).

Cited in In re Willis, 286 N.C. 207, 209 S.E.2d 457 (1974); In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); In re Beasley, 151 N.C. App. 569, 566 S.E.2d 125, 2002 N.C. App. LEXIS 760 (2002).

§ 84-22. Officers and committees of the North Carolina State Bar.

The officers of the North Carolina State Bar and the Council shall consist of a president, president-elect, vice-president and an immediate past president, who shall be deemed members of the Council in all respects. The president, president-elect and vice-president need not be members of the Council at the time of their election. There shall be a secretary-treasurer who shall also have the title of executive director, but who shall not be a member of the Council. All officers shall be elected annually by the Council at an election to take place at the annual meeting of the North Carolina State Bar. The regular term of all officers is one year. The Council is the judge of the election and qualifications of its members.

In addition to the committees and commissions as may be specifically established or authorized by law, the North Carolina State Bar may have committees, standing or special, as from time to time the Council deems appropriate for the proper discharge of the duties and functions of the North Carolina State Bar. The Council shall determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to each committee. Any committee may, at the discretion of the appointing or electing authority, be composed of Council members or members of the North Carolina State Bar who are not members of the Council, or of lay persons, or of any combination. (1933, c. 210, s. 8; 1941, c. 344, ss. 4, 5; 1973, c. 1152, s. 3; 1979, c. 570, s. 5; 1995, c. 431, s. 15.)

§ 84-23. Powers of Council.

(a) The Council is vested, as an agency of the State, with the authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals. Among other powers, the Council shall administer this Article; take actions that are necessary to ensure the competence of lawyers and State Bar certified paralegals; formulate and adopt rules of professional ethics and conduct; investigate and prosecute matters of professional misconduct; grant or deny petitions for reinstatement; resolve questions pertaining to membership status; arbitrate disputes concerning legal fees; certify legal specialists and paralegals and charge fees to applicants and participants necessary to administer these certification programs; determine whether a member is disabled; maintain an annual registry of interstate and international law firms doing business in this State; and formulate and adopt procedures for accomplishing these purposes. The Council may do all things necessary in the furtherance of the purposes of this Article that are not otherwise prohibited by law.

(b) The Council or any committee of the Council, including the Client Security Fund and the Disciplinary Hearing Commission or any committee of the Commission, may subpoena financial records of any licensed lawyers, lawyers whose licenses have been suspended, or disbarred lawyers, relating to any account into which client or fiduciary funds have been deposited.

(c) The Council may publish an official journal concerning matters of interest to the legal profession.

(d) The Council may acquire, hold, rent, encumber, alienate, lease, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing and sale of real property. The Council may borrow money upon its bonds, notes, debentures, or other evidences of indebtedness sold through public or private sale pursuant to a loan agreement or a trust agreement or indenture with a trustee, with such borrowing either unsecured or secured by a mortgage on the Council's interest in real or personal property, and engage and contract with attorneys, underwriters, financial advisors, and other parties as necessary for such borrowing, with such borrowing and security subject to the approval of the Governor and the Council of State. The Council may utilize the services of the Purchase and Contract Division of the Department of Administration to procure personal property, in accordance with the provisions of Article 3 of Chapter 143 of the General Statutes. (1933, c. 210, s. 9; 1935, c. 74, s. 1; 1937, c. 51, s. 2; 1975, c. 582, s. 3; 1977, c. 841, s. 2; 1995, c. 431, s. 16; 2003-116, s. 2; 2004-174, s. 1; 2005-396, s. 4; 2009-82, s. 2.)

Effect of Amendments. — Session Laws 2009-82, s. 2, effective June 11, 2009, in subsection (d), in the first sentence, inserted "lease", and added the second sentence.

Legal Periodicals. — For article on rules, ethics and reform in connection with transferring North Carolina real estate, see 49 N.C.L. Rev. 593 (1971).

For article on the criminal defendant who proposes or commits perjury, see 17 N.C. Cent. L.J. 157 (1988).

CASE NOTES

Setting Aside Judgment of Disbarment. — The court is without authority to set aside a judgment of disbarment on motion, especially since the enactment of this and subsequent sections. State v. Hollingsworth, 206 N.C. 739, 175 S.E.2d 99 (1934).

North Carolina State Bar Has Jurisdiction over Unethical Conduct of Counsel. — While the court has the inherent power to act whenever it is made to appear that the conduct of counsel in a cause pending in court is improper or unethical, questions of propriety and ethics are ordinarily for the consideration of the North Carolina State Bar which is now vested with jurisdiction over such matters. McMichael v. Proctor, 243 N.C. 479, 91 S.E.2d 231 (1956).

Error in Dismissing Grievance Filed with State Bar. — North Carolina State Bar and the trial courts of this State share concurrent jurisdiction over matters of attorney discipline; therefore, where individual filed a civil claim against attorney for alleged impropriety in handling an estate, and also filed a grievance with the State Bar alleging that the attorney's actions violated the Rules of Professional Conduct, the trial court erred in naming the State Bar as a party and dismissing the grievance proceeding against the defendant. North Carolina State Bar v. Randolph, 325 N.C. 699, 386 S.E.2d 185 (1989).

Confession of Guilt. — Where an attorney has confessed in open court to four crimes, all involving moral turpitude, and he has been disbarred from practicing in the district court of the United States, disbarment must ultimately result regardless of this and the following sections. In re Brittain, 214 N.C. 95, 197 S.E. 705 (1938).

Applied in Gilbert v. N.C. State Bar, 363 N.C. 70, 678 S.E.2d 602, 2009 N.C. LEXIS 238 (2009).

Cited in In re Suspension of Right to Practice Law of Palmer, 32 N.C. App. 449, 232 S.E.2d 497 (1977); In re Garrison, 44 N.C. App. 158, 260 S.E.2d 445 (1979); North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982); North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983); In re Beasley, 151 N.C. App. 569, 566 S.E.2d 125, 2002 N.C. App. LEXIS 760 (2002).

§ 84-23.1. Prepaid legal services.

(a) This section is in addition to and not a limitation of the powers and responsibilities of the council set out in G.S. 84-23. To the extent that this section deals with the same powers and responsibilities it shall be taken to be in amplification of those powers and not in derogation thereof.

(b) Repealed by Session Laws 1991, c. 210, s. 1.

(b1) All organizations offering prepaid legal services plans shall register those plans with the North Carolina State Bar Council on forms provided by the Council. Each plan shall be registered prior to its implementation or operation in this State and shall renew its registration with the State Bar annually.

(b2) Every plan shall pay an administrative fee to the Council for the initial registration and an annual renewal fee in amounts determined by the Council.

(c) Repealed by Session Laws 1991, c. 210, s. 1.

(d) Notwithstanding registration of the plan with the North Carolina State Bar Council pursuant to subsection (b1), any plan for prepaid legal services is subject to regulation under Chapter 58 of the General Statutes if offered by a company engaged in the insurance business or if the plan itself constitutes the offering of insurance.

(e) Repealed by Session Laws 1991, c. 210, s. 1. (1975, c. 707, s. 1; 1991, c. 210, s. 1; 2005-396, ss. 5, 6.)

Legal Periodicals. — For article, "Student Legal Services at the University of North Carolina at Chapel Hill," see 7 N.C. Cent. L.J. 286 (1976).

For article, "The Advent of Prepaid Legal Services in North Carolina," see 13 Wake Forest L. Rev. 271 (1977).

§ 84-24. Admission to practice.

For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of 11 members of the Bar, elected by the Council, who need not be members of the Council. No teacher in any law school, however, shall be eligible. The members of the Board of Law Examiners elected from the Bar shall each hold office for a term of three years.

The Board of Law Examiners shall elect a member of the Board as chair thereof, and the Board may employ an executive secretary and provide such assistance as may be required to enable the Board to perform its duties promptly and properly. The chair and any employees shall serve for a period of time determined by the Board.

The examination shall be held in the manner and at the times as the Board of Law Examiners may determine.

The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law and to this end the Board of Law Examiners shall have the power of subpoena and to summons and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the inquiry and shall also have authority to employ and provide assistance as may be required to enable it to perform its duties promptly and properly. Records, papers, and other documents containing information collected and compiled by the Board or its members or employees as a result of investigations, inquiries, or interviews conducted in connection with examinations or licensing matters, are not public records within the meaning of Chapter 132 of the General Statutes.

All applicants for admission to the Bar shall be fingerprinted to determine whether the applicant has a record of criminal conviction in this State or in any other state or jurisdiction. The information obtained as a result of the fingerprinting of an applicant shall be limited to the official use of the Board of Law Examiners in determining the character and general fitness of the applicant.

The Department of Justice may provide a criminal record check to the Board of Law Examiners for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this section.

The Board of Law Examiners, subject to the approval of the Council, shall by majority vote, from time to time, make, alter, and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of the change.

All rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in G.S. 84-21 in relation to the certificate of organization and the rules and regulations of the Council.

Whenever the Council shall order the restoration of license to any person as authorized by G.S. 84-32, it shall be the duty of the Board of Law Examiners to issue a written license to the person, noting thereon that the license is issued in compliance with an order of the Council, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance.

Appeals from the Board shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G.S. 84-21 or as may be promulgated by the Supreme Court. (1933, c. 210, s. 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, s. 6; 1947, c. 77; 1951, c. 991, s. 1; 1953, c. 1012; 1965, cc. 65, 725; 1973, c. 13; 1977, c. 841, s. 2; 1983, c. 177; 1991, c. 210, s. 4; 1995, c. 431, s. 17; 2002-147, s. 5.)

Cross References. — As to discipline and disbarment, see G.S. 84-28. As to restoration of license to practice law, see G.S. 84-32.

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Legal Periodicals. — For note on "Admission to the Bar — 'Good Moral Character' — Constitutional Protections," see 45 N.C.L. Rev. 1008 (1967).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

For article, "Improving the Fitness Inquiry of the North Carolina Bar Application," see 81 N.C.L. Rev. 2179 (2003).

CASE NOTES

Constitutionality. — The "character and general fitness" requirement of this section and the "good moral character" requirement of the Rules Governing Admission to the Practice of Law are constitutionally permissible standards. In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975).

While a state cannot exclude a person from the practice of law for reasons that contravene the Due Process or Equal Protection Clauses of U.S. Const., Amend. XIV, a state can require high standards for admission to the bar, including good moral character and proficiency in its laws, so long as the qualifying standards have a rational connection with the applicant's fitness or capacity to practice law. In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975).

The term "good moral character," although broad, has been so extensively used as a standard that its long usage and the case law surrounding that usage have given the term well-defined contours which make it a constitutionally appropriate standard. In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975).

This section does not unconstitutionally delegate legislative power by authorizing the Board of Law Examiners to make rules governing admission to the bar to "promote the welfare of the State and the profession." Bring v. North Carolina State Bar, 348 N.C. 655, 501 S.E.2d 907 (1998).

The constitutional power to establish the qualifications for admission to the bar rests in the legislature, which may delegate a limited portion of its power as to some specific subject matter if it prescribes the standards under which the agency is to exercise the delegated authority. Bowens v. Board of Law Exmrs., 57 N.C. App. 78, 291 S.E.2d 170 (1982).

Board Able to Establish Guidelines. — The requirement for a legal education would be of no importance if the Board were unable to establish guidelines to review whether a law school's curriculum satisfies the threshold requirement. Bring v. North Carolina State Bar, 126 N.C. App. 655, 486 S.E.2d 236 (1997), appeal denied, 347 N.C. 135, 492 S.E.2d 18 (1997), aff'd, 348 N.C. 655, 501 S.E.2d 907 (1998).

The Board of Law Examiners is an "administrative agency," with both judicial and delegated legislative powers. Keenan v. Board of Law Exmrs., 317 F. Supp. 1350 (E.D.N.C. 1970).

This section establishes the Board of Law Examiners as an administrative agency of the State, and its findings of fact are conclusive on appeal if properly supported by the evidence. In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975).

Rule-Making Power Delegated. — The North Carolina General Assembly, in this section, has delegated its rule-making power to the Board of Law Examiners and has determined that the Board shall also apply its own rules "to the particular case." Keenan v. Board of Law Exmrs., 317 F. Supp. 1350 (E.D.N.C. 1970).

In licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975).

The Legislature is not equipped to investigate law schools with graduates applying for admission to the bar to determine whether the schools meet the minimum requirement; thus, this ministerial task has properly been delegated to the Board of Law Examiners. Bring v. North Carolina State Bar, 126 N.C. App. 655, 486 S.E.2d 236 (1997), appeal denied, 347 N.C. 135, 492 S.E.2d 18 (1997), aff'd, 348 N.C. 655, 501 S.E.2d 907 (1998).

A person does not have a natural or constitutional right to practice law; it is a privilege or franchise to be earned by hard study and compliance with the qualifications for admission to practice law prescribed by law. By virtue of its police power a state is authorized to establish qualifications for admission to practice law in its jurisdiction. Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

The determination of proficiency is a ministerial function, not a matter of managing public affairs. The Board of Law Examiners is, therefore, not required to make important policy choices which might just as easily be made by the elected representatives in the legislature, but merely to compile and administer examinations. Form, grading and logistics only are left to the board, which does no violence to constitutional principle. Bowens v. Board of Law Exmrs., 57 N.C. App. 78, 291 S.E.2d 170 (1982).

Purpose of Board. — The Board of Law Examiners was created for the purpose of examining applicants and providing rules and regulations for admission to the bar. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

It is not arbitrary to limit permission to take the bar examination to a certain group of persons if the limitation is reasonably related to a legitimate objective, such as fitness to practice law. Bring v. North Carolina State Bar, 126 N.C. App. 655, 486 S.E.2d 236 (1997), appeal denied, 347 N.C. 135, 492 S.E.2d 18 (1997), aff'd, 348 N.C. 655, 501 S.E.2d 907 (1998).

Investigation of Individual Schools' Qualifications Unreasonable. — Requiring the Board of Law Examiners to investigate the individual qualifications of every nonaccredited law school each time a graduate from a nonaccredited law school applies for admission to the state's bar would place an unreasonable burden on the Board. Bring v. North Carolina State Bar, 126 N.C. App. 655, 486 S.E.2d 236 (1997), appeal denied, 347 N.C. 135, 492 S.E.2d 18 (1997), aff'd, 348 N.C. 655, 501 S.E.2d 907 (1998).

The policy requiring that applicants for admission to the North Carolina bar graduate from an ABA approved law school is a reasonable means of assuring that applicants have a competent legal education and facilitates the legislative goal of protection of the public interest by the maintenance of a competent Bar. Bring v. North Carolina State Bar, 126 N.C. App. 655, 486 S.E.2d 236 (1997), appeal denied, 347 N.C. 135, 492 S.E.2d 18 (1997), aff'd, 348 N.C. 655, 501 S.E.2d 907 (1998).

Character Evaluation and Examination Are Separate and Distinct Requirements. — In an action to obtain admission to the North Carolina Bar, it was found that the Board of Law Examiners properly advised the applicant for admission to the practice of law that he would be permitted to take the bar examination but that the result would be sealed until the board has concluded its character evaluation, and the board was not required subsequently to divulge applicant's examination result, since the result was irrelevant to the matter of applicant's character evaluation, and even if applicant failed the examination, this appeal would not be moot since it concerned applicant's character, a separate and distinct matter. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Applicant Has Burden of Showing Compliance with Residence Requirement. — The burden of showing that he has the qualifications to comply with requirements of Rule Five of the Rules Governing Admission to Practice of Law in North Carolina, adopted under authority of this Article, and specifying the resident requirement, rests upon the applicant, and if the proof offered by him fails to satisfy the Board of Law Examiners that he has the qualifications required by the rule, it is their duty to deny his application to take the examination for admission. Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

The findings of fact made by the Board of Law Examiners supported by the evidence are conclusive upon a reviewing court, and are not within the scope of reviewing powers. Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

As long as there is evidence in the record which rationally justifies a finding that the applicant has failed to establish his moral fitness to practice law, this court cannot substitute its judgment for that of the Board of Law Examiners. In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975).

Board's Duty to Resolve Factual Disputes. — When a decision of the Board of Law Examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Under this section the board is the primary investigatory and fact-finding agency in the bar admissions process. When factual disputes are fairly brought before it, it must resolve them. No other agency exists to make such resolutions. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

In determining an applicant's fitness to practice law, the Board of Law Examiners should not conduct a hearing to consider applicant's alleged commission of specific acts of misconduct and, without a finding that he committed the prior acts, use his denial that he committed them as substantive evidence of his lack of moral character; rather, the board should first determine whether in fact the applicant committed the prior acts of misconduct and, if it determines that he did, it must then say whether these acts so reflect on the applicant's character that they are sufficient to rebut his prima facie showing of good character. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Because the board is free "to make or cause to be made such examinations and investigations as may be deemed necessary," it was not improper for the board to question the witness before the 1987 hearing in the course of its investigation without first notifying applicant, and furthermore, the witness's adverse testimony at the hearing regarding the events surrounding the loan did not constitute a protest. In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

Detailing of Facts on Which Conclusion Is Based. — In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the board need only weigh the evidence and determine whether the applicant has shown his good moral character. However, even in such cases, while it might be permissible for the board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where the only facts which could support a conclusion that the applicant did not show good moral character are in sharp dispute, the board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Proving Specific Acts of Misconduct. — When an applicant makes a prima facie showing of his good moral character and, to rebut the showing, the board relies on specific acts of misconduct the commission of which is denied by the applicant, the board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the board from having to prove such specific acts of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

To place the burden on the applicant to disprove acts of misconduct would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the board's burden of proving particular instances of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

When an applicant makes a prima facie showing of good moral character and the board, to rebut the showing, relies on specific acts of misconduct the commission of which are denied by the applicant, the board must prove the specific acts by the greater weight of the evidence. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

In an action to obtain admission to the North Carolina Bar, it was found that a finding of fact by the Board of Law Examiners that applicant "made false statements under oath on matters material to his fitness of character" inadequately resolved the factual issue which it addressed and was too vague to permit appropriate judicial review because the board did not indicate which statements it considered to be untruthful; consequently, neither a reviewing court nor the applicant could be certain as to the content or materiality of the false statements referred to, and the board could not meet its burden of proving specific acts of misconduct without setting out with specificity what they were and that they had been proved by the greater weight of the evidence. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Applicant's Showing of Good Moral Character. — An applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The board, or any other person wishing to contest an application, may then offer rebuttal evidence. If there are material factual disputes, the board must resolve them by making findings of fact. If the disputes arise out of charges initially made before the board, the board must determine whether the charges have been proved by a preponderance of the evidence before it can rely on them in concluding that an applicant has not shown his good moral character. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Character encompasses both a person's past behavior and the opinion of members of his community arising from it. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

An application for admission to the bar may not be denied on the basis of suspicions or accusations alone. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Sufficiency of Findings. — Where an applicant for admission to the practice of law had been convicted of assault and murder, finding by the Board of Law Examiners that applicant did not disclose that he had been convicted of assault and battery on a female failed adequately to resolve the factual issue to which it was addressed where the factual issue before the board was whether the omission was a mere inadvertence caused by applicant's initial failure to recall the conviction as an incident separate from the murder or was instead a purposeful omission designed to mislead the board, the later correction of which was prompted only by notice of the hearing. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

In an action to obtain admission to the North Carolina Bar, the court on appeal could not conclude that as a matter of law the Board of Law Examiners' evidence was insufficient to support findings of fact which could rebut a prima facie showing of good moral character by an applicant for admission to the bar where it was undisputed that applicant had committed and been convicted of murder and assault; the question before the board was whether these acts occurring 14 years ago continued to constitute evidence that applicant was presently morally unfit to practice law; and only the board through proper findings of fact and conclusions of law based thereon could answer the question as to whether events subsequent to the murder and assault demonstrated to the board that applicant had been fully rehabilitated so that the evidentiary force of the 14 year old offenses was spent or whether they led to a contrary conclusion. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Findings Not Prejudicial. — An applicant for admission to practice law was not prejudiced where the Board of Law Examiners found that applicant was paroled after serving a portion of his prison term but the board failed to find that applicant was completely discharged from parole, since the reviewing court would take into account, under a whole record review, undisputed facts which favored applicant's position including the fact of discharge from parole which applicant argued was unfairly omitted from the board's findings. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

The "whole record" test is the proper scope of judicial review of findings of the Board of Law Examiners. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Cited in In re Willis, 286 N.C. 207, 209 S.E.2d 457 (1974); In re Elkins, 308 N.C. 317, 302 S.E.2d 215 (1983); In re Moore, 308 N.C. 771, 303 S.E.2d 810 (1983).

§ 84-25. Fees of applicants.

All applicants before the Board of Law Examiners shall pay such fees as prescribed under the rules of said Board as may be promulgated under G.S. 84-21 and 84-24. (1935, c. 33, s. 1; 1955, c. 651, s. 3.)

§ 84-26. Pay of Board of Law Examiners.

Each member of the Board of Law Examiners shall receive the sum of fifty dollars ($50.00) for his services in connection with each examination and shall receive his actual expenses of travel and subsistence while engaged in duties assigned to him, provided that for transportation by the use of private automobile the expense of travel shall be the same as paid other boards and commissions by the State. (1935, c. 33, s. 2; 1937, c. 35; 1953, c. 1310, s. 3; 1971, c. 13, s. 2; 1973, c. 1368.)

§ 84-27: Repealed by Session Laws 1945, c. 782.

§ 84-28. Discipline and disbarment.

(a) Any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the Council under such rules and procedures as the Council shall adopt as provided in G.S. 84-23.

(b) The following acts or omissions by a member of the North Carolina State Bar or any attorney admitted for limited practice under G.S. 84-4.1, individually or in concert with any other person or persons, shall constitute misconduct and shall be grounds for discipline whether the act or omission occurred in the course of an attorney-client relationship or otherwise:

(1) Conviction of, or a tender and acceptance of a plea of guilty or no contest to, a criminal offense showing professional unfitness;

(2) The violation of the Rules of Professional Conduct adopted and promulgated by the Council in effect at the time of the act;

(3) Knowing misrepresentation of any facts or circumstances surrounding any complaint, allegation or charge of misconduct; failure to answer any formal inquiry or complaint issued by or in the name of the North Carolina State Bar in any disciplinary matter; or contempt of the Council or any committee of the North Carolina State Bar.

(c) Misconduct by any attorney shall be grounds for:

(1) Disbarment;

(2) Suspension for a period up to but not exceeding five years, any portion of which may be stayed upon reasonable conditions to which the offending attorney consents;

(3) Censure — A censure is a written form of discipline more serious than a reprimand issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession or members of the public, but the protection of the public does not require suspension of the attorney's license;

(4) Reprimand — A reprimand is a written form of discipline more serious than an admonition issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct, but the protection of the public does not require a censure. A reprimand is generally reserved for cases in which the attorney's conduct has caused harm or potential harm to a client, the administration of justice, the profession, or members of the public; or

(5) Admonition — An admonition is a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.

Any order disbarring or suspending an attorney may impose reasonable conditions precedent to reinstatement. No attorney who has been disbarred by the Disciplinary Hearing Commission, the Council, or by order of any court of this State may seek reinstatement to the practice of law prior to five years from the effective date of the order of disbarment. Any order of the Disciplinary Hearing Commission or the Grievance Committee imposing an admonition, reprimand, censure, or stayed suspension may also require the attorney to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court.

(d) Any attorney admitted to practice law in this State, who is convicted of or has tendered and has had accepted, a plea of guilty or no contest to, a criminal offense showing professional unfitness, may be disciplined based upon the conviction, without awaiting the outcome of any appeals of the conviction. An order of discipline based solely upon a conviction of a criminal offense showing professional unfitness shall be vacated immediately upon receipt by the Secretary of the North Carolina State Bar of a certified copy of a judgment or order reversing the conviction. The fact that the attorney's criminal conviction has been overturned on appeal shall not prevent the North Carolina State Bar from conducting a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

(d1) An attorney who is disciplined as provided in subsection (d) of this section may petition the court in the trial division in the judicial district where the conviction occurred for an order staying the disciplinary action pending the outcome of any appeals of the conviction. The court may grant or deny the stay in its discretion upon such terms as it deems proper. A stay of the disciplinary action by the court shall not prevent the North Carolina State Bar from going forward with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

(e) Any attorney admitted to practice law in this State who is disciplined in another jurisdiction shall be subject to the same discipline in this State: Provided, that the discipline imposed in the other jurisdiction does not exceed that provided for in subsection (c) above and that the attorney was not deprived of due process in the other jurisdiction.

(f) Upon application by the North Carolina State Bar, misconduct by an attorney admitted to practice in this State may be restrained or enjoined where the necessity for prompt action exists regardless of whether a disciplinary proceeding in the matter of the conduct is pending. The application shall be filed in the Superior Court of Wake County and shall be governed by the procedure set forth in G.S. 1A-1, Rule 65.

(g) Any member of the North Carolina State Bar may be transferred to disability inactive status for mental incompetence, physical disability, or substance abuse interfering with the attorney's ability to competently engage in the practice of law under the rules and procedures the Council adopts pursuant to G.S. 84-23.

(h) There shall be an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals. Review by the appellate division shall be upon matters of law or legal inference. The procedures governing any appeal shall be as provided by statute or court rule for appeals in civil cases. A final order which imposes disbarment or suspension for 18 months or more shall not be stayed except upon application, under the rules of the Court of Appeals, for a writ of supersedeas. A final order imposing suspension for less than 18 months or any other discipline except disbarment shall be stayed pending determination of any appeal of right.

(i) The North Carolina State Bar may invoke the process of the General Court of Justice to enforce the powers of the Council or any committee to which the Council delegates its authority.

(j) The North Carolina State Bar may apply to appropriate courts for orders necessary to protect the interests of clients of missing, suspended, disbarred, disabled, or deceased attorneys.

The senior regular resident judge of the superior court of any district wherein a member of the North Carolina State Bar resides or maintains an office shall have the authority and power to enter orders necessary to protect the interests of the clients, including the authority to order the payment of compensation by the member or the estate of a deceased or disabled member to any attorney appointed to administer or conserve the law practice of the member. Compensation awarded to a member serving under this section awarded from the estate of a deceased member shall be considered an administrative expense of the estate for purposes of determining priority of payment. (1933, c. 210, s. 11; 1937, c. 51, s. 3; 1959, c. 1282, ss. 1, 2; 1961, c. 1075; 1969, c. 44, s. 61; 1975, c. 582, s. 5; 1979, c. 570, ss. 6, 7; 1983, c. 390, ss. 2, 3; 1985, c. 167; 1987, c. 316, s. 4; 1989, c. 172, s. 2; 1991, c. 210, s. 5; 1995, c. 431, s. 18; 2005-237, s. 1.)

Cross References. — As to issuance of written license upon restoration of license, see G.S. 84-24. As to restoration of license, see G.S. 84-32.

Legal Periodicals. — For article on rules, ethics and reform in connection with transferring North Carolina real estate, see 49 N.C.L. Rev. 593 (1971).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For survey of 1982 law relating to constitutional law, see 61 N.C.L. Rev. 1052 (1983).

For article, "Malpractice and Ethical Considerations," see 19 N.C. Cent. L.J. 165 (1991).

CASE NOTES

I. General Consideration.
II. Sanctions.
III. Appeals.

I. GENERAL CONSIDERATION.

Editor's Note. — Many of the cases cited under this section were decided under former statutes similar in subject matter to the present section.

Constitutionality. — Laws 1870-1, c. 216, s. 4, an early statute dealing with the same subject matter as this section, was constitutional. It did not take away any of the inherent rights which are absolutely essential in the administration of justice. Ex parte Schenck, 65 N.C. 353 (1871).

Construction with Fifth Amendment Rights. — The requirements of this section did not cause the defendant to be compelled, in violation of his constitutional rights, by the state bar to provide information which would later be used against him in a perjury case where he, acting of his own volition, made statements to the bar investigator. The record does not indicate that these statements were extracted under the power of a subpoena; and the defendant was not in custody at the time these statements were made. The defendant could have asserted his Fifth Amendment privilege during the bar proceedings, although the protection would not have extended to any records that he was required by law to maintain. State v. Linney, 138 N.C. App. 169, 531 S.E.2d 245, 2000 N.C. App. LEXIS 538 (2000).

Superior court has the inherent power to discipline members of the bar. It can require attorneys to appear and answer charges based on records of the court. There is not a plaintiff in such a proceeding and a complaint does not have to be filed. In re Delk, 336 N.C. 543, 444 S.E.2d 198, reh'g denied, 336 N.C. 785, 447 S.E.2d 419 (1994).

The practice of law is a property right requiring due process of law before it may be impaired. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1982).

But Due Process Does Not Require Trial by Jury. — Defendant was not deprived of due process of law by virtue of the elimination by the 1975 amendment to this section of the right to trial by jury in attorney disciplinary matters; due process does not require that a jury trial be afforded an attorney for disciplinary or disbarment procedures and the procedural safeguards provided by the 1975 amendments were sufficient to satisfy due process requirements. North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

When Due Process Requires Notice and Opportunity to Be Heard. — Where the attorney pleads guilty or is convicted in another court, or the conduct complained of is not related to litigation pending before the court investigating attorney's alleged misconduct, the procedure, to meet the test of due process, must be initiated by a sworn written complaint, and the court should issue a rule or order advising the attorney to the specific charges, directing him to show cause why disciplinary action should not be taken, and granting a reasonable time for answering and preparation of defense, and attorney should be given full opportunity to be heard and permitted to have counsel for his defense. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); In re Palmer, 32 N.C. App. 449, 232 S.E.2d 497 (1977), rev'd on other grounds, 296 N.C. 638, 252 S.E.2d 784 (1979).

The doctrine of ex post facto laws does not apply to attorney disciplinary proceedings. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1982).

Application of the procedures included in the 1975 amendment to this section did not constitute an unconstitutional ex post facto application of the law. North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

Former Law a "Disabling Statute". — The act of 1871, upon which C.S., §§ 204 and 205, were based, failed to provide any power to take the place of the power formerly invested in the courts, and so was a disabling statute. Kane v. Haywood, 66 N.C. 1 (1872); In re Ebbs, 150 N.C. 44, 63 S.E. 190 (1908). See § 84-36.

Right to Practice Law Not Interfered with. — This section only establishes procedures by which an attorney may be disciplined in the event that he violates the standards of professional conduct. Without some wrongful action on the part of an attorney, this section in no way interferes with an attorney's right to practice law. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1982).

While the practice of law is a property right requiring due process of law before it may be impaired, the 1975 amendment to this section in no way interfered with or impaired defendant's right to practice law. North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

Rule-Making Power of Council of North Carolina State Bar. — The 1937 amendment to this section, providing that the council of the North Carolina State Bar should have power to formulate rules of procedure governing disbarment proceedings which shall conform as near as may be to the procedure provided by law for hearings before referees in compulsory references, relates to the formulation of rules of procedure incident to hearings before the council or the trial committee and not to procedure upon appeal to the superior court. In re Gilliland, 248 N.C. 517, 103 S.E.2d 807 (1958).

Attorney's Ethics Ordinarily for Consideration of State Bar. — By virtue of this section and G.S. 84-29 to 84-32, questions relating to the propriety and ethics of an attorney are ordinarily for the consideration of the North Carolina State Bar. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

The object of the regulations is to protect the public from unethical conduct by one vested with an attorney's license. A well-educated lawyer, whose position and achievement bring trusting persons to his office in a search of guidance and protection has the duty of conducting himself with the highest degree of honor, integrity and ethics. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Disbarment Is to Protect Public. — An order disbarring an attorney upon his conviction of a felony is not entered as additional punishment, but as a protection to the public. State v. Spivey, 213 N.C. 45, 195 S.E. 1 (1938).

Civil Action. — Proceedings for disbarment are of a civil nature. In re Ebbs, 150 N.C. 44, 63 S.E. 190 (1908).

The proceedings under each method by which disciplinary action or disbarment may be imposed partake of the nature of civil actions. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Disciplinary proceedings against attorneys in North Carolina are civil proceedings, not criminal. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1982).

In North Carolina there are two methods by which disciplinary action or disbarment may be imposed upon attorneys — statutory and judicial. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

The statutory method by which disciplinary action or disbarment may be imposed provides for written complaint, notice to accused, opportunity to answer and be represented by counsel, hearing before a committee conducting proceedings in the nature of a reference, and trial by jury unless waived. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

Inherent Powers of Court Not Abridged. — Nothing contained in the statutes concerning discipline or disbarment is to be construed as disabling or abridging the inherent powers of the court to deal with its attorneys. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Complaint Need Not Be by Layman or Client. — It is not required that proceedings against an attorney for disbarment or suspension initiated by the council of the State Bar be based upon complaint of a layman or a client defrauded by the attorney. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Council Is Not Limited to Any Particular Source for Information. — The duty of patrolling the conduct of licensed attorneys is placed on the council of the State Bar, and there are no requirements that it shall be limited to any particular source for its information or instigation of proceedings. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Section provides for disbarment for the conviction of a criminal offense showing professional unfitness. It does not limit this penalty to cases brought by the State Bar. In re Delk, 336 N.C. 543, 444 S.E.2d 198, reh'g denied, 336 N.C. 785, 447 S.E.2d 419 (1994).

Committee to Investigate Facts. — Where issues of fact are raised the court may appoint a committee to investigate and make report. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); In re Palmer, 32 N.C. App. 449, 232 S.E.2d 497 (1977), rev'd on other grounds, 296 N.C. 638, 252 S.E.2d 784 (1979).

Disciplinary Proceedings Not Barred by Limitations. — Disciplinary proceedings are not barred by the general statute of limitations. Nor is a disciplinary proceeding barred because it is grounded on acts that also constitute a crime that cannot be prosecuted in a criminal action because of limitations. North Carolina State Bar v. Temple, 2 N.C. App. 91, 162 S.E.2d 649 (1968), appeal dismissed, 6 N.C. App. 437, 170 S.E.2d 131 (1969), cert. denied, 397 U.S. 1023, 90 S. Ct. 1263, 25 L. Ed. 2d 532, reh'g denied, 397 U.S. 1081, 90 S. Ct. 1520 (1970).

Detention of Money or Property. — Under this section the detention of money received in his professional capacity without bona fide claim thereto is ground for the disbarment of an attorney. In re Escoffery, 216 N.C. 19, 3 S.E.2d 425 (1939).

Inexperience in the legal profession cannot excuse detention of money collected for a client under circumstances which amount to embezzlement. Dishonesty and breach of trust may be committed by anyone, and no person needs a law license or experience in the practice of law to know that dishonesty and crookedness are wrong. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Findings Must Be Supported by Evidence. — In attorney discipline and disbarment proceedings, findings of fact must be supported by clear, cogent, and convincing evidence drawn from the whole record. North Carolina State Bar v. Speckman, 87 N.C. App. 116, 360 S.E.2d 129 (1987).

Failure to Comply with Grievance Committee Subpoena. — A subpoena is a type of "formal inquiry" contemplated by the General Assembly in defining the grounds for attorney discipline under subdivision (b)(3) of this section; thus, where the defendant attorney failed to produce documents as required by a Grievance Committee subpoena, he was subject to discipline as a result and the Hearing Committee did not err in concluding that defendant violated subdivision (b)(3) of this section. North Carolina State Bar v. Speckman, 87 N.C. App. 116, 360 S.E.2d 129 (1987).

Duty to Protect Clients' Interests Where Their Attorney Disappears. — Chapter 7 trustee's objection to the North Carolina State Bar's request for payment of the expenditures made to wind down a debtor lawyer's practice was sustained because the lawyer's disappearance and the appointment of a trustee to protect his clients occurred pre-petition, the rules governing the Bar and the Bankruptcy Code did not indicate that the filing of the bankruptcy petition transferred to the Chapter 7 trustee the Bar's duty to appoint a trustee to protect the clients when a lawyer disappeared, and the Bar's actions in preventing the filing of malpractice claims against the debtor did not confer actual benefit on the bankruptcy estate. In re McCormick, — Bankr. —, 2007 Bankr. LEXIS 2137 (Bankr. M.D.N.C. June 18, 2007).

Loss of Right to Claim Negligence of Attorney by Pursuing Initial Claim. — Where wife had a claim for permanent alimony which was lost by the negligence of her attorney, she then retained another attorney who filed a counterclaim for alimony, and the alimony agreement negotiated by the first attorney was rescinded and a second alimony agreement was signed, by pursuing her claim for alimony against her husband the wife lost her right to make a claim against the first attorney for his negligence in representing the plaintiff in her original alimony claim. Stewart v. Herring, 80 N.C. App. 529, 342 S.E.2d 566 (1986).

Applied in North Carolina State Bar v. Talman, 62 N.C. App. 355, 303 S.E.2d 175 (1983); North Carolina State Bar v. Sheffield, 73 N.C. App. 349, 326 S.E.2d 320 (1985); N.C. State Bar v. Gilbert, 151 N.C. App. 299, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002); Gilbert v. N.C. State Bar, 363 N.C. 70, 678 S.E.2d 602, 2009 N.C. LEXIS 238 (2009).

Cited in In re Gertzman, 115 N.C. App. 634, 446 S.E.2d 130; Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969); Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978); North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983); North Carolina State Bar v. Braswell, 67 N.C. App. 456, 313 S.E.2d 272 (1984); North Carolina State Bar v. Barrett, 132 N.C. App. 110, 511 S.E.2d 15 (1999); In re Beasley, 151 N.C. App. 569, 566 S.E.2d 125, 2002 N.C. App. LEXIS 760 (2002); N.C. State Bar v. McLaurin, 169 N.C. App. 144, 609 S.E.2d 491, 2005 N.C. App. LEXIS 508 (2005); N.C. State Bar v. Gilbert, 189 N.C. App. 320, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

II. SANCTIONS.

Fine and imprisonment is not the appropriate remedy to be applied to an attorney who, by reason of moral delinquency or other cause, has shown himself to be an unworthy member of the profession. Kane v. Haywood, 66 N.C. 1 (1872).

Public Censure Held Appropriate. — An order of public censure was not arbitrary and unreasonably harsh punishment for defendant attorney's unprofessional conduct in encouraging a potential adverse witness not to testify against his client, in a prosecution for driving under the influence of alcohol, in return for an agreement by the client not to give any testimony which might incriminate the potential witness, and it did not violate the defendant's rights to due process and equal protection. North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

The mere potential for harm to a client is a statutory factor that supports a reprimand, one of the lesser sanctions that may be imposed on an attorney by the North Carolina State Bar Disciplinary Hearing Commission; however, in order to justify the imposition of a more severe sanction, such as censure, suspension, or disbarment, the attorney's misconduct must show either significant harm or the potential for significant harm. N.C. State Bar v. Talford, 356 N.C. 626, 576 S.E.2d 305, 2003 N.C. LEXIS 38 (2003).

In order to impose a more severe sanction than reprimand under G.S. 84-28, such as censure, suspension, or disbarment, an attorney's misconduct must include attending circumstances that demonstrate: (1) a risk of significant potential harm, and (2) that the chosen sanction is necessary in order to protect the public. N.C. State Bar v. Talford, 356 N.C. 626, 576 S.E.2d 305, 2003 N.C. LEXIS 38 (2003).

Summary Disbarment by Court in Criminal Prosecution. — Where an attorney is on trial, charged with a criminal offense involving moral turpitude and amounting to a felony, and pleads guilty, or is convicted, or pleads nolo contendere with agreement that he will surrender his license, the court conducting the criminal trial has authority to disbar him summarily without further proceedings, and on appeal the Supreme Court may do likewise upon motion of the Attorney General. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); In re Palmer, 32 N.C. App. 449, 232 S.E.2d 497 (1977), rev'd on other grounds, 296 N.C. 638, 252 S.E.2d 784 (1979).

Sanctions Authorized by Statute Not Subject to Review. — Where an attorney's sanction, a one-year suspension, was by her own admission authorized by statute, it was not subject to review. North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

So long as the punishment imposed is within the limits allowed by statute, the Court of Appeals does not have the authority to modify or change it. North Carolina State Bar v. Whitted, 82 N.C. App. 531, 347 S.E.2d 60 (1986), aff'd, 319 N.C. 354, 354 S.E.2d 501 (1987).

Disbarment for Crime — Entry of Judgment of Conviction on Plea of Nolo Contendere. — Defendant's plea of nolo contendere in the Federal District Court to a charge of receiving and possessing chattels valued at less than $100 knowing them to have been stolen or embezzled does not entitle the State Bar to summary judgment authorizing disciplinary action against the defendant. North Carolina State Bar v. Hall, 293 N.C. 539, 238 S.E.2d 521 (1977).

Same — Nature of Offense. — Under Laws 1870-1, c. 216, s. 4, upon which an action for disbarment was originally based, conviction of a "criminal offense" showing untrustworthiness was sufficient basis for disbarment; but by Laws 1907, c. 941, s. 1, conviction of a "felony" was necessary; construing these provisions together the court held that the two provisions were consistent and reconcilable (a view evidently adopted by the Revision Commission of 1920, as C.S., § 205 contained the language of both provisions), and further stated that the conviction of a criminal offense — the illegal sale of liquor — was sufficient grounds for disbarment as showing the attorney unfit for practice. State ex rel. Solicitor v. Johnson, 171 N.C. 799, 88 S.E. 437 (1916). See also State ex rel. McLean v. Johnson, 174 N.C. 345, 93 S.E. 847 (1917).

It having appeared to the court that the defendant was guilty of an infamous misdemeanor, converted to a felony by G.S. 14-1, 14-3, the court by virtue of its inherent power was authorized to order his name stricken from the rolls of attorneys and his license to practice law in the State of North Carolina returned to the Supreme Court, which issued it. State v. Spivey, 213 N.C. 45, 195 S.E. 1 (1938); State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973).

Where attorney contended that there was not a finding that he was convicted of any crime because the order only said "the records of this Court disclose" that he was convicted, the fact that the records of the court disclosed he had been convicted of a crime showing he was unfit to practice law, was a sufficient finding of fact to support disbarment. In re Delk, 336 N.C. 543, 444 S.E.2d 198, reh'g denied, 336 N.C. 785, 447 S.E.2d 419 (1994).

Same — Confession of a Felony. — A plea of guilty to an indictment charging defendant with willfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue (now Secretary of Revenue), etc., was held a confession of a felony, and ground for disbarment if defendant was a practicing attorney, under former G.S. 205 of the Consolidated Statutes. State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934).

Conviction or Confession of Guilt. — The words "conviction" and "confession," as used in a former statute providing that no attorney should be disbarred for crime unless upon conviction or confession in open court must be construed to convey the idea that the party had been convicted by a jury or had in open court declined to take issue by the plea of not guilty, and confessed himself guilty. Kane v. Haywood, 66 N.C. 1 (1872).

The admission of an attorney in an answer to a rule to show cause why he should not be attached for contempt for failure to pay money into court, not being voluntary, was not a confession in open court as contemplated by the statutes. Kane v. Haywood, 66 N.C. 1 (1872).

Indictment. — By a proper construction of the former statute, the court was shorn of its power to disbar an attorney, except in the single instance where he had been indicted for some criminal offense, showing him unfit to be trusted in the discharge of the duties of his profession, and upon such indictment had either been convicted or pleaded guilty. Kane v. Haywood, 66 N.C. 1 (1872).

Conviction in Foreign State. — Laws 1870-1, c. 216, s. 4, and Laws 1907, c. 941, s. 1, did not confer upon the court the power to disbar an attorney because he had been "convicted" in the courts of another state or of the United States. In re Ebbs, 150 N.C. 44, 63 S.E. 190 (1908).

Suspension. — Court of appeals rejected challenges which an attorney made to procedures used by the Disciplinary Hearing Commission (DHC) to hear allegations that the attorney made false statements, filed a motion for improper purposes, charged an excessive fee, and engaged in other misconduct, and it upheld the DHC's decision suspending the attorney's license to practice law for three years. N.C. State Bar v. Rogers, 164 N.C. App. 648, 596 S.E.2d 337, 2004 N.C. App. LEXIS 965 (2004).

Order of the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar suspending an attorney fell short of containing clear, cogent, and convincing evidence supporting the discipline imposed upon the attorney because the DHC's findings of fact in the adjudicatory phase failed to support the conclusions made in the dispositional section of the order, and admonition was not considered by the DHC in making its determination with regard to lesser sanctions; the DHC must show a reviewing court that all potential lesser sanctions have been considered before discipline of a greater nature is imposed. N.C. State Bar v. Sossomon, — N.C. App. —, 676 S.E.2d 910, 2009 N.C. App. LEXIS 710 (2009).

Trial court sanctioned a lawyer for characterizing her opposing counsel and their witnesses as liars; its order that she be suspended from practicing law pro hac vice in North Carolina for one year was not an abuse of discretion. Couch v. Private Diagnostic Clinic, 146 N.C. App. 658, 554 S.E.2d 356, 2001 N.C. App. LEXIS 1059 (2001), cert. denied, cert. dismissed, 355 N.C. 348, 563 S.E.2d 562 (2002).

Disbarment Held Not Appropriate. — Though an attorney violated the disciplinary rules regarding trust accounts by commingling funds and failing to keep proper records, as there was no evidence that he benefitted from this misconduct, or that any client was harmed by it, the order disbarring him was reversed as an abuse of discretion. North Carolina State Bar v. Talford, 147 N.C. App. 581, 556 S.E.2d 344, 2001 N.C. App. LEXIS 1243 (2001).

Disbarment Held Proper. — Attorney was properly disbarred after the attorney failed to properly maintain a trust account and commingled client funds and operational funds; implicit in the finding that the attorney violated N.C. R. Prof. Conduct 8.4(b) and (c), was a determination that the attorney's misconduct posed a significant potential harm to clients. N.C. State Bar v. Leonard, 178 N.C. App. 432, 632 S.E.2d 183, 2006 N.C. App. LEXIS 1573 (2006).

Attorney's disbarment was reversed since the statutory scheme in G.S. 84-28 clearly evidenced an intent to punish attorneys in an escalating fashion, keyed to the harm or potential harm created by the misconduct and a demonstrable need to protect the public; the North Carolina Disciplinary Hearing Commission did not expressly address how the attorney's failure to maintain accurate records might result in harm to a client, the public, or the legal profession, and therefore, the Commission exceeded its statutory authority when it disbarred the attorney. N.C. State Bar v. Talford, 356 N.C. 626, 576 S.E.2d 305, 2003 N.C. LEXIS 38 (2003).

Admonishment. — Disciplinary commission did not err by ordering the issuance of an admonition as opposed to a less serious sanction for the attorney's misconduct in stating on his letterhead and website that he had been published in the federal appellate court reporter; a showing of public harm was not required and such discipline was within the statutory limits of G.S. 84-28. N.C. State Bar v. Culbertson, 177 N.C. App. 89, 627 S.E.2d 644, 2006 N.C. App. LEXIS 720 (2006).

III. APPEALS.

Editor's Note. *— Some of the cases below were decided prior to subsequent amendments to the provisions in this section relating to appeals.*

Test on Appeal. — Due process does not require the "clear, cogent and convincing" test in determining whether plaintiff satisfied its burden of proof rather than the "greater weight of the evidence" rule. North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

"Whole Record" Test. — The test for determining whether the findings of the disciplinary committee are supported by the evidence is the "whole record" test. Under this test there must be substantial evidence, based on a review of the record, to support the committee's findings, conclusions and results. North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

Disciplinary commission's finding that the attorney's statements on his letterhead and website to the effect that the attorney had been published in the federal appellate court reporter were inherently misleading in multiple respects was supported by the "whole record" test; analysis of the whole record showed that the disciplinary commission's finding was supported by substantial evidence and no abuse of discretion was shown in thus ordering as discipline that he be admonished. N.C. State Bar v. Culbertson, 177 N.C. App. 89, 627 S.E.2d 644, 2006 N.C. App. LEXIS 720 (2006).

"Whole record test" is standard for judicial review of attorney discipline cases and requires the reviewing court to consider the evidence which in and of itself justifies or supports the administrative findings and also to take into account the contradictory evidence or evidence from which conflicting inferences can be drawn. The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion. North Carolina State Bar v. Speckman, 87 N.C. App. 116, 360 S.E.2d 129 (1987).

Appeals from Decisions of State Bar Disciplinary Hearing Commission. — Article 4 of Chapter 150A (see now G.S. 150B-43 et seq.) is the controlling judicial review statute for appeals from decisions of the State Bar Disciplinary Hearing Commission. North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

Clear, cogent, and convincing evidence supported the Disciplinary Hearing Commission's findings and conclusions that the attorney violated N.C. Rev. R. Prof. Conduct Rule 1.16, regarding the termination of representation, Rule 1.3, about neglecting client matters, and Rule 8.4, prejudicing the administration of justice, in violation of an earlier Consent Order of Discipline resulting in the attorney's license suspension. The attorney's conduct violated those rules because the attorney stopped representing the client when the client notified the attorney that she could not pay an additional sum to represent the client on probation violation matters, and the attorney did not obtain permission from the trial court to withdraw from representing her after the attorney had appeared on her behalf. N.C. State Bar v. Key, 187 N.C. App. 616, 654 S.E.2d 55, 2007 N.C. App. LEXIS 2576 (2007), aff'd on rehearing, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008).

State Has Right to Appeal. — Under the statutory method of disciplinary attorneys any party, including the attorney in question and the State Bar, may appeal from a decision of the disciplinary hearing commission. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

The State may seek review by the appellate division of proceedings disciplining attorneys under the judicial method, not as a matter of right, but by petition for writ of certiorari. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Duty of Judge on Appeal from Council. — It is the duty of the superior court judge, on appeal from the council, to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases, use his own faculties in ascertaining the truth, and form his own judgment as to fact and law. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Power of Judge with Respect to Report of Council. — Since this section provides that the proceedings in the superior court shall be in accordance with the laws and rules relating to civil actions in which there has been a reference by consent, the judge of the superior court may affirm, amend, modify, set aside, make additional findings, and confirm in whole or in part, or disaffirm the report of the council. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Power of Reviewing Court to Change Discipline. — Subsection (h) of this section does not give a reviewing court the authority to modify or change the discipline properly imposed by the commission. North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

Power of Reviewing Court to Modify or Change Imposed Punishment. — So long as the punishment imposed is within the limits allowed by the statute the court does not have the authority to modify or change it. North Carolina State Bar v. Nelson, 107 N.C. App. 543, 421 S.E.2d 163 (1992), aff'd per curiam, 333 N.C. 786, 429 S.E.2d 716 (1993).

Imposition of Greater Punishment on Appeal to Superior Court. — On appeal from disciplinary action taken by the State Bar, an attorney cannot complain that the punishment imposed by the superior court was greater than the punishment imposed by the council of the State Bar from which he had appealed. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Jurisdiction Lacking. — Court of Appeals of North Carolina lacked jurisdiction to hear the State Bar of North Carolina's appeal of a grant of summary judgment to an attorney in a disciplinary proceeding because G.S. 84-28(h) provided no appeal from a final order that did not impose discipline and in the instant case, no discipline had been imposed. N.C. State Bar v. Rudisill, 159 N.C. App. 704, 583 S.E.2d 413, 2003 N.C. App. LEXIS 1527 (2003).

Collateral Attack on State Bar Decision to Disbar Attorney. — Former attorney's suit, alleging that the North Carolina State Bar's decision disbarring him was contrary to a state supreme court decision decided five years after his disbarment and seeking declaratory and injunctive relief on certain constitutional arguments, was properly dismissed because, while the Bar was not a court of competent jurisdiction, the attorney could not present his claims in superior court because they were a collateral attack on a final judgment properly entered by the Bar, and the attorney did not avail himself of his right of appeal to the court under G.S. 84-28(h); even assuming that the attorney's case was factually similar to the state supreme court's decision, nothing in the opinion indicated that the decision was retroactive to cases finalized prior to the decision. Clayton v. N.C. State Bar, 168 N.C. App. 717, 608 S.E.2d 821, 2005 N.C. App. LEXIS 455 (2005), cert. denied, — N.C. —, 615 S.E.2d 867 (2005).

§ 84-28.1. Disciplinary hearing commission.

(a) There shall be a disciplinary hearing commission of the North Carolina State Bar which shall consist of 20 members. Twelve of these members shall be members of the North Carolina State Bar, and shall be appointed by the Council. The other eight shall be citizens of North Carolina not licensed to practice law in this or any other state, four of whom shall be appointed by the Governor, two by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121, and two by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121. The Council shall designate one of its appointees as chair and another as vice-chair. The chair shall have actively practiced law in the courts of the State for at least 10 years. Except as set out herein, the terms of members of the commission are set at three years commencing on the first day of July of the year of their appointment. The Council, the Governor, and the General Assembly respectively, shall appoint members to fill unexpired terms when vacancies are created by resignation, disqualification, disability or death, except that vacancies in appointments made by the General Assembly may also be filled as provided by G.S. 120-122. No member may serve more than a total of seven years or a one-year term and two consecutive three-year terms: Provided, that any member or former member who is designated chair may serve one additional three-year term in that capacity. No member of the Council may be appointed to the commission.

(b) The disciplinary hearing commission of the North Carolina State Bar, or any committee of the disciplinary hearing commission, may hold hearings in discipline, incapacity and disability matters, make findings of fact and conclusions of law after these hearings, enter orders necessary to carry out the duties delegated to it by the Council, and tax the costs to an attorney who is disciplined or is found to be incapacitated or disabled.

(b1) The disciplinary hearing commission of the North Carolina State Bar, or any committee thereof, acting through its chairman, shall have the power to hold persons, firms or corporations in contempt as provided in Chapter 5A.

(c) Members of the disciplinary hearing commission shall receive the same per diem and travel expenses as are authorized for members of State commissions under G.S. 138-5. (1975, c. 582, s. 6; 1979, c. 570, s. 8; 1983, c. 390, s. 4; 1995, c. 431, s. 19; c. 490, s. 51; 2003-116, s. 3; 2005-396, s. 3.)

CASE NOTES

Public Duty Doctrine Applied to Claim Against Disciplinary Hearing Commission. — Disbarred attorney's claim against the Disciplinary Hearing Commission for negligent infliction of emotional distress in the performance of its duties came under the public duty doctrine, since the Commission was acting within its statutory authority under this section when it held plaintiff in criminal contempt. Frazier v. Murray, 135 N.C. App. 43, 519 S.E.2d 525 (1999).

The Disciplinary Hearing Commission had contempt power over a plaintiff who has already been disbarred and the right to lawfully exercise that contempt power. Disciplinary Hearing Comm'n v. Frazier, 141 N.C. App. 514, 540 S.E.2d 758, 2000 N.C. App. LEXIS 1393 (2000), cert. granted sub nom. North Carolina State Bar v. Frazier, 353 N.C. 378, 547 S.E.2d 434 (2001).

State Bar Disciplinary Hearing Commission did not have authority to discipline previously disbarred attorney or find him in criminal contempt for unauthorized practice of law because its authority was extinguished following disbarment; the process of seeking criminal sanctions for the unlawful practice of law was under the exclusive control of district attorneys. Disciplinary Hearing Comm'n v. Frazier, 354 N.C. 555, 556 S.E.2d 262, 2001 N.C. LEXIS 1242 (2001).

Procedure. — Disciplinary Hearing Commission (DHC) properly denied an attorney's motion for separate hearings on charges that he made false statements and committed other acts of misconduct while representing a client in one case, and while he was involved in a dispute with his neighbors in a separate case, and the DHC did not err when it considered evidence that the attorney had two misdemeanor convictions and had previously received a letter of warning from the State Bar when it determined an appropriate sanction. N.C. State Bar v. Rogers, 164 N.C. App. 648, 596 S.E.2d 337, 2004 N.C. App. LEXIS 965 (2004).

Applied in North Carolina State Bar v. Braswell, 67 N.C. App. 456, 313 S.E.2d 272 (1984); Gilbert v. N.C. State Bar, 363 N.C. 70, 678 S.E.2d 602, 2009 N.C. LEXIS 238 (2009).

Cited in North Carolina State Bar v. DuMont, 298 N.C. 564, 259 S.E.2d 280 (1979); North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982); North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983).

§ 84-28.2. Persons immune from suit.

Persons shall be immune from suit for all statements made without malice, and intended for transmittal to the North Carolina State Bar or any board, committee, officer, agent or employee thereof, or given in any investigation or proceedings, pertaining to alleged misconduct or disability or to reinstatement of an attorney. The protection of this immunity does not exist, however, as to statements made to others not intended for this use. (1975, c. 582, s. 4; 1995, c. 431, s. 20.)

CASE NOTES

Cited in Wallace v. Jarvis, 119 N.C. App. 582, 459 S.E.2d 44 (1995); Snyder v. Learning Servs. Corp., 187 N.C. App. 480, 653 S.E.2d 548, 2007 N.C. App. LEXIS 2454 (2007).

§ 84-29. Evidence and witnesses.

In any investigation of charges of professional misconduct or disability or in petitions for reinstatement, the Council and any committee thereof, and the disciplinary hearing commission, and any committee thereof, may administer oaths and affirmations and shall have the power to subpoena and examine witnesses under oath, and to compel their attendance, and the production of books, papers and other documents or writings deemed by it necessary or material to the inquiry. Each subpoena shall be issued under the hand of the secretary-treasurer or the president of the Council or the chair of the committee appointed to hear the charges, and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness or other person who shall refuse or neglect to appear in obedience thereto, or to testify or produce the books, papers, or other documents or writings required, shall be liable to punishment for contempt either by the Council or its committee or a hearing committee of the disciplinary hearing commission through its chair pursuant to the procedures set out in Chapter 5A of the General Statutes, but with the right to appeal therefrom. Depositions may be taken in any investigations of professional misconduct as in civil proceedings, but the Council or the committee hearing the case may, in its discretion, whenever it believes that the ends of substantial justice so require, direct that any witness within the State be brought before it. Witnesses giving testimony under a subpoena before the Council or any committee thereof, or the disciplinary hearing commission or any committee thereof, or by deposition, shall be entitled to the same fees as in civil actions.

In cases heard before the Council or any committee thereof or the disciplinary hearing commission or any committee thereof, if the party shall be convicted of the charges, the party shall be taxed with the cost of the hearings: Provided, however, that the bill of costs shall not include any compensation to the members of the Council or committee before whom the hearings are conducted. (1933, c. 210, s. 12; 1959, c. 1282, s. 2; 1975, c. 582, s. 7; 1983, c. 390, s. 6; 1995, c. 431, s. 21.)

CASE NOTES

Construction with Fifth Amendment Rights. — This section did not cause the defendant to be compelled in violation of his constitutional rights by the state bar to provide information which would later be used against him in a perjury case where he, acting of his own volition, made statements to the bar investigator. The record does not indicate that these statements were extracted under the power of a subpoena; and the defendant was not in custody at the time these statements were made. The defendant could have asserted his Fifth Amendment privilege during the bar proceedings although the protection would not have extended to any records that he was required by law to maintain. State v. Linney, 138 N.C. App. 169, 531 S.E.2d 245, 2000 N.C. App. LEXIS 538 (2000).

Cited in North Carolina State Bar v. Speckman, 87 N.C. App. 116, 360 S.E.2d 129 (1987).

§ 84-30. Rights of accused person.

Any person who shall stand charged with an offense cognizable by the council or any committee thereof or the disciplinary hearing commission or any committee thereof shall have the right to invoke and have exercised in his favor the powers of the council or any committee, in respect of compulsory process for witnesses and for the production of books, papers, and other writings and documents, and shall also have the right to be represented by counsel. (1933, c. 210, s. 13; 1959, c. 1282, s. 2; 1975, c. 582, s. 8.)

CASE NOTES

Deprivation of Right to Practice Is Judicial Act Requiring Due Process. — The granting of a license to engage in business or practice a profession is a right conferred by administrative act, but the deprivation of the right is a judicial act requiring due process. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); In re Palmer, 32 N.C. App. 449, 232 S.E.2d 497 (1977), rev'd on other grounds, 296 N.C. 638, 252 S.E.2d 784 (1979).

Applied in Gilbert v. N.C. State Bar, 363 N.C. 70, 678 S.E.2d 602, 2009 N.C. LEXIS 238 (2009).

Cited in North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983).

§ 84-31. Counsel; investigators; powers; compensation.

The Council may appoint a member of the North Carolina State Bar to represent the North Carolina State Bar in any proceedings in which it has an interest including reinstatement and the prosecution of charges of misconduct or disability in the hearings that are held, including appeals, and may authorize counsel to employ assistant counsel, investigators, and administrative assistants in such numbers as it deems necessary. Counsel and investigators engaged in discipline, reinstatement, and disability matters shall have the authority throughout the State to serve subpoenas or other process issued by the Council or any committee thereof or the disciplinary hearing commission or any committee thereof, in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice. The Council may allow counsel, assistant counsel, investigators and administrative assistants such compensation as it deems proper. (1933, c. 210, s. 14; 1969, c. 44, s. 62; 1975, c. 582, s. 9; 1995, c. 431, s. 22.)

CASE NOTES

Cited in North Carolina State Bar v. Harris, 137 N.C. App. 207, 527 S.E.2d 728, 2000 N.C. App. LEXIS 317 (2000).

§ 84-32. Records and judgments and their effect; restoration of licenses.

(a) In cases heard by the disciplinary hearing commission or any committee thereof, the proceedings shall be recorded by a certified court reporter and an official copy of all exhibits introduced into evidence shall be made and preserved in the office of the secretary-treasurer. Final judgments of suspension or disbarment shall be entered upon the judgment docket of the superior court in the district wherein the respondent resides or practices law, and also upon the minutes of the Supreme Court of North Carolina; and the judgment shall be effective throughout the State.

(b) Whenever any attorney desires to voluntarily surrender his license, the attorney must tender the license and a written resignation to the Council. The Council, in its discretion, may accept or reject the tender. If the tender is accepted, the Council shall enter an order of disbarment. A copy of any order of disbarment shall be filed with the clerk of the superior court of the county where the respondent resides, maintains an office, or practices law and also upon the minutes of the Supreme Court of North Carolina. The judgment shall be effective throughout the State.

(c) Whenever any attorney has been deprived of the attorney's license by suspension or disbarment, the Council or the disciplinary hearing commission or the secretary-treasurer may, in accordance with rules and regulations prescribed by the Council, restore the license upon due notice being given and satisfactory evidence produced of proper reformation of the suspended or disbarred attorney and of satisfaction of any conditions precedent to restoration.

(d) The Council has jurisdiction to determine any petition seeking the reinstatement of the license of any attorney disbarred or suspended by any court in its inherent power when requested by the court. The proceeding shall be governed by the rules and regulations adopted by the Council. The disbarred or suspended attorney shall satisfy all conditions precedent to reinstatement generally imposed upon attorneys disbarred or suspended by the disciplinary hearing commission or the Council, as well as any conditions imposed by the court. Under no circumstances shall an attorney disbarred by a court or by the North Carolina State Bar be reinstated prior to five years from the effective date of the order of disbarment. (1933, c. 210, s. 15; 1935, c. 74, s. 2; 1953, c. 1310, s. 4; 1959, c. 1282, s. 2; 1975, c. 582, s. 10; 1983, c. 390, s. 5; 1995, c. 431, s. 23.)

Cross References. — As to issuance of written license upon restoration of license to practice, see G.S. 84-24.

CASE NOTES

Constitutionality. — This section, giving the State Bar Council the discretion to reinstate the license to practice law of a disbarred attorney is not an unconstitutional delegation of legislative power. In re Garrison, 44 N.C. App. 158, 260 S.E.2d 445 (1979), cert. denied, 299 N.C. 545, 265 S.E.2d 404 (1980).

The council did not err in the denial of petitioner's application for reinstatement of his license to practice law where there was evidence that petitioner had compromised four of the six civil judgments rendered against him but had failed to make restitution for two outstanding judgments against him in excess of $30,000, which he had been unable to compromise, and that petitioner also renounced funds which would have enabled him to help satisfy the judgments against him. Petitioner's willingness to satisfy only the judgments that could be compromised, while failing to satisfy those not the subject of compromise, is evidence of the lack of proper reformation required by the statute. In re Garrison, 44 N.C. App. 158, 260 S.E.2d 445 (1979), cert. denied, 299 N.C. 545, 265 S.E.2d 404 (1980).

§ 84-33. Annual and special meetings.

The Council shall hold an annual meeting and other meetings necessary to conduct the business of the North Carolina State Bar. (1933, c. 210, s. 16; 1969, c. 104; 1995, c. 431, s. 24.)

§ 84-34. Membership fees and list of members.

Every active member of the North Carolina State Bar shall, prior to the first day of July of each year, pay to the secretary-treasurer an annual membership fee in an amount determined by the Council but not to exceed three hundred dollars ($300.00), plus a surcharge of fifty dollars ($50.00) for the implementation of Article 22D of Chapter 163 of the General Statutes, and every member shall notify the secretary-treasurer of the member's correct mailing address. Any member who fails to pay the required dues by the last day of June of each year shall be subject to a late fee in an amount determined by the Council but not to exceed thirty dollars ($30.00). All dues for prior years shall be as were set forth in the General Statutes then in effect. The membership fee shall be regarded as a service charge for the maintenance of the several services authorized by this Article, and shall be in addition to all fees required in connection with admissions to practice, and in addition to all license taxes required by law. The fee shall not be prorated: Provided, that no fee shall be required of an attorney licensed after this Article shall have gone into effect until the first day of January of the calendar year following that in which the attorney was licensed; but this proviso shall not apply to attorneys from other states admitted on certificate. The fees shall be disbursed by the secretary-treasurer on the order of the Council. The fifty-dollar ($50.00) surcharge shall be sent on a monthly schedule to the State Board of Elections. The secretary-treasurer shall annually, at a time and in a law magazine or daily newspaper to be prescribed by the Council, publish an account of the financial transactions of the Council in a form to be prescribed by it. The secretary-treasurer shall compile and keep currently correct from the names and mailing addresses forwarded to the secretary-treasurer and from any other available sources of information a list of members of the North Carolina State Bar and furnish to the clerk of the superior court in each county, not later than the first day of October in each year, a list showing the name and address of each attorney for that county who has not complied with the provisions of this Article. The name of each of the active members who are in arrears in the payment of membership fees shall be furnished to the presiding judge at the next term of the superior court after the first day of October of each year, by the clerk of the superior court of each county wherein the member or members reside, and the court shall thereupon take action that is necessary and proper. The names and addresses of attorneys so certified shall be kept available to the public. The Secretary of Revenue is hereby directed to supply the secretary-treasurer, from records of license tax payments, with any information for which the secretary-treasurer may call in order to enable the secretary-treasurer to comply with this requirement.

The list submitted to several clerks of the superior court shall also be submitted to the Council at its October meeting of each year and it shall take the action thereon that is necessary and proper. (1933, c. 210, s. 17; 1939, c. 21, ss. 2, 3; 1953, c. 1310, s. 5; 1955, c. 651, s. 4; 1961, c. 760; 1971, c. 18; 1973, c. 476, s. 193; c. 1152, s. 4; 1977, c. 841, s. 2; 1981, c. 788, s. 5; 1989, c. 172, s. 1; 1995, c. 431, s. 25; 2005-237, s. 2; 2005-276, s. 23A.1(a).)

Cross References. — As to who is an active member, see G.S. 84-16.

CASE NOTES

Applied in N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

§ 84-34.1. Deposits of the North Carolina State Bar.

Deposits of the North Carolina State Bar, its boards, agencies, and committees shall be secured as provided in G.S. 159-31(b). (1991, c. 210, s. 3.)

§ 84-34.2. Specific statutory authority for certain fees.

In addition to fees the Council is elsewhere authorized to charge and collect, the Council may charge and collect the following fees in amounts determined by the Council:

(1) A reinstatement fee for any attorney seeking reinstatement from inactive status, administrative suspension, or suspension for failure to comply with the annual continuing legal education requirements.
(2) A registration fee and annual renewal fee for an interstate or international law firm.
(3) An attendance fee for continuing legal education programs that may include a fee to support the Chief Justice's Commission on Professionalism.
(4) A late fee for failing to file timely the continuing legal education annual report form, for failure to pay attendance fees, or failure to complete the annual continuing legal education requirements.
(5) An administrative fee for any attorney against whom discipline has been imposed. (2005-396, s. 7.)

§ 84-35. Saving as to North Carolina Bar Association.

Nothing in this Article contained shall be construed as affecting in any way the North Carolina Bar Association, or any local bar association. (1933, c. 210, s. 18.)

§ 84-36. Inherent powers of courts unaffected.

Nothing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys. (1937, c. 51, s. 4.)

CASE NOTES

In North Carolina there are two methods by which disciplinary action or disbarment may be imposed upon attorneys — statutory and judicial. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

Concurrent Power of Supreme Court and Bar to Regulate Conduct of Attorneys. — While questions of propriety and ethics are ordinarily for the consideration of the bar, because that organization was expressly created by the legislature to deal with such questions, nevertheless the power to regulate the conduct of attorneys is held concurrently by the Bar and the Supreme Court. Therefore, in a proper case, the Court may rule on questions concerning the conduct of attorneys. Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986).

Powers of Court Distinguished from Powers Granted to State Bar. — This inherent power is co-equal and co-extensive with the statutory grant of powers to the North Carolina State Bar, and, while the interests of the two entities having disciplinary jurisdiction may, and often do, overlap, they are not always identical and as the interests sought to be protected by the court's inherent power are distinct from those of the North Carolina State Bar, the action of a court in disciplining or disqualifying an attorney practicing before it is not in derogation or to the exclusion of similar action by the Bar. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 296 N.C. 740, 254 S.E.2d 182, 296 N.C. 740, 254 S.E.2d 183 (1979).

The power of the court to regulate and discipline attorneys is an inherent one because it is an essential one for the court to possess in order for it to protect itself from fraud and impropriety and to serve the ends of the administration of justice which are, fundamentally, the raison d'etre for the existence and operation of the courts. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 296 N.C. 740, 254 S.E.2d 182, 296 N.C. 740, 254 S.E.2d 183 (1979).

The court's inherent power is not limited or bound by the technical precepts contained in the Code of Professional Responsibility as administered by the Bar. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 296 N.C. 740, 254 S.E.2d 182, 296 N.C. 740, 254 S.E.2d 183 (1979).

Suspension of Attorney as Sanction. — Trial judge had the authority, recognized in G.S. 84-36, to sanction an attorney, and the sanction of a one-year suspension imposed by the judge was not an abuse of discretion; the attorney willfully abandoned a client at the client's probation hearing, refused to represent the client when confronted with his ethical and legal obligations by the trial judge, made comments questioning the authority of the judge, made an obscene reference to the judge, and behaved rudely towards the courtroom clerk. In re Key, — N.C. App. —, 643 S.E.2d 452, 2007 N.C. App. LEXIS 799 (2007), cert. denied, 361 N.C. 428, 648 S.E.2d 506 (2007).

General Assembly Cannot Abridge Inherent Power. — The existence of inherent judicial power is not dependent upon legislative action; however, the General Assembly has recognized the existence of the inherent power of the court and the General Assembly cannot abridge that power. Beard v. North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987).

The Judicial Method Is Not Dependent upon Statutory Authority. — It arises because of a court's inherent authority to take disciplinary action against attorneys licensed before it; an authority which extends even to matters which are not pending in the particular court exercising the authority. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972); In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

Basis of Court's Power. — A court's power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

Form of Disciplinary Action. — Judicial disciplinary action may take the form of an order of disbarment or suspension of the attorney's privilege to practice law. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

Statutory Method of Disbarment Not Exclusive. — C.S., §§ 204 and 205, restricting the power of courts to disbar attorneys, were repealed by Laws 1933, c. 210, s. 20, and the statutory method of disbarment provided by the act of 1933 is not exclusive, but on the contrary the act recognizes the inherent power of the courts, and the courts have jurisdiction to order the disbarment of an attorney upon his conviction of an infamous misdemeanor, converted to a felony by G.S. 14-1 and 14-3. State v. Spivey, 213 N.C. 45, 195 S.E. 1 (1938). See also State ex rel. McLean v. Johnson, 174 N.C. 345, 93 S.E. 847 (1917).

Due Process Required. — While it is incontrovertible that the courts have inherent authority to take disciplinary action against attorneys practicing therein, even in relation to matters not pending in the particular court exercising that authority, it is not after the manner of the courts, however, to deprive a lawyer, any more than anyone else, of his constitutional guaranties or to revoke his license without due process of law. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

No statute provides for a jury trial when the judicial method is employed to seek disciplinary action against an attorney practicing in this State. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

This State has never had a statute which expressly conferred upon an attorney the right to a trial by jury in a judicial disciplining or disbarment proceeding. Since no such right existed at common law, or by statute at the time our Constitution was adopted, and is not now provided for by statute, appellant's motion for a trial by jury was properly denied. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

Due Process Procedures Under Judicial Method. — Under the judicial method, the procedure, to meet the test of due process, must be initiated by a sworn written complaint, and the court should issue a rule or order advising the attorney of the specific charges, directing him to show cause why disciplinary action should not be taken, and granting a reasonable time for answering and preparation of defense, and attorney should be given full opportunity to be heard and permitted to have counsel for his defense; where issues of fact are raised the court may appoint a committee to investigate and make report. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

Disbarment Order Supported by Contempt Conviction. — The trial court's findings of fact supported order disbarring respondent attorney, where respondent was convicted of contempt for soliciting someone to disrupt a criminal trial in which he, respondent, represented the defendant. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

Error in Dismissing Grievance Filed with State Bar. — North Carolina State Bar and the trial courts of this State share concurrent jurisdiction over matters of attorney discipline; therefore, where individual filed a civil claim against attorney for alleged impropriety in handling an estate, and also filed a grievance with the State Bar alleging that the attorney's actions violated the Rules of Professional Conduct, the trial court erred in naming the State Bar as a party and dismissing the grievance proceeding against the defendant. North Carolina State Bar v. Randolph, 325 N.C. 699, 386 S.E.2d 185 (1989).

Client Security Fund Constitutional. — The order of the North Carolina Supreme Court establishing the Client Security Fund and requiring annual payments by attorneys to the Fund is an essential corollary to the court's function, was required for the proper administration of justice, and did not violate the North Carolina Constitution. Beard v. North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987).

Cited in State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973); In re Palmer, 32 N.C. App. 449, 232 S.E.2d 497 (1977); In re Beasley, 151 N.C. App. 569, 566 S.E.2d 125, 2002 N.C. App. LEXIS 760 (2002).

§ 84-36.1. Clerks of court to certify orders.

The clerk of any court of this State in which a member of the North Carolina State Bar is convicted of any criminal offense, disciplined, found to be in contempt of the court or adjudged incompetent shall transmit a certified copy of the order or judgment to the secretary-treasurer of the North Carolina State Bar within 10 days of the entry of such judgment or order. (1975, c. 582, s. 11.)

§ 84-37. State Bar may investigate and enjoin unauthorized activities.

(a) The Council or any committee appointed by it for that purpose may inquire into and investigate any charges or complaints of (i) unauthorized or unlawful practice of law or (ii) the use of the designations, "North Carolina Certified Paralegal," "North Carolina State Bar Certified Paralegal," or "Paralegal Certified by the North Carolina State Bar Board of Paralegal Certification," by individuals who have not been certified in accordance with the rules adopted by the North Carolina State Bar. The Council may bring or cause to be brought and maintained in the name of the North Carolina State Bar an action or actions, upon information or upon the complaint of any person or entity against any person or entity that engages in rendering any legal service, holds himself or herself out as a North Carolina certified paralegal by use of the designations set forth in this subsection, or makes it a practice or business to render legal services that are unauthorized or prohibited by law. No bond for cost shall be required in the proceeding.

(b) In an action brought under this section, the final judgment if in favor of the plaintiff shall perpetually restrain the defendant or defendants from the commission or continuance of the unauthorized or unlawful act or acts. A temporary injunction to restrain the commission or continuance of the act or acts may be granted upon proof or by affidavit, that the defendant or defendants have violated any of the laws applicable to unauthorized or unlawful practice of law or the unauthorized use of the designations set forth in subsection (a) of this section or any other designation implying certification by the State Bar. The provisions of law relating generally to injunctions as provisional remedies in actions shall apply to a temporary injunction and the proceedings for temporary injunctions.

(c) The venue for actions brought under this section shall be the superior court of any county in which the relevant acts are alleged to have been committed or in which there appear reasonable grounds that they will be committed in the county where the defendants in the action reside, or in Wake County.

(d) The plaintiff in the action shall be entitled to examine the adverse party and witnesses before filing complaint and before trial in the same manner as provided by law for examining parties.

(e) This section shall not repeal or limit any remedy now provided in cases of unauthorized or unlawful practice of law. Nothing contained in this section shall be construed as disabling or abridging the inherent powers of the court in these matters.

(f) The Council or its duly appointed committee may issue advisory opinions in response to inquiries from members or the public regarding whether contemplated conduct would constitute the unauthorized practice of law. (1939, c. 281; 1979, c. 570, s. 9; 1995, c. 431, s. 26; 2004-174, s. 2.)

Cross References. — As to the power of any district attorney of any of the superior courts to bring injunction or criminal proceedings, see G.S. 84-7.

Legal Periodicals. — For comment on this section, see 17 N.C.L. Rev. 342 (1939).

§ 84-38. Solicitation of retainer or contract for legal services prohibited; division of fees.

It shall be unlawful for any person, firm, corporation, or association or his or their agent, agents, or employees, acting on his or their behalf, to solicit or procure through solicitation either directly or indirectly, any legal business, whether to be performed in this State or elsewhere, or to solicit or procure through solicitation either directly or indirectly, a retainer or contract, written or oral, or any agreement authorizing an attorney or any other person, firm, corporation, or association to perform or render any legal services, whether to be performed in this State or elsewhere.

It shall be unlawful for any person, firm, corporation, or association to divide with or receive from any attorney-at-law, or group of attorneys-at-law, whether practicing in this State or elsewhere, either before or after action is brought, any portion of any fee or compensation charged or received by such attorney-at-law, or any valuable consideration or reward, as an inducement for placing or in consideration of being placed in the hands of such attorney or attorneys-at-law, or in the hands of another person, firm, corporation or association, a claim or demand of any kind, for the purpose of collecting such claim or instituting an action thereon or of representing claimant in the pursuit of any civil remedy for the recovery thereof, or for the settlement or compromise thereof, whether such compromise, settlement, recovery, suit, claim, collection or demand shall be in this State or elsewhere. This paragraph shall not apply to agreements between attorneys to divide compensation received in cases or matters legitimately, lawfully and properly received by them.

Any person, firm, corporation or association of persons violating the provisions of this section shall be guilty of a Class 1 misdemeanor.

The council of the North Carolina State Bar is hereby authorized and empowered to investigate and bring action against persons charged with violations of this section and the provisions as set forth in G.S. 84-37 shall apply. Nothing contained herein shall be construed to supersede the authority of district attorneys to seek injunctive relief or institute criminal proceedings in the same manner as provided for in G.S. 84-7. Nothing herein shall be construed as abridging the inherent powers of the courts to deal with such matters. (1947, c. 573; 1973, c. 47, s. 2; 1993, c. 539, s. 599; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For discussion of the purposes of this section, see 25 N.C.L. Rev. 379 (1947).

For article on lawyer advertising, see 18 Wake Forest L. Rev. 503 (1982).

CASE NOTES

No Civil Cause of Action. — Legislative codification of the common law offense of barratry in G.S. 84-38 does not provide a civil cause of action for the offense. DaimlerChrysler Corp. v. Kirkhart, 148 N.C. App. 572, 561 S.E.2d 276, 2002 N.C. App. LEXIS 60 (2002).

Cited in State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492 (1984).

Chapter 84A.

Foreign Legal Consultants.

Sec.
84A-1. License to practice as a foreign legal consultant.
84A-2. Application for a certificate of registration.
84A-3. Issuance of a certificate of registration; waiver.
Sec.
84A-4. Scope of practice.
84A-5. Duties of a foreign legal consultant.
84A-6. Service of process on foreign legal consultant.
84A-7. Delegation of duties.
84A-8. Adoption of rules.

§ 84A-1. License to practice as a foreign legal consultant.

(a) The North Carolina Supreme Court may issue a license to practice in the form of a certificate of registration as a foreign legal consultant to any applicant who satisfies all of the following requirements:

(1) Has been admitted to practice as an attorney, or the equivalent thereof, in a foreign country for at least five years as of the date of application for a certificate of registration;
(2) Possesses the character, ethical, and moral qualifications required of a member of the North Carolina State Bar;
(3) Intends to practice in the State as a foreign legal consultant and intends to maintain an office in the State for this practice;
(4) Is at least 21 years of age;
(5) Has been actively and substantially engaged in the practice of law or a profession or occupation that requires admission to the practice of law, or the equivalent thereof, in the foreign country in which the applicant holds a license for at least five of the seven years immediately preceding the date of application for a certificate of registration and is in good standing as an attorney, or the equivalent thereof, in that country; and
(6) Obtains a certificate of registration as a foreign legal consultant pursuant to G.S. 84A-3.

(b) An applicant is not required to take an examination to be licensed under this Chapter.

(c) As used in this section, "foreign country" means any country other than the United States of America. "Foreign country" includes Puerto Rico, Guam, the Virgin Islands, and the possessions of the United States. (1995, c. 427, s. 1.)

§ 84A-2. Application for a certificate of registration.

(a) Any person desiring to obtain a certificate of registration as a foreign legal consultant shall file an application, in duplicate, with the North Carolina State Bar on a form prescribed by the North Carolina State Bar. The application shall be made under oath, and shall contain information relating to the applicant's age, residence, address, citizenship, occupation, general education, legal education, moral character, and any other matters requested by the North Carolina State Bar.

(b) An applicant shall submit two 2-inch by 3-inch photographs of the applicant showing a front view of the applicant's head and shoulders.

(c) The applicant shall submit an application fee required by the North Carolina State Bar with the application. An application fee imposed under this subsection may not exceed two hundred dollars ($200.00). Applications that are received without fees or applications that are not substantially complete shall be promptly returned to the applicant, with a notice stating the reasons for returning the application unprocessed and stating any additional fees that the State Bar determines are required as a condition of reapplication.

(d) The application shall be accompanied by all of the following documents, and, if any documents are not in English, accompanied by duly authenticated English translations of:

- (1) A certificate from the authority that has final jurisdiction regarding matters of professional discipline in the foreign country or jurisdiction in which the applicant was admitted to practice law, or the equivalent thereof. This certificate must be signed by a responsible official or one of the members of the executive body of the authority, imprinted with the official seal of the authority, if any, and must certify:
  - a. The authority's jurisdiction in such matters;
  - b. The applicant's admission to practice law, or the equivalent thereof, in the foreign country, the date of admission, and the applicant's standing as an attorney or the equivalent thereof; and
  - c. Whether any charge or complaint ever has been filed with the authority against the applicant, and, if so, the substance of and adjudication or resolution of each charge or complaint.
- (2) A letter of recommendation from one of the members of the executive body of this authority or from one of the judges of the highest law court or court of general original jurisdiction of the foreign country, certifying the applicant's professional qualifications, and a certificate from the clerk of this authority or the clerk of the highest law court or court of general original jurisdiction, attesting to the genuineness of the applicant's signature.
- (3) A letter of recommendation from at least two attorneys, or the equivalent thereof, admitted in and practicing law in the foreign country, stating the length of time, when, and under what circumstances they have known the applicant and their appraisal of the applicant's moral character.
- (4) Any other relevant documents or information as may be required by the North Carolina State Bar.

(e) In addition to the documents set forth in subsection (d) of this section, the North Carolina State Bar may require other evidence as to the applicant's education, professional qualification, character, fitness, and moral qualification.

(f) Records, papers, and other documents containing information collected or compiled by the North Carolina State Bar or any of its members or employees as a result of any investigation, application, inquiry or interview conducted in connection with an application for a certificate of registration are not public records within the meaning of Chapter 132 of the General Statutes.

(g) Reciprocity between North Carolina and the foreign country in which the applicant is licensed is required for the applicant to be licensed as a foreign legal consultant under this Chapter. (1995, c. 427, s. 1.)

§ 84A-3. Issuance of a certificate of registration; waiver.

(a) The North Carolina State Bar shall review the statements and the supporting documents contained in an application submitted pursuant to G.S. 84A-2 and shall report the results of their review, with recommendations, to the North Carolina Supreme Court.

(b) The North Carolina Supreme Court may issue to an applicant a certificate of registration as a foreign legal consultant.

(c) The North Carolina Supreme Court shall not grant a certificate of registration as a foreign legal consultant unless it is satisfied that the applicant possesses good moral character.

(d) Upon a showing that strict compliance with all of the provisions of G.S. 84A-2 would cause the applicant unnecessary hardship or upon a showing of professional qualifications to practice as a foreign legal consultant satisfactory to the North Carolina Supreme Court, the North Carolina Supreme Court may issue a certificate of registration under this Chapter to an applicant who did not satisfy the provisions of G.S. 84A-2. (1995, c. 427, s. 1.)

§ 84A-4. Scope of practice.

(a) Subject to the limitations set forth in subsections (b) and (c) of this section, a person licensed as a foreign legal consultant under this Chapter may provide legal services in the State and be compensated for those legal services.

(b) A person licensed as a foreign legal consultant shall not engage in any of the following:

(1) Appear on behalf of another person or entity as the attorney for that person or entity in any legal proceeding or before any judicial officer or State or municipal agency or tribunal.

(2) Sign or file in the capacity of an attorney any pleadings, motions, or other documents in any legal proceeding or before any judicial officer or State or municipal agencies, or tribunal.

(3) Prepare any deed, deed of trust, mortgage, option, lease, assignment, agreement or contract of sale, or any other instrument that may affect title to real estate located in the United States.

(4) Prepare any will or trust instrument affecting the disposition of any property located in the United States and owned by a resident of the United States.

(5) Prepare any instrument relating to the administration of a decedent's estate in the United States.

(6) Prepare any instrument affecting the marital relationship, rights, or duties of a resident of the United States or affecting the custody or care of the children of such a resident.

(7) Render professional legal advice regarding State law, the laws of any other state, the laws of the District of Columbia, the laws of the United States or the laws of any foreign country other than the country in which the foreign legal consultant is admitted to practice as an attorney or the equivalent thereof.

(8) In any way represent that the foreign legal consultant is licensed as an attorney in the State or in any other jurisdiction unless he or she is licensed in that jurisdiction.

(9) Use any title other than "foreign legal consultant"; provided, however, that the foreign legal consultant's authorized title and firm name in the foreign country in which he or she is admitted to practice as an attorney or the equivalent thereof, may be used, if the title, firm name, and the name of the foreign country are stated together with the title "foreign legal consultant". Nothing may be added to the title to create the impression that the foreign legal consultant holds a license to practice law in North Carolina.

(10) Be hired by a firm as a partner, member, or in any capacity other than as a foreign legal consultant whose services shall be overseen by an attorney licensed to practice law in North Carolina.

(c) If a particular matter requires legal advice from a person admitted to practice law as an attorney in a jurisdiction other than the one in which the foreign legal consultant is admitted to practice law, or its equivalent thereof, then the foreign legal consultant shall consult an attorney, or the equivalent thereof, in that other jurisdiction, obtain written legal advice on the particular matter, and transmit the written legal advice to the client. (1995, c. 427, s. 1.)

§ 84A-5. Duties of a foreign legal consultant.

A foreign legal consultant shall:

(1) Be subject to rules adopted by the North Carolina Supreme Court and the North Carolina State Bar and be subject to professional discipline in the same manner as is prescribed for disciplinary proceedings against attorneys;

(2) Be subject to a proceeding brought by the North Carolina State Bar in superior court pursuant to G.S. 84-28(j) to protect the interests of clients of disabled, incapacitated, or deceased foreign legal consultants;

(3) Provide the Clerk of the North Carolina Supreme Court with evidence of professional liability insurance, in an amount as prescribed by the Supreme Court to assure the foreign legal consultant's proper professional conduct and responsibility;

(4) Subject his or her trust accounts to audit in the same manner as is prescribed for attorneys licensed to practice law in North Carolina;

(5) Execute and file with the Clerk of the North Carolina Supreme Court, in a form and manner as prescribed by the Clerk:

  a. An oath attesting that the foreign legal consultant will abide by the Rules of Professional Conduct of the North Carolina State Bar and those rules and directives of the North Carolina Supreme Court that are applicable to foreign legal consultants;

  b. A document setting forth the foreign legal consultant's address in the State and designating the Clerk of the North Carolina Supreme Court as agent upon whom process may be served, with the same effect as if served personally upon the foreign legal consultant in any judicial, quasi-judicial, or administrative proceeding brought against the foreign legal consultant arising out of or based upon any legal services rendered or offered to be rendered by the foreign legal consultant within the State or to residents of the State; and

  c. The foreign legal consultant's commitment to notify the Clerk of the North Carolina Supreme Court of any resignation or revocation of the foreign legal consultant's admission to practice law, or the equivalent thereof, in the foreign country in which he or she is admitted to practice as an attorney, or the equivalent thereof, and of any censure, suspension, reprimand, or expulsion with respect to that admission, or of any change of address within the State.

(6) Pay an annual administration fee to the North Carolina State Bar equal in amount to the annual membership fee charged to active members of the North Carolina State Bar. Such fee shall be due on January 1 and delinquent on July 1 for each year or portion of a year in which the foreign legal consultant holds a certificate of registration. No portion of the annual administrative fee shall be waived or prorated. The State Bar's rules and regulations regarding enforcement and collection of annual membership fees shall apply to the enforcement of the obligation to pay the administrative fee. (1995, c. 427, s. 1.)

§ 84A-6. Service of process on foreign legal consultant.

Service of process on the Clerk of the North Carolina Supreme Court, pursuant to this Article, shall be made by personally delivering to and leaving with the Clerk duplicate copies of such process together with a fee of ten dollars ($10.00). The Clerk shall promptly send one of such copies to the foreign legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to the foreign legal consultant at the address specified by the foreign legal consultant in his or her application under G.S. 84A-2, as updated pursuant to G.S. 84A-5(5). (1995, c. 427, s. 1.)

§ 84A-7. Delegation of duties.

The North Carolina State Bar may delegate any of its duties under this Chapter to the North Carolina Board of Law Examiners. (1995, c. 427, s. 1.)

§ 84A-8. Adoption of rules.

The North Carolina State Bar is authorized to adopt and amend such rules, subject to approval of the North Carolina Supreme Court, as are appropriate to accomplish the provisions of this Chapter. (1995, c. 427, s. 1.)

dollars ($10.00). The Clerk shall promptly send a copy of the process to the foreign legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to the foreign legal consultant at the address specified by the foreign legal consultant in his or her application under G.S. 84A-2, as updated pursuant to G.S. 84A-2(c)(5). (1995, c. 431, s. 1.)

§ 84A-7. Delegation of duties.

The North Carolina State Bar may delegate any of its duties under this Chapter to the North Carolina Board of Law Examiners. (1995, c. 431, s. 1.)

§ 84A-8. Adoption of rules.

The North Carolina State Bar is authorized to adopt and amend such rules, subject to approval of the North Carolina Supreme Court, as are appropriate to accomplish the provisions of this Chapter. (1995, c. 431, s. 1.)

Chapter 85.

Auctions and Auctioneers.

§§ 85-1 through 85-27: Repealed by Session Laws 1973, c. 552, s. 9.

Cross References. — For present provisions as to auctions and auctioneers, see Chapter 85B.

Chapter 85A.

Bail Bondsmen and Runners.

§§ 85A-1 through 85A-34: Recodified as G.S. 85C-1 through 85C-41.

Editor's Note. — This Chapter was rewritten by Session Laws 1975, c. 619, s. 1, effective October 1, 1975, and was recodified as Chapter 85C.

G.S. 85C-1 through 85C-41 have been recodified as Article 71 of Chapter 58, G.S. 58-71-1 et seq., pursuant to Session Laws 1987, c. 752, s. 9, as amended by Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

Former G.S. 85A-34 was amended by Session Laws 1975, c. 16, which made the Chapter applicable to Burke County, and by Session Laws 1975, c. 560, which made the Chapter applicable to Carteret, Craven, Forsyth, Pitt and Pamlico Counties.

Chapter 85B.

Auctions and Auctioneers.

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§ 85B-1. Definitions.

For the purposes of this Chapter the following definitions shall apply:

(1) "Auction" means the sale of goods or real estate by means of exchanges between an auctioneer and members of an audience, the exchanges consisting of a series of invitations for offers made by the auctioneer, offers by members of the audience, and the acceptance by the auctioneer of the highest or most favorable offer.

(2) "Auctioneer" means any person who conducts or offers to conduct auctions and includes apprentice auctioneers except as stricter standards are specified by this Chapter for apprentice auctioneers.

(3) "Owner" means the bona fide owner of the property being offered for sale; in the case of partnerships, "owner" means a general partner in a partnership that owns the property being offered for sale, provided that in the case of a limited partnership it has filed a certificate of limited partnership as required by Chapter 59 of the General Statutes; in the case of corporations, "owner" means an officer or director or employee or someone acting on behalf of the employee of a corporation that owns the property being offered for sale provided that the corporation is registered to do business in the State.

(4) "Absolute Auction" means the sale of real or personal property at auction in which the item offered for auction is sold to the highest bidder without reserve, without the requirement of any minimum bid, and without competing bids of any type by the owner, or agent of the owner, of the property.

(5) "Estate Sale" means the liquidation by sale at auction of real or personal property of a specified person.

(6) "Auction Firm" means a sole proprietorship of which the owner is not a licensed auctioneer, or any partnership, association, or corporation, not otherwise exempt from this Chapter, that sells either directly or through agents, real or personal property at auction, or that arranges, sponsors, manages, conducts or advertises auctions, or that in the regular course of business uses or allows the use of its facilities for

auctions. This definition applies whether or not an owner or officer of the business acts as an auctioneer.

(7) "Fund" means Auctioneer Recovery Fund.

(8) "Auctioneering", "conduct of auction", or "conduct of business" means, in addition to the actual calling of bids, any of the following:

a. Contracting for auction.
b. Accepting consignments of items for sale at auction.
c. Advertising an auction.
d. Offering items for sale at auction.
e. Accepting payment or disbursing monies for items sold at auction.
f. Otherwise soliciting, arranging, sponsoring, or managing an auction or holding oneself out as an auctioneer or auction firm.

(9) "Consignment" means, unless otherwise modified by written agreement, the act of delivering or transferring goods or real estate in fact or constructively to an auctioneer or the auctioneer's agent in trust for the purpose of resale at auction whereby title does not pass to the buyer until there is an action indicating a sale. For purposes of this section, consignment may also mean a bailment for sale.

(10) "Designated person" means any person approved by the Board to have the authority to transact business for a licensed auction firm. (1973, c. 552, s. 1; 1983, c. 751, s. 1; 1991 (Reg. Sess., 1992), c. 819, s. 1; 2005-330, s. 1.)

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 85B-2. Activities governed by Chapter.

(a) This Chapter shall apply to all auctions held in this State except the following:

(1) Sales at auction conducted by the owner of all of the goods or real estate being offered, or an attorney representing the owner, unless the owner's regular course of business includes engaging in the sale of goods or real estate by means of auction or unless the owner originally acquired the goods for the purposes of resale at auction;

(2) Sales at auction conducted by or under the direction of any public authority;

(3) Sales conducted by a receiver, trustee, guardian, administrator or executor or any similarly appointed person under order of any court or any person conducting a sale pursuant to an order of a United States Bankruptcy Court or the agent or attorney of such person, receiver, trustee, guardian, administrator or executor;

(4) Any sale required by law to be at auction;

(5) Sale of livestock at a public livestock market authorized and regulated by the Commissioner of Agriculture;

(6) Leaf tobacco sales conducted in accordance with the provisions of Chapter 106 of the General Statutes;

(7) Sale at auction of automobiles conducted under the provisions of G.S. 20-77, or sale at auction of motor vehicles by a motor vehicle dealer licensed under Article 12, Chapter 20 of the General Statutes;

(8) Sale at auction of a particular breed of livestock conducted by an auctioneer who specializes in the sale of that breed when such sale is conducted under the auspices of a livestock trade association; provided that the sale is regulated by the Packers and Stockyards Act and the auctioneer is required to be bonded by the United States Department of Agriculture;

(9) Sales conducted by and on behalf of any charitable or religious organization;
(9a) Sales conducted by and on behalf of a civic club, not exceeding one sale per year;
(10) Sales conducted by a trustee pursuant to a power of sale contained in a deed of trust on real property;
(11) Sales of collateral, sales conducted to enforce carriers' or warehousemen's liens, sales of goods by a presenting bank following dishonor of a documentary draft, resales of rightfully rejected goods, resales of goods by an aggrieved seller, or other resales conducted pursuant to authority in Articles 2, 4, 7, and 9 of Chapter 25 of the General Statutes (the Uniform Commercial Code).

(b) The exceptions provided in subdivisions (2), (4), (9), (9a) and (11) of subsection (a) of this section shall not apply to any person or entity engaged in the business of organizing, arranging, or conducting auction sales for compensation or any person who or entity that accepts consignments to be sold at auction where the consignor receives any proceeds from the sale.

(c) The exceptions provided in subdivision (7) of subsection (a) of this section shall not apply to any auctioneer licensed pursuant to this Chapter employed to be an auctioneer of motor vehicles for a licensed motor vehicle dealer, while conducting an auction for that dealer. (1973, c. 552, s. 2; 1977, c. 1115; 1983, c. 751, ss. 2, 3; 1991 (Reg. Sess., 1992), c. 819, s. 2; 2004-190, s. 5; 2005-330, ss. 2, 3.)

§ 85B-3. Auctioneers Commission.

(a) There shall be a five-member North Carolina Auctioneers Commission having the powers and responsibilities set out in this Chapter. The Governor shall appoint the members of the Commission, at least three of whom, and their successors, may be from nominations submitted by the Auctioneers Association of North Carolina. The Auctioneers Association shall submit, within 45 days of when the vacancy occurs, at least three names for each position for which it is entitled to make a nomination. Of the initial five members of the Commission one shall be appointed for a one-year term, two shall be appointed for two-year terms and two for three-year terms; thereafter, each new member shall be appointed for a term of three years. Any vacancy shall be filled for the remainder of the unexpired term only. Each member shall continue in office until his successor is appointed and qualified. No member shall serve more than two complete consecutive terms.

(b) At least three members of the Commission shall be experienced auctioneers who are licensed under this Chapter. One member shall be a person who shall represent the public at large and shall not be licensed under this Chapter.

(c) The Commission shall employ an executive director and other employees as needed to carry out the duties of this Chapter. All employees shall serve at the pleasure of the Commission.

(d) Any action that may be taken by the Commission may be taken by vote of any three of its members.

(e) The members of the Commission shall elect from among themselves a chairman to serve a one-year term. No person shall serve more than two consecutive terms as chairman.

(f) Repealed by Session Laws 1999-142, s. 1, effective October 1, 1999.

(g) Members of the Commission shall receive the compensation set for members of occupational licensing boards by G.S. 93B-5. (1973, c. 552, s. 3; 1975, c. 648, s. 1; 1983, c. 751, ss. 4, 5; 1991 (Reg. Sess., 1992), c. 819, s. 3; 1999-142, s. 1; 2008-138, s. 1.)

Effect of Amendments. — Session Laws 2008-138, s. 1, effective July 28, 2008, substituted "may" for "shall" in the second sentence of subsection (a).

§ 85B-3.1. Auctioneers Commission; powers and duties.

(a) The Commission shall have the following powers and duties:

(1) To receive and act upon applications for licenses.
(2) To issue licenses.
(3) To deny, suspend, and revoke licenses pursuant to G.S. 85B-8.
(4) To issue declaratory rulings.
(5) To adopt rules for auctioneers and auctions that are consistent with the provisions of this Chapter and the General Statutes.

(b) The Commission may assess a civil penalty not in excess of two thousand dollars ($2,000) for acts prohibited in G.S. 85B-8. All civil penalties collected by the Commission shall be remitted to the school fund of the county in which the violation occurred. Before imposing and assessing a civil penalty and fixing the amount thereof, the Commission shall, as a part of its deliberations, take into consideration the following factors:

(1) The nature, gravity, and persistence of the particular violation.
(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.
(3) Whether the violation was willful.
(4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) The Commission shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to approval of the Governor and the Council of State. Collateral pledged by the Commission for an encumbrance is limited to the assets, income, and revenues of the Commission.

(d) The Commission may purchase, rent, or lease equipment and supplies and purchase liability insurance or other insurance to cover the activities of the Commission, its operations, or its employees. (1999-142, s. 2; 1999-456, s. 23; 2001-198, s. 3.)

§ 85B-3.2. Criminal history record checks of applicants for licensure.

(a) Definitions. — The following definitions shall apply in this section:

(1) Applicant — An applicant for initial licensure as an auctioneer, apprentice auctioneer, or auction firm.
(2) Criminal history — A State or federal history of conviction of a crime, whether a misdemeanor or felony, that bears upon an applicant's fitness to be licensed as an auctioneer, apprentice auctioneer, or auction firm.

(b) The Commission shall ensure that the State criminal history of an applicant is checked. National criminal history checks are authorized for an applicant who has not resided in the State of North Carolina during the past five years. The Commission shall provide to the North Carolina Department of Justice the fingerprints of the applicant to be checked, a form signed by the applicant to be checked consenting to the check of the criminal history and to the use of fingerprints and other identifying information required by the State or National Repositories, and any additional information required by the Department of Justice.

(c) All releases of criminal history information to the Commission shall be subject to, and in compliance with, rules governing the dissemination of criminal history record checks as adopted by the North Carolina Division of

Criminal Information. All of the information the Commission receives through the checking of the criminal history is for the exclusive use of the Commission and shall be kept confidential.

(d) If the applicant's verified criminal history record check reveals one or more convictions of a crime that is punishable as a felony offense, or the conviction of any crime involving fraud or moral turptitude, the Commission may deny the applicant's license. However, the conviction shall not automatically prohibit licensure, and the following factors shall be considered by the Commission in determining whether licensure shall be denied:

(1) The level and seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of the crime.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the applicant and the applicant's duties as an auctioneer, apprentice auctioneer, or auction firm.
(6) The prison, jail, probation, parole, rehabilitation, and employment records of the applicant since the date the crime was committed.
(7) The subsequent commission by the person of a crime.

(e) The Commission may deny licensure to an applicant who refuses to consent to a criminal history record check or use of fingerprints or other identifying information required by the State or National Repositories of Criminal Histories.

(f) The Commission shall notify the applicant of the applicant's right to review the criminal history information, the procedure for challenging the accuracy of the criminal history, and the applicant's right to contest the Commission's denial of licensure.

(g) The Commission shall collect any fees required by the Department of Justice and shall remit the fees to the Department of Justice for expenses associated with conducting the criminal history record check. (1999-142, s. 3; 2000-140, ss. 59(a), (b); 2001-198, s. 1.)

§ 85B-4. Licenses required.

(a) No person who is not exempt under G.S. 85B-2, shall sell, or offer to sell, goods or real estate at auction in this State or perform any act for which an auction firm license is required unless the person holds a currently valid license issued under this Chapter.

(b) No person shall be licensed as an apprentice auctioneer, auctioneer, or receive an auction firm license if the person:

(1) Is under 18 years of age.
(1a) Is not a high school graduate or the equivalent. However, a person licensed under this Chapter prior to July 1, 1999, does not need to meet this requirement.
(2) Repealed by Session Laws 1983, c. 751, s. 6.
(3) Has within the preceding five years pleaded guilty to, entered a plea of nolo contendere or been convicted of any felony, or committed or been convicted of any act involving fraud or moral turpitude.
(4) Has had an auctioneer or apprentice auctioneer or auction firm license revoked.
(5) Has, within the preceding five years, committed any act that constitutes grounds for license suspension or revocation under this Chapter or a Commission rule.

(c) Each applicant for an apprentice auctioneer license shall submit a written application in a form approved by the Commission and containing at least two statements by residents of the community in which the applicant resides attesting to the applicant's good moral character.

(c1) Each apprentice auctioneer application and license shall name a licensed auctioneer to serve as the supervisor of the apprentice. No apprentice auctioneer may enter into an agreement to conduct an auction, or conduct an auction, without the express approval of his supervisor. The supervisor shall review all contracts before approving them and shall regularly review the records his apprentice is required to maintain under G.S. 85B-7 to see that they are accurate and current, and shall perform such other supervisory duties as may be required by the Commission.

(d) No person shall be licensed as an auctioneer unless the person has held an apprentice auctioneer license and served as an apprentice auctioneer for the two preceding years, accumulated sufficient knowledge and experience in such areas of the auctioneer profession as the Commission may deem appropriate, and has taken an examination approved by the Commission and performed on it to the satisfaction of the Commission. The examination shall test the applicant's understanding of the law relating to auctioneers and auctions, ethical practices for auctioneers, the mathematics applicable to the auctioneer business, and such other matters relating to auctions as the Commission considers appropriate. The examination shall be given at least twice each year in North Carolina, and at other times and places the Commission designates, but no person shall be allowed to take the examination within six months after having failed it a second time.

Any person who has successfully completed the equivalent of at least 80 hours of classroom instruction in a course in auctioneering at an institution whose curriculum and instructors meet the qualifications approved or established by the Commission may be licensed as an auctioneer without holding an apprentice license and serving as an apprentice for two years, but shall take the examination required by this subsection and perform on it to the satisfaction of the Commission.

Each applicant for an auctioneer license shall submit a written application in a form approved by the Commission, pay all applicable fees, and consent in writing to a criminal history check as required by G.S. 85B-3.2. If the applicant has been previously licensed as an apprentice auctioneer, the application shall contain an evaluation by the applicant's supervisor of the applicant's performance as an apprentice auctioneer and the applicant's performance in specific areas as required by the Commission. If the applicant is exempted from apprenticeship after completion of the equivalent of at least 80 hours of classroom instruction in auctioneering, the application shall contain a transcript of the applicant's course work in auctioneering. Each application shall be accompanied by statements of at least two residents of the community in which the applicant resides attesting to the applicant's good moral character. The Commission may require verification of any information included in an application for an auctioneer license and may request other information or verification of information provided to determine whether the applicant possesses the good moral character or other qualifications for licensure.

(e) Each license issued under this Chapter shall be valid from July 1 of the year issued, or from the date issued, whichever is later, to the following June 30 unless sooner revoked or suspended pursuant to this Chapter or a rule of the Commission. A license may be renewed for one year at a time, except an apprentice auctioneer license may not be renewed for more than three times. No examination shall be required for renewal of an auctioneer license if the application for renewal is made within 24 months of the expiration of the previous license.

(e1) The Commission may require licensees to complete annually not more than six hours of Commission-approved continuing education courses prior to license renewal. The Commission may impose different continuing education requirements, including no such requirements, upon the classes of licensees under this Chapter. The Commission may waive any or all continuing education requirements in cases of hardship, disability, or illness, or under other circumstances as the Commission deems appropriate. The Commission may adopt rules not inconsistent with the provisions of this Chapter to establish continuing education requirements, including rules that govern any of the following:

(1) The content and subject matter of continuing education courses.
(2) The curriculum of required continuing education courses.
(3) The criteria, standards, and procedures for the approval of courses, course sponsors, and course instructors.
(4) The methods of instruction for continuing education courses.
(5) The computation of course credit.
(6) The number of credit hours needed annually.
(7) The ability to carry forward course credit from one year to another.
(8) The waiver of the continuing education requirement for hardship or other reasons to be determined by the Commission.
(9) The procedures for compliance and noncompliance with continuing education requirements.

(f) No person shall be issued an auctioneer or apprentice auctioneer license until the person has made the contribution to the Fund as required by G.S. 85B-4.1.

(g) An auction firm must be licensed by the Board even though no owner or officer of the firm acts as an auctioneer. To be licensed an auction firm must make the contribution to the Fund as required by G.S. 85B-4.1 and must pay the proper fees as set out in G.S. §85B-6. Auction firms are covered by the provisions of G.S. 85B-8.

An auction firm license issued by the Commission is restricted to the persons named in the license and does not inure to the benefit of any other person. Where a license is issued to an auction firm, authority to transact business under the license is limited to the person or persons designated in the application and named in the license.

The designated person or persons, prior to being licensed, shall be required to take a written examination, approved by the Commission, and demonstrate to the satisfaction of the Commission a thorough understanding of the law relating to the conduct of the auction business and other matters the Commission deems appropriate. An individual who is licensed as an auctioneer and who is the designated person applying for an auction firm license is not required to take the auction firm examination. Licensed real estate brokers and real estate firms may be exempt from the auction firm examination provided they employ or associate themselves with a licensed auctioneer to handle those aspects of the transactions peculiar to the auctioneer profession. Any person or entity, on the effective date of this Chapter, duly licensed as an auction firm in good standing is not required to take any examination in order to maintain or to renew an auction firm license provided that the license does not otherwise expire or lapse and is not suspended or revoked by the Commission.

(h) The Commission shall publish at least once a year a list of names and addresses of all persons, sole proprietorships, partnerships and corporations holding valid apprentice auctioneer, auctioneer, or auction firm licenses.

(i) The Commission may investigate as it deems necessary the ethical background of any applicant for licensure under this Chapter. (1973, c. 552, s. 4; c. 1195, ss. 1, 2; 1975, c. 648, ss. 2-4; 1983, c. 603, s. 4; c. 751, ss. 6-8; 1989, c. 732, s. 1; 1991 (Reg. Sess., 1992), c. 819, s. 4; c. 1030, s. 51.5; 1993, c. 421, s. 3; 1999-142, s. 4; 2001-198, s. 2; 2005-330, s. 4.)

§ 85B-4.1. Auctioneer Recovery Fund.

(a) In addition to license fees, upon application for a license or renewal of a license, the Commission may charge the applicant or licensee up to fifty dollars ($50.00) per year to be included in the Fund.

(b) The Commission shall maintain at least two hundred thousand dollars ($200,000) in the Fund for use as provided in this Chapter. The Fund may be invested by the State Treasurer in interest bearing accounts, and any interest accrued shall be added to the Fund. Sufficient liquidity shall be maintained to insure that funds will be available to satisfy claims processed through the Board. The Fund may be disbursed by a warrant drawn against the State Treasurer or by other method at the discretion of the State Treasurer.

(c) The Commission, in its discretion, may use contents of the Fund in excess of two hundred thousand dollars ($200,000) for the following purposes:

(1) To promote education and research in the auctioneer profession, in order to benefit persons licensed under this Chapter and to improve the efficiency of the profession.

(2) To underwrite educational seminars, training centers, and other forms of educational projects for the use and benefit of licensees.

(3) To sponsor, contract for, or underwrite education and research projects in order to advance the auctioneer profession in North Carolina.

(4) To cooperate with associations of auctioneers, or other groups, in order to promote the enlightenment and advancement of the auctioneer profession in North Carolina. (1983, c. 603, s. 2; 1989, c. 732, s. 2; 1991 (Reg. Sess., 1992), c. 819, s. 5; 1999-142, s. 5.)

§ 85B-4.2. Grounds for payment; notice and application to Commission.

An aggrieved person who has suffered a monetary loss as a direct result of the conversion of funds or property or other fraudulent act or conduct by a licensed auctioneer, apprentice auctioneer, or auction firm shall be eligible to seek compensation from the Fund subject to the limitations of this Chapter and the amount of loss which is otherwise unrecoverable provided that:

(1) The aggrieved person has sued the licensee in a court of competent jurisdiction and has filed with the Commission written notice of such lawsuit within 60 days after its commencement unless the total loss claimed excluding attorneys' fees is less than two thousand five hundred dollars ($2,500), in which case the notice may be filed within 90 days after the termination of all judicial proceedings, including appeals;

(2) The aggrieved person has obtained final judgment in a court of competent jurisdiction against the licensee based upon conversion or other fraudulent conduct arising out of a transaction which occurred when the licensee was licensed by the Commission and was acting in a capacity for which a North Carolina license is required, which judgment shall show the amount owed the aggrieved person;

(3) The aggrieved person was not engaged in any act or conduct for which an auctioneer license is required and was not acting in violation of any of the laws of the State of North Carolina or of the United States; and

(4) Execution on the judgment has been issued and has been returned unsatisfied in whole or in part.

Upon the termination of all judicial proceedings including appeals, and for a period of one year thereafter, a person eligible for recovery may file a verified application with the Commission for payment out of the Fund of the amount remaining unpaid upon the judgment which represents the actual and direct loss sustained by reason of conversion or other fraudulent conduct. A certified copy of the judgment and return of execution shall be attached to the application and filed with the Commission. The applicant shall serve upon the judgment debtor a copy of the application and shall file with the Commission an affidavit or certificate of service, in accordance with the procedures specified by rule by the Commission. (1983, c. 603, s. 2; 1989, c. 732, s. 3; 1991 (Reg. Sess., 1992), c. 819, s. 6.)

§ 85B-4.3. Hearing; required showing.

Upon application by an aggrieved person, the Commission shall conduct a hearing and the aggrieved person shall be required to show that:

(1) The person is not a spouse of the judgment debtor or a person representing such spouse;
(2) The person gave notice of the lawsuit as required by G.S. 85B-4.2;
(3) The person is making application not more than one year after termination of all judicial proceedings, including appeals, in connection with the judgment;
(4) The person has complied with all requirements of this Article;
(5) The person has obtained a judgment as described in G.S. 85B-4.2;
(6) The person has made all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of real or personal property or other assets subject to be sold or applied in satisfaction of the judgment;
(7) That by a search the person has discovered no real or personal property or other assets subject to be sold or applied, or has discovered certain of them, describing them, but that the amount realized was insufficient to satisfy the judgment, stating the amount realized and the balance remaining due on the judgment after application of the amount realized; and
(8) The person has diligently pursued available remedies including attempted execution on the judgment against all the judgment debtors and the execution has been returned unsatisfied. In addition to that, the person knows of no assets of the judgment debtor and has attempted collection from all other persons who may be liable in the transaction for which payment is sought from the Fund if there are any other persons. (1991 (Reg. Sess., 1992), c. 819, s. 7.)

§ 85B-4.4. Response and defense by Commission and judgment debtor; proof of conversion or other fraudulent act.

(a) When the Commission proceeds upon an application as set forth in this Article, counsel for the Commission may defend action on behalf of the Fund and shall have recourse to all appropriate means of defense, including the examination of witnesses. The judgment debtor may personally defend the action and shall have recourse to all appropriate means of defense, including the examination of witnesses. Within 30 days after service of the application, counsel for the Commission and the judgment debtor may file responses setting forth answers and defenses. Responses shall be filed with the Commission and copies shall be served upon every party by the filing party. If at any time it appears there are no triable issues of fact and the application for payment from the Fund is without merit, the Commission shall dismiss the application. A motion to dismiss may be supported by affidavit of any person having knowledge of the facts and may be made on the basis that the application or the judgment referred to does not form a basis for meritorious recovery under G.S. 85B-4.2, that the applicant has not complied with the provisions of this Article, or that the liability of the Fund with regard to the particular licensee or transaction has been exhausted; provided, however, notice of such motion shall be given at least 10 days prior to the time fixed for hearing.

(b) Whenever the judgment obtained by an applicant is by default, stipulation, or consent, or whenever the action against the licensee was defended by a trustee in bankruptcy, the applicant, for purposes of this Article, shall have the burden of proving the cause of action for conversion of funds or property or other fraudulent conduct. Otherwise, the judgment shall create a rebuttable presumption of conversion or other fraudulent conduct. (1991 (Reg. Sess., 1992), c. 819, s. 8.)

§ 85B-4.5. Determination of certain small claims without a prior judicial determination.

Notwithstanding any other provisions of this Chapter, the Commission may, in its discretion, order that payment be made from the Fund, without requiring a prior judicial determination in any case where:

(1) The total loss claimed by the claimant is two thousand five hundred dollars ($2,500) or less;

(2) The amount of alleged loss is readily ascertainable rather than speculative in nature;

(3) The alleged loss is one that is otherwise compensable under this Chapter;

(4) The claimant filed a properly notarized complaint with the Commission not more than one year following the date of the alleged wrongful act or conduct of the licensee; and

(5) The Commission, in its discretion, determines that, based upon the evidence presented, justice would be better served by allowing compensation to be paid without first requiring the aggrieved party to obtain a judgment from a court of competent jurisdiction. (1991 (Reg. Sess., 1992), c. 819, s. 9.)

§ 85B-4.6. Order directing payment out of Fund; compromise of claims.

(a) Applications for payment from the Fund shall be heard and decided by a majority of the members of the Commission. If, after a hearing, the Commission finds that the claim should be paid from the Fund, the Commission shall enter an order requiring payment from the Fund of whatever sum the Commission shall find to be payable upon the claim in accordance with the limitations contained in this Article.

(b) Subject to Commission approval, a claim based upon the application of an aggrieved person may be compromised; however, the Commission shall not be bound in any way by any compromise or stipulation of the judgment debtor. (1991 (Reg. Sess., 1992), c. 819, s. 10.)

§ 85B-4.7. Limitations; pro rata distribution; attorneys' fees.

(a) Payments from the Fund shall be subject to the following limitations:

(1) The right to recovery under this Article shall be forever barred unless timely notice is given as required by G.S. 85B-4.2(a)(1) and application is made within one year after termination of all proceedings, including appeals, in connection with the judgment.

(2) The Fund shall not be liable for more than ten thousand dollars ($10,000) per transaction regardless of the number of persons aggrieved.

(3) The liability of the Fund shall not exceed in the aggregate ten thousand dollars ($10,000) for any one licensee within a single calendar year, and in no event shall it exceed in the aggregate twenty thousand dollars ($20,000) for any one licensee.

(4) The Fund shall not be liable for payment of any judgment awards of consequential damages, multiple or punitive damages, civil penalties, incidental damages, special damages, interest, costs of court or action, or other similar awards.

(b) If the maximum of the Fund is insufficient to pay in full the valid claims of all aggrieved persons whose claims relate to the same transaction or to the same licensee, the amount for which the Fund is liable shall be distributed among the claimants in a ratio that their respective claims bear to the total of such valid claims or in a manner the Commission deems equitable. Upon petition of the Commission, the Commission may require all claimants and prospective claimants to be joined in one proceeding so that the respective rights of all claimants to the Fund may be equitably resolved. (1991 (Reg. Sess., 1992), c. 819, s. 11.)

§ 85B-4.8. Repayment to Fund; automatic suspension of license.

Should the Commission pay from the Fund any amount in settlement of a claim or toward satisfaction of a judgment against a licensee, the license of the licensee shall be automatically suspended upon the effective date of the order authorizing payment from the Fund. The licensee shall not be eligible for consideration for reinstatement until repayment in full, plus interest at the legal rate as provided for in G.S. 24-1, the amount paid from the Fund. (1991 (Reg. Sess., 1992), c. 819, s. 12.)

§ 85B-4.9. Subrogation of rights.

When the Commission has paid from the Fund any sum to the judgment creditor, the Commission shall be subrogated to all of the rights of the judgment creditor to the extent of the amount paid and the judgment creditor shall assign all his right, title, and interest in the judgment to the extent of the amount paid to the Commission and any amount and interest recovered by the Commission on the judgment shall be deposited in the Fund. (1991 (Reg. Sess., 1992), c. 819, s. 13.)

§ 85B-4.10. Waiver of rights.

The failure of an aggrieved person to comply with this Chapter shall constitute a waiver of any rights hereunder. (1991 (Reg. Sess., 1992), c. 819, s. 14.)

§ 85B-4.11. Persons ineligible to recover from Fund.

No licensee who suffers the loss of any commission from any transaction in which the licensee was acting in the capacity of an auctioneer, apprentice auctioneer, or auction firm shall be entitled to make application for payment from the Fund for the loss. Likewise, any person who suffers any monetary loss as a result of a joint business venture of any sort with a licensee shall not be entitled to be compensated from the Fund for the loss. (1991 (Reg. Sess., 1992), c. 819, s. 15.)

§ 85B-4.12. Disciplinary action against licensee.

Nothing contained in this Article shall limit the authority of the Commission to take disciplinary action against any licensee under this Chapter, nor shall the repayment in full of all obligations to the Fund by any licensee nullify or modify the effect of any other disciplinary proceeding brought under this Chapter. (1991 (Reg. Sess., 1992), c. 819, s. 16.)

§ 85B-5. Licensing of nonresidents.

(a) Any person who holds a valid auctioneer license in another state may apply for and be granted a reciprocal North Carolina license if the resident state in which the person is licensed has minimum training or experience standards which are acceptable to the Commission but are not more lenient than those required by this Chapter, if the resident state extends similar reciprocal privileges to auctioneers who are residents of and licensed by the State of North Carolina.

(b) An applicant under this section shall submit an application and other documentation and proof of eligibility for licensure as may be required by the Commission, but shall not be required to take the examination required under G.S. 85B-4. Applicants shall pay the appropriate fee under G.S. 85B-6 and shall file with the Commission an irrevocable consent that service on the Executive Director of the Commission shall be sufficient service of process for actions against the applicant by a resident of this State arising out of his auctioneering activities.

(c) An applicant under this section shall make the contribution to the Fund as required by G.S. 85B-4.1. Any license issued under this section shall be marked to indicate that its holder is a nonresident reciprocal licensee.

(d) A license issued pursuant to this section shall be valid from the date of issuance to the following June 30 and may be renewed from year to year unless suspended or revoked pursuant to the provisions of this Chapter or rule of the Commission, provided that the licensee continues to be a resident of and duly licensed in good standing in the licensee's resident state.

(e) Any person licensed under this section shall notify the Commission of the lapse, surrender, suspension, revocation, or any other act amounting to a loss of license in the person's resident state. The notice must be sent to the Commission, by certified mail, return receipt requested, within 10 days of the occurrence.

(f) Any person licensed under this section shall provide the Commission with written notice of any change of business address or residence within 10 days of the occurrence.

(g) Any license issued under this section shall be immediately suspended or revoked based upon the occurrence of any of the events set out in subsection (e) of this section or based upon a change of principal state residence of the reciprocal licensee.

(h) Any person whose license is terminated as a result of a change of principal state residence may reapply for reciprocal status provided the person is otherwise eligible for a license based upon the new state residence, and submits with the application the fees required by the Commission.

(i) Notwithstanding any other provision of this section, a reciprocal licensee who subsequently becomes a domiciliary of the State of North Carolina may request, by application, that the reciprocal license be converted to that of an in-State licensee without having to take the State exam required by G.S.

85B-4. The Commission may, however, require an applicant to pay processing and application fees it deems appropriate. (1973, c. 552, s. 5; 1983, c. 603, s. 5; c. 751, ss. 9-11; 1989, c. 732, s. 4; 1991 (Reg. Sess., 1992), c. 819, s. 17.)

§ 85B-6. Fees; local governments not to charge fees or require licenses.

(a) The Commission shall collect and remit to the State Treasurer fees in an amount not to exceed the following:

Item	Maximum Fee
Apprentice Auctioneers:	
Application for license	$ 125.00
Issuance or renewal of license	125.00
Auctioneers:	
Application for license	125.00
Examination	75.00
Issuance or renewal of license	250.00
Auction Firms:	
Application for license	125.00
Examination	75.00
Issuance or renewal of license	250.00
Reinstatement of License	75.00.

An application fee for a license and an examination fee are nonrefundable. The amount payable by a nonresident under G.S. 85B-5 to obtain a nonresident reciprocal auctioneer license is the greater of the amount set in the above table for an examination for and the issuance of an auctioneer's license and the amount the nonresident's state would charge a resident auctioneer of this State to obtain a comparable license from that state.

A reinstatement fee is payable when a person applies for renewal of a license after the license has lapsed for failure to renew it before it expired. The reinstatement of a lapsed license is not retroactive in effect and does not limit the authority of the courts or of the Commission to take disciplinary action against a person who engages in the auctioneer profession with a lapsed license.

(b) No local government or agency of local government may charge any fees or require any licenses for auctioneers, apprentice auctioneers, or auction firms in addition to those set out in this Chapter. (1973, c. 552, s. 6; c. 1195, s. 3; 1975, c. 648, s. 5; 1977, 2nd Sess., c. 1219, s. 43.7; 1983, c. 751, s. 12; 1991 (Reg. Sess., 1992), c. 819, s. 18; 1993, c. 421, s. 1; 1999-142, s. 6.)

OPINIONS OF ATTORNEY GENERAL

Applicability of Itinerant Merchant License Requirement. — If an auctioneer travels into a city or county in which he does not maintain a regular place of business and sells or auctions property owned by him, he must obtain an itinerant merchant license pursuant to G.S. 105-53(d), as well as comply with any ordinances of the particular city or county governing itinerant merchants. See opinion of Attorney General to Mr. DeWitt S. McCarley, City Attorney, Greenville, North Carolina, 55 N.C.A.G. 38 (1985).

An auctioneer is not deemed to be an itinerant merchant if he travels into a city or county in which he does not maintain a regular place of business and auctions merchandise belonging to another person, whether or not that person maintains a regular place of business in the particular city or county. Therefore, such an auctioneer would not be required to comply with G.S. 105-53(d) or any local ordinances of the particular city or county governing itinerant merchants. However, if the owner of the goods to be auctioned off does not maintain a regular place of business in the particular city or county, that person would be required to comply with G.S. 105-53(d) and any local ordinances governing itinerant merchants. See opinion of Attorney General to Mr. DeWitt S. McCarley, City Attorney, Greenville, North Carolina, 55 N.C.A.G. 38 (1985).

§ 85B-7. Conduct of auction; records.

(a) No licensee shall conduct an auction in this State without first having a written agreement with the owner of any property to be sold. The agreement must contain the terms and conditions upon which the auctioneer received the goods for sale. The licensee shall provide the owner with a signed copy of the agreement and shall keep at least one copy for his own records for two years from the date of the agreement. Copies of all contracts shall be made available to the Commission or its designated agent upon request.

(b) Each licensee shall maintain consignment records and enter in them, upon receipt of goods for auction and before sale, the name and address of the person who employed the licensee to sell the goods at auction and the name and address of the owner of the goods to be sold. The consignment record shall contain an adequate description of the goods to be sold and shall be sufficient to positively identify each item. Consignment records shall be open for inspection by the Commission or its designated agent at reasonable times.

(c) All licensees shall have their licenses available at each auction they conduct.

(d) Each licensee shall maintain sales records, which identify the purchaser of all goods sold by name, address, and when possible, telephone number. The sales records shall contain an adequate description of the items sold and must be sufficient to positively identify the owner of the property. Sales records shall be maintained for a period of not less than two years from the date of sale. Sales records shall be open for inspection by the Commission or its designated agent at reasonable times. (1973, c. 552, s. 7; 1991 (Reg. Sess., 1992), c. 819, s. 19; 2005-330, s. 5.)

§ 85B-7.1. Handling clients' funds.

(a) Each licensee who does not disburse all funds to the seller on auction day shall maintain a trust or escrow account and shall deposit in the account all funds that are received for the benefit of another person and are not disbursed to the seller on auction day. The licensee shall deposit funds that are not disbursed on auction day with an insured bank or savings and loan association located in North Carolina. At or before the time of all final settlements, the auctioneer shall provide the seller or consignor with a settlement statement, which includes a description of all goods sold, the selling price of the goods sold, the net proceeds due to the seller or consignor, the name and address of the person receiving the disbursement, and the amount of the disbursement. All settlement statements shall be signed by the licensee or the licensee's agent and by the person receiving the disbursement.

(b) Each licensee shall maintain, for not less than five years, complete records showing the deposit, maintenance, and withdrawal of trust or escrow funds and the disbursement of funds on auction day. Records of the disbursement of funds on auction day shall include a copy of each receipt or settlement statement issued when the funds were disbursed. The Commission or its designated agent may inspect these records periodically, without prior notice, and may also inspect these records whenever the Commission determines that they are pertinent to an investigation of any specific complaint against a licensee. (1991 (Reg. Sess., 1992), c. 819, s. 20; 1993, c. 421, s. 2; 2005-330, s. 6.)

§ 85B-8. Prohibited acts; assessment of civil penalty; denial, suspension, or revocation of license.

(a) The following shall be grounds for the assessment of a civil penalty in accordance with G.S. 85B-3.1(b) or the denial, suspension, or revocation of an auctioneer, auctioneer apprentice, or auction firm license:

(1) Any violation of this Chapter or any violation of a rule or regulation duly adopted by the Commission.

(2) A continued and flagrant course of misrepresentation or making false promises, either by the licensee, an employee of the licensee, or by someone acting on behalf of and with the licensee's consent.

(3) Any failure to account for or to pay over within a reasonable time, not to exceed 30 days, funds belonging to another which have come into the licensee's possession through an auction sale.

(4) Any false, misleading, or untruthful advertising.

(5) Any act of conduct in connection with a sales transaction which demonstrates bad faith or dishonesty.

(6) Knowingly using false bidders, cappers or pullers, or knowingly making a material false statement or representation.

(7) Commingling the funds or property of a client with the licensee's own or failing to maintain and deposit in a trust or escrow account in an insured bank or savings and loan association located in North Carolina funds received for another person through sale at auction.

(8) Failure to make the required contribution to the Fund.

(9) The commission or conviction of a crime that is punishable as a felony offense under the laws of North Carolina or the laws of the jurisdiction where committed or convicted, or the commission of any act involving fraud or moral turpitude.

(10) Failure to properly make any disclosures or to provide documents or information required by this Chapter or by the Commission.

(11) A demonstrated lack of financial responsibility.

(b) through (d) Repealed by Session Laws 1973, c. 1195, s. 5.

(e) The Commission may investigate complaints and conduct hearings as follows:

(1) The Commission may upon its own motion or upon the complaint in writing of any person, provided the complaint and any evidence presented with it establishes a prima facie case, hold a hearing and investigate the actions of any auctioneer, apprentice auctioneer, or auction firm, or any person who holds himself or herself out as an auctioneer or apprentice auctioneer, and shall have the power to impose a civil penalty on any licensee, suspend or revoke any license issued under the provisions of this Chapter, or to reprimand or censure any licensee. In all proceedings for the imposition of a civil penalty or the denial, suspension, or revocation of licenses, the provisions of Chapter 150B of the General Statutes including provisions relating to summary suspension shall be applicable. Any person who desires to appeal the denial of an application for any license authorized to be issued under this Chapter shall file a written appeal with the Commission not later than 30 days following notice of denial.

(2) The Commission may, upon its own motion, summarily suspend a license when the health, safety, or welfare of the public is at risk, such as in the event of a potential loss of consigned items or potential loss of funds.

(f) A person whose license has been denied, suspended, or revoked may not apply in that person's name or in any other manner within the period during which the order of denial, suspension, or revocation is in effect, and no firm, partnership, or corporation in which any person has a substantial interest or exercises management responsibility or control may be licensed during the period. (1973, c. 552, s. 8; c. 1195, ss. 4, 5; c. 1331, s. 3; 1975, c. 648, s. 6; 1983, c. 603, s. 6; 1989, c. 732, s. 5; 1991 (Reg. Sess., 1992), c. 819, s. 21; 1999-142, s. 7; 2005-330, s. 7.)

§ 85B-9. Penalties and enforcement.

(a) Any person, corporation or association of persons violating the provisions of G.S. 85B-4(a) shall be guilty of a Class 1 misdemeanor. The Attorney General of North Carolina, or the Attorney General's designee, shall have concurrent jurisdiction with the district attorneys of this State to prosecute violations of this Chapter.

(b) The Commission may in its own name seek injunctive relief in the General Court of Justice to restrain any violation or anticipated violation of the provisions of G.S. 85B-4(a) or any violation of this Chapter.

(c) The Commission shall be entitled to the services of the Attorney General of North Carolina in enforcing the provisions of this Chapter or may employ an attorney to assist and represent it in enforcement of specific matters. (1973, c. 1195, s. 6; 1975, c. 648, s. 7; 1991 (Reg. Sess., 1992), c. 819, s. 22; 1993, c. 539, s. 600; 1994, Ex. Sess., c. 24, s. 14(c); 1999-142, s. 8.)

Chapter 85C.

Bail Bondsmen and Runners.

§§ 85C-1 through 85C-41: Recodified as Article 71 of Chapter 58.

Editor's Note. — This Chapter has been recodified as Article 71 of Chapter 58, G.S. 58-71-1 et seq., under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

G.S. 85C-41 was repealed by Session Laws 1983, c. 742, s. 3.

Chapter 86.

Barbers.

§§ 86-1 through 86-25: Recodified as G.S. 86A-1 through 86A-26.

Editor's Note. — This Chapter was rewritten by Session Laws 1979, c. 695, and has been recodified as Chapter 86A.

Chapter 86A.

Barbers.

Sec.
86A-1. Necessity for certificate of registration and shop or school permit.
86A-2. What constitutes practice of barbering.
86A-3. Qualifications for certificate as a registered barber.
86A-4. State Board of Barber Examiners; appointment and qualifications; term of office; removal.
86A-5. Powers and duties of the Board.
86A-6. Office; seal; officers and executive director; funds.
86A-7. Salary and expenses; employees; audits; annual reports to the Governor.
86A-8. Application for examinations; payment of fee.
86A-9. Board to conduct examinations not less than four times each year.
86A-10. Issuance of certificates of registration.
86A-11. Temporary permits.
86A-12. Applicants licensed in other states.
86A-13. Barbershop and barber school permits.

Sec.
86A-14. Persons exempt from the provisions of this Chapter.
86A-15. Sanitary rules and regulations; inspections.
86A-16. Certificates to be displayed.
86A-17. Renewal or restoration of certificate.
86A-18. Disqualifications for certificate.
86A-19. Refusal, revocation or suspension of certificates or permits.
86A-20. Misdemeanors.
86A-20.1. Enjoining illegal practices.
86A-21. Board to keep record of proceedings; data on registrants.
86A-22. Licensing and regulating barber schools and colleges.
86A-23. Instructors.
86A-24. Apprenticeship.
86A-25. Fees collectible by Board.
86A-26. Barbering among members of same family.
86A-27. Civil penalties; disciplinary costs.

§ 86A-1. Necessity for certificate of registration and shop or school permit.

No person or combination of persons shall, either directly or indirectly, practice or attempt to practice barbering in the State of North Carolina without first obtaining a certificate of registration either as a registered apprentice or as a registered barber issued pursuant to provisions of this Chapter by the State Board of Barber Examiners. No person or combination of persons, or corporation, shall operate, manage or attempt to operate or manage a barber school, barbershop, or any other place where barber services are rendered, after July 1, 1945, without first obtaining a shop permit, or school permit, issued by the State Board of Barber Examiners, pursuant to the provisions of this Chapter. (1929, c. 119, s. 1; 1941, c. 375, s. 1; 1945, c. 830, s. 1; 1979, c. 695, s. 1.)

Editor's Note. — This Chapter is former Chapter 86, as rewritten by Session Laws 1979, c. 695, and recodified. Where appropriate, historical citations to sections in the former Chapter have been added to corresponding sections in the Chapter as rewritten.

Legal Periodicals. — For comment on the 1941 amendment, see 19 N.C.L. Rev. 447 (1941).

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

CASE NOTES

Editor's Note. — *The cases cited under the various sections below were decided under this Chapter as it existed prior to its revision and recodification by Session Laws 1979, c. 695.*

Constitutionality. — This Chapter, known as the "Barber's Act," relates to the public health and is constitutional as a valid exercise of the police power of the State. State v. Lockey, 198 N.C. 551, 152 S.E. 693 (1930).

Validity of Chapter Is No Longer Open

to Attack. — The validity of this Chapter, providing for the licensing of barbers and the control and regulation of the trade, having been judicially determined, it may not be attacked in a subsequent suit. Motley v. State Bd. of Barber Exmrs., 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

Application. — The provisions of this Chapter apply to proprietor barbers. State v. Lockey, 198 N.C. 551, 152 S.E. 693 (1930).

Cited in James v. Denny, 214 N.C. 470, 199 S.E. 617 (1938).

§ 86A-2. What constitutes practice of barbering.

Any one or combination of the following practices constitutes the practice of barbering in the purview of this Chapter:

(1) Shaving or trimming the beard, or cutting the hair;

(2) Dyeing the hair or applying hair tonics, permanent waving or marcelling the hair;

(3) Giving facial or scalp massages, or treatments with oils, creams, lotions or other preparations either by hand or mechanical appliances. (1929, c. 119, s. 2; 1941, c. 375, s. 2; 1979, c. 695, s. 1.)

§ 86A-3. Qualifications for certificate as a registered barber.

A certificate of registration as a registered barber shall be issued by the Board to any person who meets all of the following qualifications:

(1) Has attended an approved barber school for at least 1528 hours.

(2) Has completed a 12-month apprenticeship under the supervision of a licensed barber, as provided in G.S. 86A-24.

(3) Has passed a clinical examination conducted by the Board.

(4) Has submitted to the Board the affidavit required by G.S. 86A-24(c) certifying that the applicant has served the apprenticeship required by subdivision (2). (1929, c. 119, ss. 3, 4, 11; 1941, c. 375, s. 3; 1961, c. 577, s. 1; 1979, c. 695, s. 1; 1981, c. 457, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 1.)

§ 86A-4. State Board of Barber Examiners; appointment and qualifications; term of office; removal.

(a) The State Board of Barber Examiners is established to consist of five members appointed by the Governor. Four shall be licensed barbers; the other shall be a person who is not licensed under this Chapter and who shall represent the interest of the public at large.

(b) No member appointed to the Board on or after July 1, 1981, shall serve more than three complete consecutive three-year terms, except that each member shall serve until the member's successor is appointed and qualifies.

No person who has been employed by the North Carolina State Board of Barber Examiners and has been removed for just cause shall be appointed within five years of the removal to serve as a Board member.

(c) The Governor may remove any member for good cause shown and may appoint members to fill unexpired terms.

(d) Expired by Session Laws 2004-146, s. 1(a), effective July 1, 2007. (1929, c. 119, s. 6; 1979, c. 695, s. 1; 1981, c. 457, s. 2; 1995 (Reg. Sess., 1996), c. 605, s. 2; 2001-486, s. 2.2; 2004-146, s. 1(a).)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

§ 86A-5. Powers and duties of the Board.

(a) The Board has the following powers and duties:

(1) To see that inspections of barbershops and schools are conducted to determine compliance with sanitary regulations. The Board may appoint inspectors as necessary.

(2) To adopt sanitary regulations concerning barber schools and shops and procedural rules in accordance with the guidelines established in G.S. 86A-15.

(3) To review the barber licensing laws of other states and to determine which are the substantive equivalent of the laws of North Carolina for purposes of G.S. 86A-12.

(4) To conduct examinations of applicants for certificate of registration as registered barber, registered apprentice and barber school instructor.

(5) To employ and fix the compensation of personnel that the Board deems necessary to carry out the provisions of this Chapter.

(6) To assess civil penalties pursuant to G.S. 86A-27.

(b) The Board shall adopt regulations:

(1) Prohibiting the use of commercial chemicals of unknown content by persons registered under this Chapter. For purposes of this section, "commercial chemicals" are those products sold only through beauty and barber supply houses and not available to the general public;

(2) Instructing persons registered under this Chapter in the proper use and application of commercial chemicals where no manufacturer's instructions are included. In the alternative, the Board shall prohibit the use of such commercial chemicals by persons registered under this Chapter.

(c) Each Board member shall submit periodic reports to the Board concerning his activities in carrying out duties as a Board member. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, ss. 3, 4; 2004-146, s. 2.)

§ 86A-6. Office; seal; officers and executive director; funds.

The Board shall maintain a suitable office in Raleigh, and shall adopt and use a common seal for the authentication of its orders and records. The Board shall annually elect its own officers, and in addition, may elect or appoint a full-time executive director who shall not be a member of the Board, and whose salary shall be fixed by the Board. The executive director shall turn over to the State Treasurer to be credited to the State Board of Barber Examiners all funds collected or received under this Chapter, the funds to be held and expended under the supervision of the Director of the Budget, exclusively for the enforcement and administration of the provisions of this Chapter. Nothing herein shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from fees collected under the provisions of this Chapter and received by the State Treasurer pursuant to the provisions of this section. (1929, c. 119, ss. 7, 14; 1937, c. 138, s. 4; 1941, c. 375, s. 4; 1943, c. 53, s. 1; 1945, c. 830, ss. 2, 4; 1951, c. 821, s. 1; 1957, c. 813, ss. 1, 3; 1965, c. 513; 1971, c. 826, ss. 1, 2; 1973, c. 1398; 1979, c. 695, s. 1; 1981, c. 884, s. 5; 1983, c. 717, s. 15; 1995 (Reg. Sess., 1996), c. 605, s. 3; 2004-146, s. 3.)

§ 86A-7. Salary and expenses; employees; audits; annual reports to the Governor.

(a) Each member of the Board of Barber Examiners shall be reimbursed for his actual expenses and shall receive compensation and travel allowance according to G.S. 93B-5 for the distance traveled in performance of his duties. The expenses, compensation and all other salaries and expenses in connection with the administration of this Chapter, shall be paid upon warrant drawn on the State Treasurer, solely from the funds derived from fees collected and received under this Chapter.

(b) The Board shall employ such agents, assistants and attorneys as it deems necessary.

(c) Repealed by Session Laws 1981, c. 884, s. 6.

(d) Repealed by Session Laws 1983, c. 913, s. 8.

(e) The Board shall report annually to the Governor, a full statement of its receipts and expenditures, and also a full statement of its work during the year, together with such recommendations as it may deem expedient. (1929, c. 119, s. 8; 1943, c. 53, s. 2; 1945, c. 830, s. 3; 1957, c. 813, s. 2; 1979, c. 695, s. 1; 1981, c. 884, s. 6; 1983, c. 913, s. 8.)

§ 86A-8. Application for examinations; payment of fee.

Each applicant for an examination shall:

(1) Make application to the Board on forms prepared and furnished by the Board, and the application shall contain proof under applicant's oath of the particular qualifications of the applicant. All applications for examination must be filed with the Board at least 30 days prior to the actual taking of such examination by applicants;

(2) Pay to the Board the required fee. (1929, c. 119, s. 9; 1979, c. 695, s. 1.)

§ 86A-9. Board to conduct examinations not less than four times each year.

The Board shall conduct examinations of applicants for certificates of registration to practice as registered barbers and registered apprentices, not less than four times each year, at such times and places as will prove most convenient and as the Board may determine. The Board may adopt rules establishing procedures for the administration of examinations. (1929, c. 119, s. 10; 1979, c. 695, s. 1; 2004-146, s. 4.)

§ 86A-10. Issuance of certificates of registration.

Whenever the provisions of this Chapter have been complied with, the Board shall issue, or have issued, a certificate of registration as a registered barber or as a registered apprentice, as the case may be. (1929, c. 119, s. 11; 1979, c. 695, s. 1; 1981, c. 457, s. 5.)

§ 86A-11. Temporary permits.

(a) The Board may grant a temporary permit to work to a graduate of a barber school in North Carolina provided application for examination has been filed and fee paid. The permit is valid only until the date of the next succeeding Board examination of applicants for apprenticeship registration except in cases of undue hardship as the Board may determine, unless it is revoked or suspended earlier by the Board. In no event shall a temporary permit be issued or remain valid after the holder has twice failed the apprentice examination required by G.S. 86A-24(a). The permittee may operate only under the supervision of a licensed barber and may work only at the registered barbershop specified in the permit.

(b) The Board may grant a temporary permit to work to one whose license has been expired for more than five years in North Carolina provided application for examination to restore has been filed and fee paid. The permit is valid only until the date of the next succeeding Board examination of applicants for barber licenses except in cases of undue hardship as the Board may determine, unless it is revoked or suspended earlier by the Board.

(c) The Board may grant a temporary permit to persons licensed in another state who come to North Carolina for the purpose of teaching or demonstrating barber skills. The Board shall also inspect and approve the area where the demonstration is to be given if it is not an already approved shop or school. This permit shall be limited to the specific days of demonstration and shall be of no validity before or after.

(d) The Board may grant a temporary permit to work to persons licensed in another state and seeking permanent licensure in North Carolina under G.S. 86A-12. (1929, c. 119, s. 12; 1941, c. 375, s. 5; 1947, c. 1024; 1961, c. 577, s. 2; 1979, c. 695, s. 1; 1981, c. 457, ss. 6, 7; 1995 (Reg. Sess., 1996), c. 605, s. 4.)

§ 86A-12. Applicants licensed in other states.

(a) The Board shall issue, without examination, a license to applicants already licensed in another state provided the applicant presents evidence satisfactory to the Board that:

(1) He is currently an active, competent practitioner in good standing; and
(2) He has practiced at least three out of the five years immediately preceding his application; and
(3) He currently holds a valid license in another state; and
(4) There is no disciplinary proceeding or unresolved complaint pending against him at the time a license is to be issued by this State; and
(5) The licensure requirements in the other state are the substantive equivalent of those required by this State.

(b) The requirements in subdivisions (1) or (5), or both, of subsection (a) of this section may be waived by the Board provided that the applicant presents evidence satisfactory to the Board that the applicant:

(1) Has met the licensure requirements of the state in which he received his license;
(2) Has at least five years practical experience; and
(3) Demonstrates his knowledge of barbering skills and of the sanitary regulations in North Carolina by passing a practical, written or oral examination.

(c) Any license granted pursuant to this section is subject to the same duties and obligations and entitled to the same rights and privileges as a license issued under G.S. 86A-3. (1929, c. 119, s. 12; 1941, c. 375, s. 5; 1947, c. 1024; 1961, c. 577, s. 2; 1979, c. 695, s. 1; 1981, c. 457, s. 8; 1987, c. 210.)

§ 86A-13. Barbershop and barber school permits.

(a) Any person, firm or corporation, before establishing or opening a barbershop or barber school not heretofore licensed by the State or the Board shall make application to the Board on forms to be furnished by the Board, for a permit to operate a barbershop or barber school, and the shop or school of the applicant shall be inspected and approved by the State Board of Barber Examiners or an agent designated for that purpose by the Board, before the barbershop or barber school may open for business. It is unlawful to open a new or reopened barbershop or barber school until that shop or school has been inspected and determined by the Board to be in compliance with the requirements of G.S. 86A-15 in the case of shops and G.S. 86A-15 and 86A-22 in the case of schools. Upon compliance by the applicant with all requirements set forth in G.S. 86A-15, and the payment of the prescribed fee the Board shall issue to the applicant the permit applied for. Notwithstanding any other provision of this Chapter, no person, firm, or corporation shall be issued a permit to operate a barbershop in a location registered as a barber school, nor shall any person, firm, or corporation be issued a permit to operate a barber school in a location registered as a barbershop.

(b) The owners of every registered barbershop and barber school shall annually, on or before May 31 of each year, renew the barbershop's or barber school's certificate of registration and pay the required renewal fee. Every certificate of registration for any barbershop or barber school shall expire on the 31st day of May in each year. Any certificate of registration issued under this Chapter shall be suspended automatically by operation of law after failure to renew the certificate of registration by the expiration date. The owner of any barbershop or barber school whose certificate of registration has expired may, after the barbershop or barber school has been inspected as required in subsection (a) of this section, have the certificate restored immediately upon paying all lapsed renewal fees and the required late fee. (1929, c. 119, ss. 1, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 1, 7; 1945, c. 830, ss. 1, 8; 1961, c. 577, ss. 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 5.)

§ 86A-14. Persons exempt from the provisions of this Chapter.

The following persons are exempt from the provisions of this Chapter while engaged in the proper discharge of their duties:

(1) Persons authorized under the laws of the State to practice medicine and surgery, and those working under their supervision;

(2) Commissioned medical or surgical officers of the U.S. Army or other components of the U.S. armed forces, and those working under their supervision;

(3) Registered nurses and licensed practical nurses and those working under their supervision;

(4) Licensed embalmers and funeral directors and those working under their supervision;

(5) Persons who are working in licensed cosmetic shops or beauty schools and are licensed by the State Board of Cosmetic Art Examiners pursuant to Chapter 88B of the General Statutes; and

(6) Persons who are working in licensed barber shops and are licensed by the State Board of Cosmetic Art Examiners pursuant to Chapter 88B of the General Statutes, provided that those persons shall comply with G.S. 86A-15. (1929, c. 119, s. 15; 1937, c. 138, s. 2; 1941, c. 375, s. 6; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 6; 1998-230, s. 2.2.)

§ 86A-15. Sanitary rules and regulations; inspections.

(a) Each barber and each owner or manager of a barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

(1) Proper quarters. —

a. Every barbershop, or other place where barber service is rendered, shall be located in buildings or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.

b. Each area where barber service is rendered or where a combination of barber service and cosmetology service is rendered shall be separated by a substantial partition or wall from areas used for purposes other than barber services, cosmetology services, or shoe shining services.

c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.

d. Running water, hot and cold, shall be provided, and sinks shall be located at a convenient place in each barbershop so that barbers may wash their hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The lavatory must have a drain pipe to drain all waste water out of the building.

e. Every barbershop or other place where barber service is rendered, and every building or structure used as a part of a barber school, shall comply with applicable building and fire codes and regulations.

(2) Equipment and instruments. —

a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a solution of fifty percent (50%) alcohol, five percent (5%) carbolic acid, twenty percent (20%) formaldehyde, or ten percent (10%) lysol or other product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.

b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.

c. The headrest of every barber chair shall be protected with clean paper or a clean laundered towel. Each barber chair shall be covered with a smooth nonporous surface, such as vinyl or leather, that is cleaned easily.

d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.

e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.

(3) Barbers. —

a. Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each patron.

b. Each person working as a barber shall be clean both as to person and dress.

c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease.

(4) Any person, other than a registered barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.

(5) The owner or manager of a barbershop or any other place where barber service is rendered shall post a copy of these rules and

regulations in a conspicuous place in the shop or other place where the services are rendered.

(b) All barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board of Barber Examiners or its agents or assistants. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops and barber schools for the proper administration and enforcement of this section, but no such additional rules or regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State.

(c) Notwithstanding any other provision of law, a registered barber may practice barbering in a client's home out of medical necessity without meeting the requirements of subsection (b) of this section. The Board of Barber Examiners shall adopt rules to allow this exception. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 7; 2009-471, s. 1.)

Effect of Amendments. — Session Laws 2009-471, s. 1, effective August 26, 2009, added subsection (c).

§ 86A-16. Certificates to be displayed.

Every holder of a certificate of registration as a registered barber, registered apprentice, shop permit, school permit, instructor's certificate, or temporary permit issued pursuant to G.S. 86A-11 shall display it in a conspicuous place adjacent to or near the person's work chair. (1929, c. 119, s. 17; 1979, c. 695, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 8.)

§ 86A-17. Renewal or restoration of certificate.

(a) Registered barbers who continue in practice shall annually, on or before May 31 of each year, renew their certificates of registration and furnish such health certificate as the Board may require and pay the required renewal fee. Every certificate of registration shall expire on the 31st day of May in each year. Any certificate of registration issued under this Chapter is automatically suspended by operation of law after failure to renew the certificate of registration by the expiration date.

(b) A registered barber whose certificate of registration has expired may have the certificate restored immediately upon paying all lapsed renewal fees and the required late fee and furnishing a health certificate if required by the Board. Where a registered barber's certificate of registration has expired for a period greater than six months, the Board may impose civil penalties pursuant to G.S. 86A-27. A registered barber whose certificate has expired for a period of five years shall be required to take the clinical examination prescribed by the State Board of Barber Examiners and otherwise comply with the provisions of this Chapter before engaging in the practice of barbering. No registered barber who is reissued a certificate under this subsection shall be required to serve an apprenticeship as a prerequisite to reissuance of the certificate.

(c) All persons serving in the United States armed forces and persons whose certificates of registration as a registered barber were in force one year prior to entering service may, without taking the required examination, renew their certificates within 90 days after receiving an honorable discharge, by paying the current annual license fee and furnishing the State Board of Barber Examiners with a satisfactory health certificate if required by the Board. (1929, c. 119, s. 18; 1937, c. 138, s. 5; 1945, c. 830, s. 5; 1973, c. 605; 1979, c. 695, s. 1; 1981, c. 457, s. 11; 1995 (Reg. Sess., 1996), c. 605, s. 9; 2004-146, s. 5.)

§ 86A-18. Disqualifications for certificate.

The Board may either refuse to issue or to renew, or may suspend or revoke any certificate of registration or barbershop permit or barber school permit for any one or combination of the following causes:

(1) Conviction of the applicant or certificate holder of a felony proved by certified copy of the record of the court conviction;
(2) Gross malpractice or gross incompetence;
(3) Continued practice by a person knowingly having an infectious or contagious disease after being warned in writing by the Board to cease practice;
(4) Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit forming drugs;
(5) The commission of any of the offenses described in subdivisions (3), (5), and (6) of G.S. 86A-20;
(6) The violation of any one or more of the sanitary rules and regulations established by statute or rule or regulation of the Board, provided that the Board has previously given two written warnings to the individual committing the violation;
(7) The violation of the rules and regulations pertaining to barber schools, provided that the Board has previously given two written warnings to the school. (1929, c. 119, s. 19; 1941, c. 375, s. 8; 1945, c. 830, s. 6; 1961, c. 477, s. 4; 1979, c. 695, s. 1; 1981, c. 457, s. 9.)

§ 86A-19. Refusal, revocation or suspension of certificates or permits.

The Board may neither refuse to issue nor refuse to renew, or suspend or revoke any certificate of registration, barbershop permit, or barber school permit, for any of these causes except in accordance with the provisions of Chapter 150B of the General Statutes. (1929, c. 119, s. 20; 1939, c. 218, s. 1; 1945, c. 830, s. 7; 1953, c. 1041, s. 2; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1987, c. 827, s. 1.)

§ 86A-20. Misdemeanors.

Each of the following acts constitutes a Class 3 misdemeanor:

(1) Violation of any of the provisions of G.S. 86A-1;
(2) Obtaining or attempting to obtain a certificate of registration for money other than the required fee or any other thing of value, or by fraudulent misrepresentations;
(3) Practicing or attempting to practice by fraudulent misrepresentations;
(4) Willful failure to display a certificate of registration as required by G.S. 86A-16;
(5) Practicing or attempting to practice barbering during the period of suspension or revocation of any certificate of registration granted under this Chapter. Each day's operation during a period of suspension or revocation shall be deemed a separate offense;
(6) Permitting any person in one's employ, supervision or control to practice as a barber unless that person holds a certificate as a

registered barber or registered apprentice. (1929, c. 119, s. 21; 1933, c. 95, s. 1; 1937, c. 138, s. 6; 1941, c. 375, ss. 9, 10; 1951, c. 821, s. 2; 1971, c. 819; 1979, c. 695, s. 1; 1981, c. 457, s. 10; 1993, c. 539, s. 601; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 86A-20.1. Enjoining illegal practices.

The Board, the Department of Health and Human Services, or any county or district health director may apply to the superior court for an injunction to restrain any person from violating the provisions of this Chapter or the Board's rules. Actions under this section shall be brought in the county where the defendant resides or maintains his or her principal place of business or where the alleged acts occurred. (2004-146, s. 6.)

§ 86A-21. Board to keep record of proceedings; data on registrants.

The Board shall keep a record of its proceedings relating to the issuance, refusal, renewal, suspension, and revocation of certificates of registration. This record shall contain the name, place of business and residence of each registered barber and registered apprentice, and the date and number of his certificate of registration. This record shall be open to public inspection at all reasonable times. (1929, c. 119, s. 22; 1979, c. 695, s. 1.)

§ 86A-22. Licensing and regulating barber schools and colleges.

The North Carolina State Board of Barber Examiners may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. The Board shall adopt rules establishing criteria for barber schools and colleges to maintain their accreditation. No barber school or college shall be approved by the Board unless the school or college meets all of the following requirements:

(1) Each school shall provide a course of instruction of at least 1528 hours.

(2) Each school shall employ at least two instructors for the first 40 enrolled students and employ at least one additional instructor for every additional 20 enrolled students. Schools that are organized as nonprofits and have obtained a ruling from the Internal Revenue Service recognizing their tax-exempt status shall have at least one instructor for every 20 enrolled students. No school, whether for profit or nonprofit, shall provide practical training and theoretical training simultaneously unless at least two instructors are present.

(3) An application for a student's permit, on a form prescribed by the Board, must be filed with the Board before the student enters school. No student may enroll without having obtained a student's permit.

(4) Each student enrolled shall be given a complete course of instruction on the following subjects: hair cutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating the muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction on common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barbershops; instruction in the use of electrical appliances and the effects of the use of these on the human skin; structure of the skin and hair; nerve points of the face; the

application of hair dyes and bleaches; permanent waving; marcelling or hair pressing; frosting and streaking; and the statutes and regulations relating to the practice of barbering in North Carolina. The Board shall specify the minimum number of hours of instruction for each subject required by this subsection.

(5) Each school shall file an up-to-date list of its students with the Board at least once a month. If a student withdraws or transfers, the school shall file a report with the Board stating the courses and hours completed by the withdrawing or transferring student. The school shall also file with the Board a list of students who have completed the amount of work necessary to meet the licensing requirements.

(6) Each school shall comply with the sanitary requirements of G.S. 86A-15.

(7)a. Each school shall provide a guaranty bond unless the school has already provided a bond or an alternative to a bond under G.S. 115D-95.

The North Carolina State Board of Barber Examiners may revoke the approval of a school that fails to maintain a bond or an alternative to a bond pursuant to this subdivision or G.S. 115D-95.

b. When application is made for approval or renewal of approval, the applicant shall file a guaranty bond with the clerk of the superior court of the county in which the school will be located. The bond shall be in favor of the students. The bond shall be executed by the applicant as principal and by a bonding company authorized to do business in this State. The bond shall be conditioned to provide indemnification to any student, or his parent or guardian, who has suffered a loss of tuition or any fees by reason of the failure of the school to offer or complete student instruction, academic services, or other goods and services related to course enrollment for any reason, including the suspension, revocation, or nonrenewal of a school's approval, bankruptcy, foreclosure, or the school ceasing to operate.

The bond shall be in an amount determined by the Board to be adequate to provide indemnification to any student, or his parent or guardian, under the terms of the bond. The bond amount for a school shall be at least equal to the maximum amount of prepaid tuition held at any time during the last fiscal year by the school. The bond amount shall also be at least ten thousand dollars ($10,000).

Each application for approval shall include a letter signed by an authorized representative of the school showing in detail the calculations made and the method of computing the amount of the bond pursuant to this subpart and the rules of the Board. If the Board finds that the calculations made and the method of computing the amount of the bond are inaccurate or that the amount of the bond is otherwise inadequate to provide indemnification under the terms of the bond, the Board may require the applicant to provide an additional bond.

The bond shall remain in force and effect until cancelled by the guarantor. The guarantor may cancel the bond upon 30 days notice to the Board. Cancellation of the bond shall not affect any liability incurred or accrued prior to the termination of the notice period.

c. An applicant that is unable to secure a bond may seek a waiver of the guaranty bond from the Board and approval of one of the guaranty bond alternatives set forth in this subpart. With the approval of the Board, an applicant may file with the clerk of the superior court of the county in which the school will be located, in lieu of a bond:

1. An assignment of a savings account in an amount equal to the bond required (i) which is in a form acceptable to the Board; (ii) which is executed by the applicant; and (iii) which is executed by a state or federal savings and loan association, state bank, or national bank, that is doing business in North Carolina and whose accounts are insured by a federal depositors corporation; and (iv) for which access to the account in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above.
2. A certificate of deposit (i) which is executed by a state or federal savings and loan association, state bank, or national bank, which is doing business in North Carolina and whose accounts are insured by a federal depositors corporation; and (ii) which is either payable to the State of North Carolina, unrestrictively endorsed to the Board; in the case of a negotiable certificate of deposit, is unrestrictively endorsed to the Board; or in the case of a nonnegotiable certificate of deposit, is assigned to the Board in a form satisfactory to the Board; and (iii) for which access to the certificate of deposit in favor of the State of North Carolina is subject to the same conditions as for a bond in subpart b. above. (1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 12; 1989 (Reg. Sess., 1990), c. 824, s. 3; 1995, c. 397, s. 1; 1995 (Reg. Sess., 1996), c. 605, ss. 10, 11; 2004-146, s. 7.)

§ 86A-23. Instructors.

(a) The Board shall issue an instructor's certificate to any currently registered barber who has passed an instructor's examination given by the Board. This examination shall cover the subjects listed in G.S. 86A-22(4) and in the Textbook of Barber Styling approved by the Board.

(b) A person desiring to take an instructor's examination must make application to the Board for examination on forms to be furnished by the Board and pay the instructor's examination fee. Each person who passes the instructor's examination shall be issued a certificate of registration as a registered instructor by paying the issuance fee. Every instructor's certificate shall expire on May 31 of each year. Any instructor's certificate issued under this Chapter is automatically suspended by operation of law after failure to renew the instructor's certificate by the expiration date and may be renewed only upon payment of all lapsed renewal fees and the required late fee. Any person whose instructor's certificate has expired for a period of three years or more shall be required to take and pass the instructor's examination before the certificate can be renewed. (1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 13; 1995 (Reg. Sess., 1996), c. 605, s. 12.)

§ 86A-24. Apprenticeship.

(a) Before being issued an apprentice license, an applicant must pass an examination conducted by the Board to determine his competence, including his knowledge of barbering, sanitary rules and regulations, and knowledge of diseases of the face, skin and scalp.

(b) An apprentice license expires on May 31 of each year. Every holder of an apprentice license shall annually renew the apprentice license by the expiration date and pay the required renewal fee. An apprentice license issued under this Chapter is automatically suspended by operation of law after failure to renew the apprentice license by the expiration date. An apprentice whose apprentice license has expired may have the certificate restored immediately upon paying all lapsed renewal fees and the required late fee. The certificate of registration of an apprentice is valid only so long as the apprentice works under the supervision of a registered barber. The registered barber shall remain present on the premises of the barbershop at all times while the apprentice is working. No apprentice shall operate a barbershop.

(c) On completion of at least one year's apprenticeship, evidenced by affidavit of the supervising registered licensed barber or barbers, and upon meeting the other requirements of G.S. 86A-3, the apprentice shall be issued a license as a registered barber, pursuant to G.S. 86A-10. No registered apprentice may practice for a period exceeding three years without retaking and passing the required examination to receive a certificate as a registered apprentice. (1929, c. 119, ss. 4, 5; 1941, c. 375, s. 3; 1975, c. 68, ss. 1, 2; 1979, c. 695, s. 1; 1981, c. 457, s. 14; 1995 (Reg. Sess., 1996), c. 605, s. 13; 2004-146, s. 8.)

§ 86A-25. Fees collectible by Board.

The State Board of Barber Examiners shall charge fees not to exceed the following:

Certificate of registration or renewal as a barber	$ 50.00
Certificate of registration or renewal as an apprentice barber	50.00
Barbershop permit or renewal	50.00
Examination to become a registered barber	85.00
Examination to become a registered apprentice barber	85.00
Late fee for restoration of an expired barber certificate within first year after expiration	35.00
Late fee for restoration of an expired barber certificate after first year after expiration but within five years after expiration	70.00
Late fee for restoration of an expired apprentice certificate within first year after expiration	35.00
Late fee for restoration of an expired apprentice certificate after first year after expiration but within three years of first issuance of the certificate	45.00
Late fee for restoration of an expired barbershop certificate	45.00
Examination to become a barber school instructor	165.00
Student permit	25.00
Issuance of any duplicate copy of a license, certificate, or permit	10.00
Barber school permit or renewal	130.00
Late fee for restoration of an expired barber school certificate	85.00
Barber school instructor certificate or renewal	85.00
Late fee for restoration of an expired barber school instructor certificate within first year after expiration	45.00
Late fee for restoration of an expired barber school instructor certificate after first year after expiration but within three years after expiration	85.00
Inspection of newly established barbershop	120.00
Inspection of newly established barber school	220.00
Issuance of a registered barber or apprentice certificate by certification	120.00
Barbers 70 years and older certificate or renewal	No charge
Reasonable charges for certified copies of public documents	
Reasonable charges for duplication services and material.	

(1929, c. 119, s. 14; 1937, c. 138, s. 4; 1945, c. 830, ss. 4, 8; 1951, c. 821, s. 1; 1957, c. 813, s. 3; 1961, c. 577, s. 5; 1965, c. 513; 1971, c. 826, ss. 1, 2; 1973, c. 1331, s. 3; c. 1398; 1979, c. 695, s. 1; 1981, c. 753; 1989 (Reg. Sess., 1990), c. 1029, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 14; 2004-146, s. 11.)

CASE NOTES

Constitutionality of Fees. — The fees prescribed are for the expenses of enforcing the Chapter, which is necessary to the public health and welfare. They are not imposed for revenue, and the payment of the barber's license tax under the Revenue Act does not affect the obligation to pay the fees prescribed by this Chapter. Assessment of the fees thereunder is constitutional. State v. Lockey, 198 N.C. 551, 152 S.E. 693 (1930).

§ 86A-26. Barbering among members of same family.

This Chapter shall not prohibit a member of a family from practicing barbering on a member of his or her family. For purposes of this section, "a member of his or her family" means a spouse, brother, sister, parent, grandparent, child, grandchild, mother-in-law, father-in-law, daughter-in-law, son-in-law, stepparent, or stepchild. (1941, c. 375, s. 12; 1979, c. 695, s. 1; 2004-146, s. 9.)

§ 86A-27. Civil penalties; disciplinary costs.

(a) Authority to Assess Civil Penalties. — The Board may assess a civil penalty not in excess of five hundred dollars ($500.00) per offense for the violation of any section of this Chapter or the violation of any rules adopted by the Board. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Consideration Factors. — Before imposing and assessing a civil penalty, the Board shall consider the following factors:

(1) The nature, gravity, and persistence of the particular violation.
(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.
(3) Whether the violation was willful and malicious.
(4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) Schedule of Civil Penalties. — The Board shall establish a schedule of civil penalties for violations of this Chapter and rules adopted by the Board.

(d) Costs. — The Board may in a disciplinary proceeding charge costs, including reasonable attorneys' fees, to the licensee against whom the proceedings were brought. (2004-146, s. 10.)

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